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BAKER & MILLER PLLC

ATTORNEYS AND COUNSELLORS

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FACSIMILE: (202) 637-9394


October 28, 2003

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



RE: **Change of Address**

Dear Secretary Williams:

Effective **Thursday, October 30, 2003**, the offices of Baker & Miller PLLC will relocate to the following address:

**Baker & Miller PLLC**
**2401 Pennsylvania Avenue, NW**
**Suite 300**
**Washington, DC 20037**
TEL: (202) 637-9499
FAX: (202) 637-9394

Please update the Surface Transportation Board's ("STB") records to reflect the above change of address for all active proceedings included on the enclosed list in which William A. Mullins, David C. Reeves and/or Christine J. Sommer have appeared. Copies of all STB notices, decisions, pleadings or other correspondence related to these proceedings dated October 30, 2003 and thereafter should be sent to the attention of Messrs. Mullins, Reeves or Ms. Sommer at Baker & Miller PLLC at their new address.

All known parties of record in the proceedings listed on the enclosure have been sent a copy of this change of address notification.

Sincerely yours,

William A. Mullins / David C. Reeves / Christine J. Sommer

Enclosure

**Change of Address Notification**

**Effective Thursday, October 30, 2003**
**Baker & Miller PLLC**
**2401 Pennsylvania Avenue, NW**
**Suite 300**
**Washington, DC 20037**
TEL: (202) 637-9499 / FAX: (202) 637-9394

William A. Mullins / David C. Reeves / Christine J. Sommer

| **Docket No. or Finance Docket No.** | **Name of Proceeding at the STB** |
|---|---|
| Docket No. AB-308 (Sub-No. 3X) | Central Michigan Railway Company-Abandonment Petition-In Saginaw, MI |
| Docket No. AB-468 (Sub-No. 5X) | Paducah & Louisville Railway, Inc.-Abandonment Exemption-In McCracken County, KY |
| Docket No. AB-468 (Sub-No. 6X) | Paducah & Louisville Railway, Inc.-Abandonment Exemption-In Hopkins County, KY |
| F.D. No. 34397 | Keokuk Junction Railway Co.-Alternative Rail Service-Line Of Toledo, Peoria And Western Railway Corporation |
| F.D. No. 34342 | Kansas City Southern-Control-The Kansas City Southern Railway Company, Gateway Eastern Railway Company, And The Texas Mexican Railway Company |
| F.D. No. 34335 | Keokuk Junction Railway Company-Feeder Railroad Development Application-Line Of Toledo, Peoria & Western Railway Corporation Between La Harpe And Hollis, IL |
| F.D. No. 34178 | Dakota, Minnesota & Eastern Railroad Corporation And Cedar American Rail Holdings, Inc.-Control-Iowa, Chicago & Eastern Railroad Company |
| F.D. No. 34177 | Iowa, Chicago & Eastern Railroad Company-Acquisition And Operation Exemption-Lines Of I&M Rail Link, LLC |
| F.D. No. 34015 | Waterloo Railway Company-Acquisition Exemption-Bangor and Aroostook Railroad Company and Van Buren Bridge Company |
| F.D. No. 34014 | Canadian National Railway Company-Trackage Rights Exemption-Bangor and Aroostook Railroad Company and Van Buren Bridge Company |
| F.D. No. 33740 and F.D. No. 33740 (Sub-No. 1) | The Burlington Northern and Santa Fe Railway Company-Petition For Declaration Or Prescription Of Crossing, Trackage Or Joint Use Rights and For Determination Of Compensation and Other Terms |
| F.D. No. 33388 | CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company-Control and Operating Leases/Agreements-Conrail Inc. and Consolidated Rail Corporation |
| F.D. No. 33388 (Sub-No. 91) | CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company-Control and Operating Leases/Agreements-Conrail Inc. and Consolidated Rail Corporation (General Oversight) |
| F.D. 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 |
| F.D. 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 |
| F.D. No. 32760 (Sub-Nos. 26 - 32) | 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 |

FD 32760 Sub 21

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Direct Dial: 202-274-2953
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July 9, 2003


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

RE: **Change of Counsel/Change of Address**

Dear Secretary Williams:

Effective **Monday, July 14, 2003**, William A. Mullins and David C. Reeves will join the law firm of:

**Baker & Miller PLLC**
**915 Fifteenth Street, NW**
**Suite 1000**
**Washington, DC 20005-2318**
TEL: (202) 637-9499
FAX: (202) 637-9394
wmullins@bakerandmiller.com
dreeves@bakerandmiller.com

ENTERED
Office of Proceedings
JUL 09 2003
Part of
Public Record

Please update the Board's records to substitute Baker & Miller PLLC as counsel of record for all proceedings included on the enclosed list, and to reflect that Troutman Sanders LLP will no longer be counsel of record for clients represented by Messrs. Mullins and Reeves as noted on the enclosed list of proceedings in which either or both have entered an appearance. However, with respect to Finance Docket No. 33388 and 33388 (Sub No. 91), Baker and Miller should be shown as counsel of record for Gateway Western Railway Company and Troutman Sanders LLP should remain as counsel of record for New York State Electric and Gas.

Copies of any STB notices, pleadings or other correspondence related to these proceedings after July 11, 2003 should be sent to the attention of Messrs. Mullins or Reeves at Baker & Miller PLLC (at the address listed above).

All known parties of record in the proceedings listed on the enclosure have been sent a copy of this change of counsel/change of address notification.

Sincerely yours,

William A. Mullins and David C. Reeves

Enclosure

**Change of Counsel/Change of Address Notification**
**for**
**William A. Mullins and David C. Reeves**

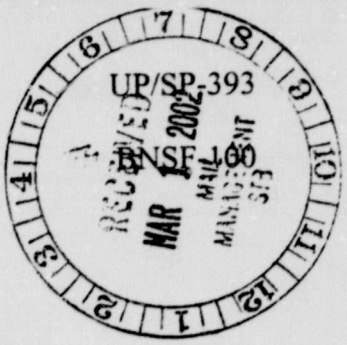
**Effective Monday, July 14, 2003**

**Baker & Miller PLLC**
**915 Fifteenth Street, NW**
**Suite 1000**
**Washington, DC 20005-2318**

**TEL: (202) 637-9499**
**FAX: (202) 637-9394**

| Docket No.<br>Ex Parte No.<br>or<br>Finance Docket No. | List of Proceedings Before the STB |
|---|---|
| Docket No. AB-468 (Sub-No. 5X) | Paducah & Louisville Railway, Inc. - Abandonment Exemption - I[illegible] McCracken County, KY |
| F.D. No. 34342 | Kansas City Southern - Control - The Kansas City Southern Railway Company, Gateway Eastern Railway Company, And The Texas Mexican Railway Company |
| F.D. No. 34335 | Keokuk Junction Railway Company - Feeder Railroad Development Application - Line Of Toledo, Peoria & Western Railway Corporation Between La Harpe And Hollis, IL |
| F.D. No. 34178 | Dakota, Minnesota & Eastern Railroad Corporation And Cedar American Rail Holdings, Inc. - Control - Iowa, Chicago & Eastern Railroad Company |
| F.D. No. 34177 | Iowa, Chicago & Eastern Railroad Company - Acquisition And Operation Exemption - Lines Of I&M Rail Link, LLC |
| F.D. No. 34015 | Waterloo Railway Company - Acquisition Exemption - Bangor and Aroostook Railroad Company and Van Buren Bridge Company |
| F.D. No. 34014 | Canadian National Railway Company - Trackage Rights Exemption - Bangor and Aroostook Railroad Company and Van Buren Bridge Company |
| F.D. No. 33740 and F.D. No. 33740 (Sub-No. 1) | The Burlington Northern and Santa Fe Railway Company - Petition For Declaration Or Prescription Of Crossing, Trackage Or Joint Use Rights and For Determination Of Compensation and Other Terms |
| F.D. No. 33388 | CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company - Control and Operating Leases/Agreements - Conrail Inc. and Consolidated Rail Corporation |
| F.D. No. 33388 (Sub-No. 91) | CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company - Control and Operating Leases/Agreements - Conrail Inc. and Consolidated Rail Corporation (General Oversight) |
| F.D. 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 |
| F.D. 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 |
| F.D. No. 32760 (Sub-Nos. 26 - 32) | 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 |

STB FD-32760 (SUB 21) 3-1-02 D 204872




BEFORE THE
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 32760 204871

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

– CONTROL AND MERGER –

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

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Finance Docket No. 32760 (Sub-No. 21) 204872

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

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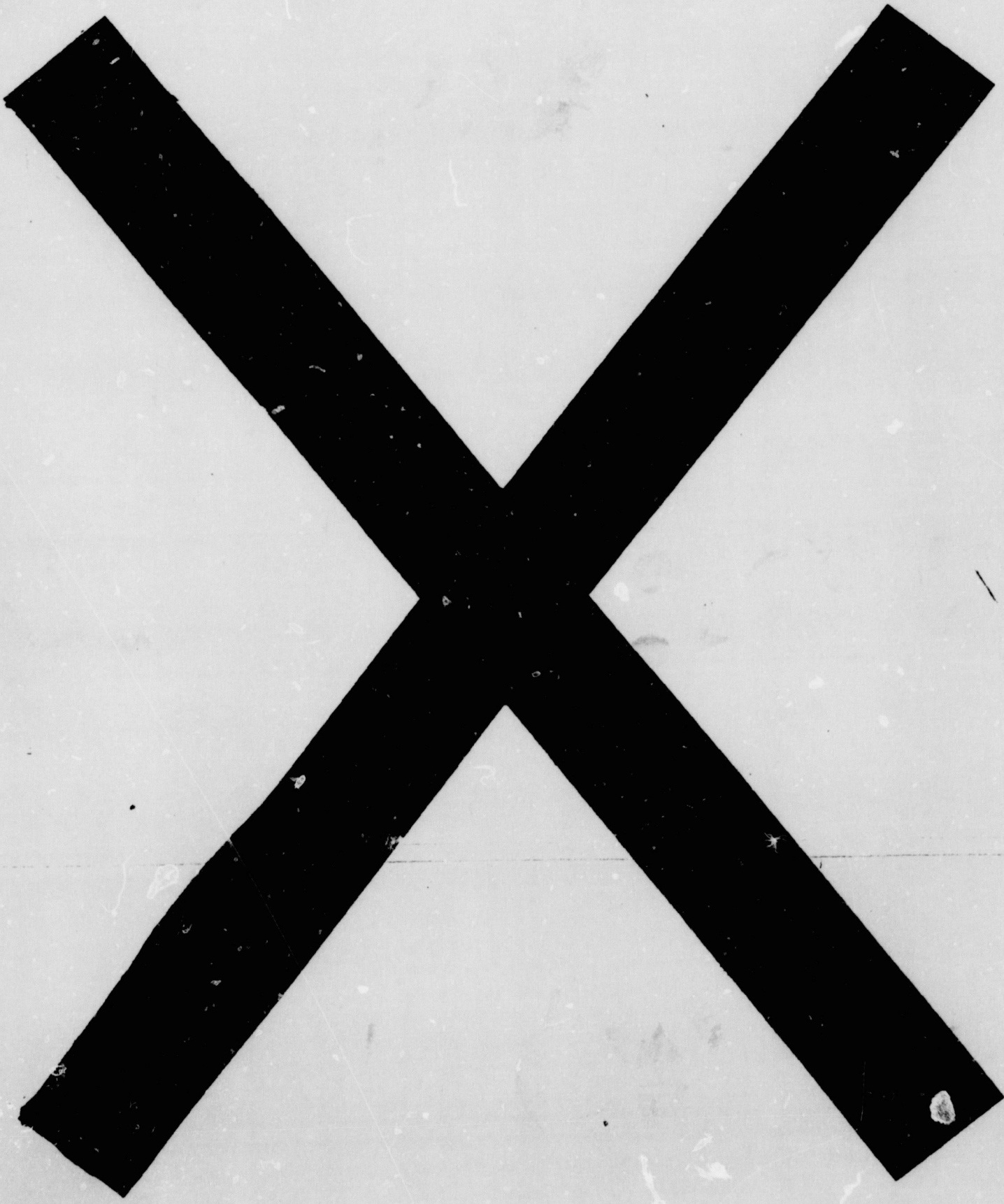
**JOINT SUBMISSION OF RESTATED AND AMENDED
BNSF SETTLEMENT AGREEMENT**

FOR FULL TEXT SEE FD-32760 AT ID-204871



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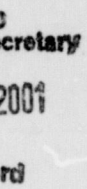
October 9, 2001

VIA HAND DELIVERY




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

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

Finance Docket No. 32760 (Sub-No. 21), Union Pacific Corporation, et al. -- Control and Merger -- Southern Pacific Rail Corporation, et al. (Oversight)

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceedings are the original and twenty-five (25) copies of The Burlington Northern and Santa Fe Railway Company's Reply Comments to the Reply Comments of the United States Department of Transportation (BNSF-96). Also enclosed is a 3.5 inch disk containing the text of the filing in WordPerfect 9 format.

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

Sincerely,

Erika Z. Jones/als

Erika Z. Jones

Enclosures

cc: All Parties of Record

BNSF-96





BEFORE THE
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 32760

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

-- CONTROL AND MERGER --

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

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Finance Docket No. 32760 (Sub-No. 21) ↗203691

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)

---

# BNSF REPLY COMMENTS TO THE REPLY COMMENTS OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION

---

Jeffrey R. Moreland
Richard E. Weicher
Sidney L. Strickland, Jr.
Michael E. Roper

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Attorneys for The Burlington Northern and Santa Fe Railway Company

October 9, 2001

BNSF-96

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

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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)

---

BNSF REPLY COMMENTS TO THE REPLY COMMENTS OF THE UNITED STATES
DEPARTMENT OF TRANSPORTATION

---

The Burlington Northern and Santa Fe Railway Company ("BNSF") submits the following comments in reply to the "Reply Comments of the United States Department of Transportation" (DOT-7), filed on September 19, 2001.[1]

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[1] As DOT explains (DOT-7, at 2 n.1), it did not express its "position on the merits" until the filing of its "reply" comments on September 19, 2001. Thus, until now, BNSF

## INTRODUCTION

In its reply comments, DOT for the first time addresses the unresolved issues relating to the Restated and Amended BNSF Settlement Agreement, expressing its agreement with UP's views on the definitions of "2-to-1" points (DOT-7, at 7) and transload facilities (id. at 8-9), generally adopting the American Chemistry Council's position on the team tracks issue (id. at 9-10), supporting BNSF with respect to the Elvas-Stockton and Houston-Memphis-Valley Junction trackage rights restrictions issues (id. at 10-11), and suggesting that oversight in some form should continue, although UP and BNSF should no longer be required to file quarterly reports and the Board should reduce the level of detail required in the annual reports filed by the two carriers (id. at 12-13). DOT also recommends monitoring to assure that any increases or decreases in UP's costs are "properly reflected in the agreed-upon adjustments to the trackage rights fees." Id. at 12.

In the interests of brevity, and to avoid repeating arguments made elsewhere, BNSF will, in these reply comments, focus on DOT's views with respect to the first two issues – the definition of "2-to-1" points and the need for an authoritative and clear

---

has not had an opportunity to learn of, and respond to, DOT's views on the unresolved issues relating to the Restated and Amended BNSF Settlement Agreement. DOT's "traditional course" of reviewing the comments of other parties before offering its "substantive views" should not deprive BNSF of its right to respond to DOT's comments on the relevant issues. See Decision No. 16, Finance Docket No. 32760 (Sub-No. 21) at 14, which provides parties with the right to respond to the comments of interested parties. Accordingly, the comments filed herein are merely an extension of the reply comments filed by BNSF in its "Reply Comments to UP's Fifth Annual Oversight Report and on Unresolved Issues Relating to the Restated and Amended BNSF Settlement Agreement" (BNSF-94), and, as such, do not constitute an improper "reply to a reply." BNSF has filed these comments in compliance with 49 C.F.R. 1104.13(a) which provides for a twenty day period for the filing of replies.

definition of the transload facilities subject to the Board's existing and new transload conditions.[2]

A. Definition of "2-to-1" Points

DOT argues that UP's proposed definition of "2-to-1" points should be adopted because, in DOT's view, the condition granting BNSF access to shippers at "2-to-1" points was "addressed to that subset of competition directed at shippers that existed at specific sites prior to the merger that received service from UP and SP and no other carrier." DOT-7, at 7. DOT believes that merger-related competitive harms to shippers who benefited from their proximity to both SP and UP were to be addressed by the Board's conditions that protect so-called "indirect" competition – conditions such as the new facilities, build-in/build-out, and transload conditions. See id. DOT thus accepts UP's position that a geographic location cannot qualify as a "2-to-1" point for the purposes of the BNSF Settlement Agreement unless there was an actual "2-to-1" shipper at the location at the time of the UP/SP merger.

There are two principal problems with DOT's position. First, the presence of an actual "2-to-1" shipper at a particular location is irrelevant to whether other shippers at the location lost indirect rate and service competition as a result of the UP/SP merger, and DOT has pointed to no reason why the presence or absence of such a shipper should matter in that determination. Such competition was driven by the availability of,

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[2] BNSF does note, however, that DOT rejects UP's positions (i) that the entry/exit restriction on the trackage rights lines north of Bald Knob and Fair Oaks, AR should remain in place, and (ii) that BNSF's trackage rights between Elvas and Stockton, CA should be overhead trackage rights only. DOT-7, at 11. In so doing with respect to the entry/exit restriction, DOT urges the Board to "hew to a fundamental purpose of its general conditions and permit BNSF the measure of flexibility that SP enjoyed, thereby replicating pre-merger competitive conditions to the extent possible." Ibid.

for instance, build-out and transloading options for such shippers, as well as the flexibility shippers had in locating new facilities on UP or SP lines in a particular location served by both UP and SP – not by whether some unrelated shipper received service from both UP and SP.

Second and relatedly, contrary to DOT's position, the new facilities, build-in/build-out and transload conditions would not fully preserve the pre-merger indirect competition that existed at geographic locations defined by 6-digit SPLCs if a requirement is imposed that there must be an actual "2-to-1" shipper at the location. For instance, a shipper interested in constructing a new facility at such a location before the merger could have sited its facility on UP or SP, whether or not an existing "2-to-1" shipper was located nearby. However, unless a trackage rights line happens to run through the 6-digit SPLC,[3] neither the new facilities nor the transload condition would preserve the pre-merger competition because, if DOT's position is adopted, the absence of an actual "2-to-1" shipper would prevent the location from qualifying as a "2-to-1" point.[4] Likewise, the pre-merger competition that an existing transload provided to exclusively-served shippers at such a location could not be preserved by either the new facilities or transload condition – again because of the absence of an actual "2-to-1"

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[3] Even if that were the situation, pre-merger UP vs. SP siting competition would not be fully preserved because the shipper would be limited to placing its new facility on the trackage rights line – a limitation that both (i) did not exist pre-merger since the shipper could locate its new facility anywhere on the UP or SP lines at the 6-digit SPLC, and (ii) would deprive the shipper of the flexibility it needs to be able to place its new facility at the most efficient and economic site within the SPLC.

[4] This would be so because, under the "2-to-1" definition advocated by DOT, the new facilities and transload conditions apply only to facilities <u>on</u> trackage rights lines or at locations with an existing "2-to-1" shipper.

shipper. Further, the build-in/build-out condition would not preserve the pre-merger siting competition that existed because it would by definition not apply to a shipper siting a new facility.

Accordingly, the adoption of a definition of "2-to-1" points that is based on 6-digit SPLCs and that does not require the presence of an actual "2-to-1" shipper provides the best assurance that all shippers who otherwise would have lost the benefits of indirect competition between SP and UP as a result of the UP/SP merger will have access to BNSF under the new facilities and transload conditions.

B. Definition of Transloads

DOT notes that the Board has already addressed the issue of transloads on several occasions and that the Board's decisions concerning transloads "in large measure appear to provide consistent support for BNSF's position" on the definition of transloads. DOT-7, at 8 (citing Decision Nos. 44, 61, and 75). Nevertheless, DOT believes UP's oft-raised concerns about the scope of the transload condition "continue[ ] to have merit" and that the "question is complex and circumstances are likely to vary depending on the situation." DOT-7, at 9. Accordingly, DOT concludes that the Board should decline to adopt either BNSF's or UP's position on the issue, but should instead "reaffirm its commitment to resolve such matters on a case-by-case basis until sufficient precedent is established." Id.

DOT's position, however, is a recipe for greater uncertainty and increased ambiguity about the meaning and scope of the transload condition. As BNSF and other parties have made clear, the Board's decisions on the transload condition have been clear and unequivocal and have fully addressed the very concerns adverted to by DOT

in its reply comments. See BNSF-94, at 12-16; BNSF-93, at 10-12; NITL-27, at 13-14; ACC-1, at 5; see also Decision No. 61 at 7 ("The transload condition should . . . be read literally: BNSF may serve any new transload facility, including those owned and operated by BNSF itself.") (emphasis added).

By leaving to case-by-case determination the question whether UP will succeed in its attempt to "engraft a new requirement [on the application of the transload condition], namely, that 'the operator of [the transload facility] has no ownership of the [product] being transloaded'" (NITL-27, at 13 (quoting UP-proposed alternative)), DOT's position would introduce a new source of uncertainty for shippers who have, or are planning to build, transloads to move their own products and who expect to avail themselves of BNSF service under the transload condition. This uncertainty is wholly unnecessary, because, as shown in BNSF's previous submissions, the currently applicable standards governing the transload condition clearly and unambiguously define the "legitimate" transloads to which the condition applies.

Moreover, DOT does not address the particular issue in dispute: UP's position that the operator of a transload facility – whether existing or new – may not have any ownership of the product being transloaded. BNSF and other parties have demonstrated (and DOT does not dispute) that, if UP's position were to be accepted, then there would be an unremedied loss in pre-merger competition at both "2-to-1" points and along the trackage rights lines, and DOT provides no explanation as to why the Board should not proceed to resolve that issue at this time so that shippers can be certain that the pre-merger competition which they would have enjoyed through the use of private transloads is protected and preserved.

There is, therefore, no basis for the Board to adopt DOT's recommendation that the Board leave the definition of "transloads" to the uncertainties of case-by-case adjudication.[5]

## CONCLUSION

DOT's adoption of UP's position with respect to the definitions of "2-to-1" points and transloads is anomalous in light of the fact – made clear above and in the prior filings of BNSF, NIT League, Entergy and ACC – that UP's positions would result in a loss of pre-merger competition. This is especially so since DOT itself stated in its reply comments that the terms of the Restated and Amended BNSF Settlement Agreement must "at a minimum, enable BNSF to continue to replicate the direct and indirect competition that SP provided". DOT-7, at 6. The positions DOT proposes would simply not do that.

In addition, as BNSF maintained in its earlier comments, DOT recognizes that oversight should continue in some fashion, at least until the outstanding issues in fully implementing the Board's conditions and the BNSF Settlement Agreement are fully resolved.

Accordingly, for the reasons set forth above, BNSF respectfully submits that the Board should not adopt DOT's positions on the two issues because those positions

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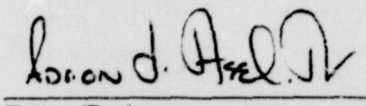
[5] In addition, contrary to DOT's assertion, the Board has provided "definitive guidance" on the issues DOT claims are unresolved. For instance, the Board rejected UP's efforts to impose a minimum distance requirement on the transload condition in Decision No. 61, and it expressly stated, in response to the same concerns about access to exclusively-served shippers that DOT has expressed here, that the transload condition should be read literally to include "any new transload facility". It is not clear what more DOT could want in the way of "guidance" on the issues.

would not fully preserve pre-merger competition that undisputedly existed and would lead to uncertainty and ambiguity in the minds of shippers.

Respectfully submitted,

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(202) 263-3000

Attorneys for The Burlington Northern and Santa Fe Railway Company


October 9, 2001

## CERTIFICATE OF SERVICE

I do hereby certify that copies of The Burlington Northern and Santa Fe Railway Company's Reply Comments to the Reply Comments of the United States Department of Transportation (BNSF-96) are being served on all parties of record.

Adrian L. Steel, Jr.

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October 5, 2001

20366





**BY HAND DELIVERY**

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Finance Docket No. 32760 (Sub-No. 21), Union Pacific Corporation, et al. -- Control and Merger -- Southern Pacific Rail Corporation, et al. (Oversight)

Dear Secretary Williams:

We write on behalf of Union Pacific Railroad Company ("UP") in response to the Joint Petition filed on September 28, 2001, by Burlington Northern and Santa Fe Railway Company ("BNSF") and Entergy Services, Inc. and Entergy Arkansas, Inc. (collectively, "Entergy") and the Board's Decision No. 91, served October 3, 2001.

UP does not object to BNSF's and Entergy's request that the Board rule expeditiously on whether BNSF has the right under the BNSF Settlement Agreement to connect its St. Louis Gateway trackage rights with its own lines north of Bald Knob and Fair Oaks, Arkansas. UP understands BNSF's and Entergy's need to proceed with planning and construction.

UP objects, however, to BNSF's and Entergy's including in their Joint Petition arguments about the merits of the underlying dispute. BNSF and Entergy represent that the Joint Petition does not do this. Nevertheless, BNSF and Entergy advance two arguments that constitute impermissible substantive replies to a reply.

First, BNSF and Entergy assert that BNSF reasonably assumed it had the right to connect with its own lines at Jonesboro and Hoxie, Arkansas. UP addressed the parties' intent, the Settlement Agreement's language, and the impact of the Board's Decision No. 61, and we will not burden the Board by restating those arguments.

Second, BNSF and Entergy argue that BNSF should be allowed to connect with its own lines because the alternative plan for serving Entergy would be more costly and take

longer to implement. This greater cost is neither surprising nor relevant to the interpretation of BNSF's rights under the BNSF Settlement Agreement. BNSF gained the right to serve Entergy as a result of the Board's build-out condition, and all build-outs, by their very nature, are expensive and time-consuming. For example, according to BNSF's press release, BNSF's planned Bayport build-out will cost some $80 million and take almost three years to complete. See Finance Docket No. 34079, San Jacinto Rail Ltd. – Authority to Construct – & The Burlington Northern & Santa Fe Ry. – Authority to Operate – Petition for Exemption from 49 U.S.C. § 10901 – Build-Out to the Bayport Loop Near Houston, Harris County, Texas, filed Aug. 30, 2001. The Board's build-out condition does not allow BNSF or affected shippers to avoid these costs by choosing routes on UP that are not available under the BNSF Settlement Agreement.

In sum, UP does not object to BNSF's and Entergy's request that the Board act expeditiously to resolve the merits of the parties' dispute. However, the Board should reject BNSF's and Entergy's effort to confuse the need for expeditiously resolving this matter with impermissible arguments for resolving the dispute in a manner that is inconsistent with the BNSF Settlement Agreement.

Sincerely,

Michael L. Rosenthal

cc: All Parties of Record

203538

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September 24, 2001


VIA HAND DELIVERY



The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Finance Docket No. 32760 (Sub-No. 21), Union Pacific Corporation, et al. -- Control and Merger -- Southern Pacific Rail Corporation, et al. (Oversight)

Dear Secretary Williams:

We represent Union Pacific Railroad Company ("UP) in the above-captioned proceeding. We write to inform the Board of several erroneous statements of the record contained in recent filings in order to ensure that the Board's decision is based on a complete and accurate record.

First, BNSF submitted a letter to the Board last Thursday withdrawing footnote 18 from its September 19 Reply Comments, but it did not explain why. We believe the reason should be explained to ensure that the footnote does not create any misimpression.

Footnote 18 was incorrect. In footnote 18, BNSF claimed that it had the "unqualified right to connect from its own lines with the former SP line at Jonesboro, AR and Rockview, MO under Section 9l of [the original BNSF Settlement] Agreement." BNSF-94, p. 19 n.18. Under the original Settlement Agreement, however, BNSF did not have trackage rights on the former SP line north of Fair Oaks, Arkansas. See UP/SP-22, pp. 9-10. BNSF thus could not have connected with its own lines at points north of Fair Oaks, such as Jonesboro and Rockview.

Second, in its discussion of the St. Louis Gateway trackage rights' geographic restriction in its September 19 Reply Comments, BNSF erroneously claims that the restriction would interfere with its "right to serve new facilities and transloads on all of the trackage rights lines, including both the UP and SP lines north of Bald Knob and Fair Oaks." BNSF-94, p. 22.

BNSF is incorrect because the geographic restriction expressly applies only to overhead traffic. It does not apply to traffic from new facilities, transloads, or build-outs along

the trackage rights lines. See UP/SP-386 & BNSF-92, Joint Submission of Restated and Amended BNSF Settlement Agreement, Proposed Restated and Amended BNSF Settlement Agreement, p. 27 ("Traffic to be handled over the UP and SP lines between Memphis and Valley Junction, IL is limited . . . ."). The Settlement Agreement explicitly gives BNSF the right to serve "any New Shipper Facility located . . . on the Trackage Rights Lines." Id.

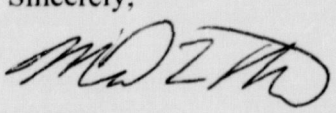
Third, BNSF erroneously claims that UP agreed that the Board would have unrestricted authority to impose new merger conditions during the oversight period. BNSF supports its claims by quoting selectively from various UP statements. See BNSF-93, p. 6.

BNSF mischaracterizes UP's statements. In the quoted statements, UP explained that the Board could impose additional conditions only if oversight revealed that the BNSF Settlement Agreement had not effectively addressed the competitive issues it was intended to address. See UP/SP-230, p. 21 ("Finally, Applicants have agreed with CMA that they will consent to . . . Board oversight proceedings to confirm that the BN/Santa Fe settlement agreement has effectively addressed the competitive issues it was intended to address."); UP/SP-231, Rebensdorf V.S. at 11 ("[W]e are willing to agree to annual Board oversight proceedings . . ., with the Board examining whether the settlement agreement has effectively addressed the competition issues it was intended to address."); UP/SP-219, CMA Agreement ¶ 14 ("Applicants will . . . state that they are agreeable to annual STB oversight proceedings . . ., with the Board to examine whether the BN/Santa Fe Settlement Agreement has effectively addressed the competitive issues it was intended to address."); Transcript of UP/SP Oral Argument, July 1, 1996, p. 59 ("[The Board] will have unrestricted power to impose additional conditions if appropriate." (emphasis added)).

Finally, counsel for BNSF has brought to our attention a statement in one of UP's prior filings that the Board defined "Existing Transload Facilities" as facilities where the operator has no ownership of the product being transloaded. UP/SP-385, pp. 9-10. As UP's subsequent filings acknowledge, the Board has not definitively resolved this issue.

We hope this information assists the Board in resolving the pending matters.

Sincerely,



Michael L. Rosenthal

cc: All Parties of Record

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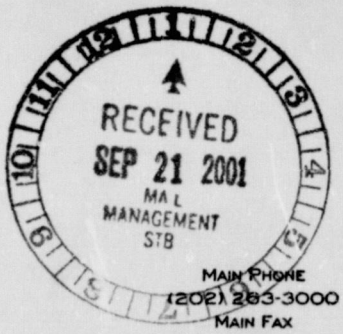


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September 20, 2001

VIA HAND DELIVERY

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

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

203509 → Finance Docket No. 32760 (Sub-No. 21), Union Pacific Corporation, et al. --
Control and Merger -- Southern Pacific Rail Corporation, et al. (Oversight)

Dear Secretary Williams:

The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby submits a 3.5 inch disk containing a corrected version, in WordPerfect 9 format, of BNSF's Reply to UP's Fifth Annual Oversight Report and on Unresolved Issues Relating to the Restated and Amended BNSF Settlement Agreement (BNSF-94). The only change made in the corrected version of BNSF-94 is the deletion of footnote 18. Because of the deletion of the footnote, the footnote numbers and page numbering of the electronic version differ from those of the paper version.

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

Sincerely,

Erika Z. Jones/als

Erika Z. Jones

Enclosures

cc: All Parties of Record

BNSF-94





BEFORE THE
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 32760

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

-- CONTROL AND MERGER --

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

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Finance Docket No. 32760 (Sub-No. 21) 203509

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)

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# BNSF REPLY COMMENTS TO UP'S FIFTH ANNUAL OVERSIGHT REPORT AND ON UNRESOLVED ISSUES RELATING TO THE RESTATED AND AMENDED BNSF SETTLEMENT AGREEMENT

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September 19, 2001

BEFORE THE
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 32760

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

-- CONTROL AND MERGER --

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

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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)

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# BNSF REPLY COMMENTS TO UP'S FIFTH ANNUAL OVERSIGHT REPORT AND ON UNRESOLVED ISSUES RELATING TO THE RESTATED AND AMENDED BNSF SETTLEMENT AGREEMENT

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The Burlington Northern and Santa Fe Railway Company ("BNSF") submits the following reply comments to (i) UP's "Fifth Annual Oversight Report" filed on July 2, 2001 (UP/SP-384); (ii) UP's "Report on Issues Arising Under the BNSF Settlement

Agreement" also filed on July 2, 2001 (UP/SP-385); (iii) UP's "Opposition to Substantive Changes to the BNSF Settlement Agreement" filed on July 25, 2001 (UP/SP-387); and (iv) the comments filed on August 17, 2001, by various parties with respect to the unresolved issues relating to the Restated and Amended BNSF Settlement Agreement.[1]

## INTRODUCTION

In its Fifth Annual Oversight Report, UP presented information and data on the various public benefits it claims have been achieved as a result of the UP/SP merger. BNSF agrees that, after what UP itself has called an "infamous start," many of the benefits projected by the Applicants have been achieved, and that, overall, BNSF has been able to provide effective competitive service utilizing the rights it received pursuant to the BNSF Settlement Agreement and the conditions imposed by the Surface Transportation Board ("Board") on the merger. However, as set forth in BNSF's "Fifth Annual and Cumulative Progress Report" filed on July 2, 2001 (BNSF-PR-20), and in its "Comments on Unresolved Issues Relating to the Restated and Amended BNSF Settlement Agreement" filed on July 25, 2001 (BNSF-93), there are issues remaining as to whether the conditions the Board imposed "have effectively addressed the competitive issues they were intended to remedy." Decision No. 16, Finance Docket No. 32760 (Sub-No. 21), at 13. These issues need to be resolved before formal oversight is ended so that each individual shipper that lost two carrier competition as a

[1] The City Public Service Board of San Antonio, TX filed comments (CPSB-15) in which it noted that the proposed Restated and Amended BNSF Settlement Agreement does not conform in certain respects to the prior agreement reached between CPSB, UP and BNSF as to the language necessary to implement the Board's decisions concerning service by BNSF to CPSB's Elmendorf, TX station. As CPSB reports in its comments, BNSF and UP have agreed to incorporate the language previously agreed upon by CPSB, UP and BNSF in the final Restated and Amended BNSF Settlement Agreement.

result of the UP/SP merger can be assured that the competition will be preserved and so that BNSF has the ability to provide competitive replacement service to all such shippers both now and in the future.

Section I of these Reply Comments addresses the unresolved issues relating to the amendment of the BNSF Settlement Agreement. Section II discusses the status of the parties' discussions on other unresolved issues, including issues relating to the adjustment of the trackage rights fees and to the I-5 Proportional Rate Agreement. Finally, Section III addresses the need for the continuation of formal oversight until such time as the Board resolves the issues raised in oversight, including the amendment of the Settlement Agreement and any other pending issues.

## I. AMENDMENT OF THE BNSF SETTLEMENT AGREEMENT

### A. BNSF'S PROPOSED ALTERNATIVES DO NOT CONSTITUTE IMPERMISSIBLE SUBSTANTIVE CHANGES TO THE BNSF SETTLEMENT AGREEMENT

Much of UP's opposition to BNSF's proposed alternatives on the unresolved Settlement Agreement issues rests on the erroneous premise that BNSF's positions on the issues would result in "substantive changes" to the Settlement Agreement – changes that, in UP's view, would expand BNSF's rights and fundamentally alter the conditions imposed by the Board in approving the UP/SP merger. UP/SP-387, at 2. Based on that premise, UP asserts that the adoption of BNSF's alternatives would constitute unlawful retroactive regulation, contravene Board policy favoring private settlement agreements, and violate BNSF's promises in the BNSF Settlement Agreement. UP further argues that it would be unfair to impose additional conditions five years after consummation of the merger. As is shown below, however, UP's premise is without foundation, and, in any event, UP expressly accepted the possibility

of further conditions necessary to preserve competition even if BNSF's proposed alternatives could somehow be construed to be new or additional conditions on the merger.

1. UP Has Mischaracterized BNSF's Proposed Alternatives

UP's characterization of BNSF's proposed alternatives is clearly incorrect. As NIT League recognizes, BNSF is not seeking new rights or conditions. Instead, BNSF merely is seeking authoritative clarifications of its existing rights under the Settlement Agreement – clarifications necessitated and justified by the parties' long-standing and, as yet, unresolved disputes over key issues and definitions under the Agreement; various Board decisions explaining and elaborating upon the conditions imposed in the UP/SP merger; and, most importantly, the need to ensure that pre-merger competitive options which shippers enjoyed are preserved. See Reply Comments on Unresolved Issues Relating to the Restated and Amended BNSF Settlement Agreement submitted by The National Industrial Transportation League (NITL-27), at 3-5. Thus, contrary to UP's characterization of BNSF's proposed alternatives, BNSF is, in fact, seeking only to codify the basic principles that have emerged from the Board's decisions and to clarify basic definitions and practices, so that (a) UP, BNSF, and the shipping community will have the benefit of the certainty that comes from clear, authoritative definitions and principles in the BNSF Settlement Agreement as modified by the Board and (b) all shippers who would have benefited from competition between UP and SP, and no other railroad, but for the UP/SP merger will have the benefit of such competition.[2]

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[2] In addition, with respect to several of the unresolved issues, it is UP, not BNSF, that is seeking a change. For instance, UP seeks to impose a new restriction on the Board's transload condition that would exclude private transloads. Similarly, UP proposes to delete the language in Section 6c of the original Settlement Agreement

Further, according to UP's own statements and representations, the overall purpose of the BNSF Settlement Agreement was to preserve pre-merger competition for "every" shipper. See, e.g., Applicants' Rebuttal – Volume 1, Narrative (UP/SP-230), at 89 (Stating that, as a result of the BNSF Settlement Agreement, "every affected shipper will gain stronger competition") (emphasis in original); Transcript of UP/SP Oral Argument, July 1, 1996, at 45, 63 ("We are not eliminating rail option[s] for any shipper in the west through this merger. * * * All the shippers that have competition will have it preserved under the BN/Santa Fe settlement.")[3] In light of these representations, it is disingenuous for UP to now claim that proposals intended to ensure the preservation of such competition for "every" shipper somehow constitute retroactive regulation, violate the Board's policy in favor of settlement agreements, or constitute a breach of BNSF's promises under the Settlement Agreement. Rather, having secured the Board's approval of the merger, UP seeks – as it has on numerous occasions throughout the 5-year oversight period – to have the BNSF Settlement Agreement and the Board's implementing conditions read narrowly rather than in a way that would protect "every potential competitive concern." See UP/SP-384, at 54 ("The Merger Conditions Addressed Every Potential Competitive Concern").

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(Section 6(d) of the amended Settlement Agreement) that expressly incorporates the right of BNSF set forth in Section 9l (original) (Section 9(m) (amended)) to connect with its own lines from the trackage rights lines. And, UP wants to classify BNSF's trackage rights between Elvas and Stockton as overhead trackage rights even though it has already acknowledged BNSF's right to serve two new shipper facilities on that line. Thus, UP's concern about changes being made after the Board's decision approving the merger would seem to apply as much, if not more, to UP's proposals as to BNSF's proposals.

[3] Excerpts of the oral argument transcript cited herein are included in Appendix 1 filed with these Reply Comments.

2. UP Has Expressly Accepted The Possibility Of Additional Conditions

Moreover, UP's extended arguments about the impropriety and unfairness of the retroactive imposition of conditions in this proceeding (UP/SP-387, at 3-8) are inconsistent with the explicit commitments that UP made prior to the Board's approval of the UP/SP merger. For instance, in oral argument, UP's counsel stated that, unlike "the case under the statute normally," the Board will "have unrestricted power to impose additional conditions, if appropriate," including divestiture. Transcript of UP/SP Oral Argument, July 1, 1996, at 59. Similarly, in the CMA Agreement, UP expressly agreed (i) that it would submit to an oversight process in which the Board would determine whether the Settlement Agreement "has effectively addressed the competitive issues it was intended to address" and (ii) that "[t]he Board shall have authority to impose additional remedial conditions." CMA Agreement ¶ 14 in UP/SP-219. See also UP/SP-230, at 21 ("The Board would have the authority to impose additional remedial conditions that it found to be called for."); Rebensdorf Rebuttal Verified Statement, at 11 (UP/SP-231, vol. 2, part C) (same). As set forth above, UP's pleadings and witnesses have stated that the BNSF Settlement Agreement was intended to preserve all existing pre-merger UP/SP competition. Accordingly, even if UP were correct in characterizing BNSF's proposed alternatives as requests for new conditions that in some other merger proceeding could not be imposed at this point, UP's retroactivity argument is unavailing here since BNSF's proposals are necessary to preserve such pre-merger competition.

In addition, UP's argument (UP/SP-387, at 3, 5) that BNSF's alternatives are unnecessary in light of BNSF's success in competing through its trackage rights operations is misconceived. The fact that BNSF's trackage rights operations are a

commercial success and that BNSF is generally an adequate competitive replacement for the loss of SP service does not mean that BNSF's proposals for the amended Settlement Agreement are unnecessary to assure that all shippers, including new shippers and users of new transloads in the future, are able to avail themselves of BNSF service to replace the loss of one of two competitive rail alternatives that otherwise would have resulted from the UP/SP merger. Further, the Board's conditions were intended to preserve competition and to enable BNSF to maintain sufficient traffic density on the trackage rights lines, not only in the present but also over the entire 99 year term of the Settlement Agreement. Thus, it is critical that all necessary modifications and clarifications be undertaken so that BNSF can provide fully competitive service over the long-term as a replacement for SP.[4]

B. BNSF'S PROPOSED ALTERNATIVES ARE NECESSARY TO PRESERVE PRE-MERGER COMPETITION AND TO MAINTAIN BNSF'S ABILITY TO PROVIDE FULLY EFFECTIVE REPLACEMENT COMPETITION

Turning to BNSF's specific proposals, UP generally does not assert that BNSF's proposed modifications are unnecessary to preserve pre-merger competition or to enable BNSF to achieve adequate traffic density over the long term – the two stated purposes of the Board-imposed conditions at issue. Rather, the focus of UP's opposition is (i) that, when the BNSF Settlement Agreement was executed, UP and BNSF did not intend to protect the particular pre-merger competition which BNSF's

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[4] In fact, the Board has previously rejected this argument by UP. In Decision No. 86, the Board held that the fact that it had recognized in its general oversight decisions that BNSF was providing fully competitive service did not mean, as UP claimed, that "the traffic density rationale can no longer 'be taken seriously'." Decision No. 86 (served July 12, 1999), at 5 (quoting UP/SP-365, at 2). The Board noted that the "new facilities condition was intended to be a permanent solution for both traffic density and competitive problems, and it continues to be necessary for both purposes." Ibid.

alternatives seek to protect, or (ii) that the Board has previously rejected BNSF's position. Neither ground justifies the denial of BNSF's proposed alternatives. As to the first, the Board's decisions override UP's and BNSF's intent and, if the Board determines, for example, that in order to fully preserve pre-merger indirect siting and transloading competition, "2-to-1" points should be defined by 6-digit Standard Point Location Codes ("SPLCs") regardless of whether an actual "2-to-1" shipper was located at the geographic point, the Board's determination would prevail.[5] As to the second, UP is simply incorrect. The Board has not previously rejected BNSF's position on any of its proposed alternatives. In fact, as shown below, the Board has previously rejected a number of the positions UP has asserted in its pleadings.

1. Definition of "2-to-1" Points

UP argues that BNSF's proposed use of 6-digit SPLCs to define "2-to-1" points should be rejected because UP and BNSF negotiated the BNSF Settlement Agreement on the basis of a definition of such points which required the presence of at least one actual "2-to-1" shipper and because, in UP's view, the Board rejected a definition of such points based on 6-digit SPLCs in Decision No. 44. Neither reason justifies the denial of BNSF's proposed definition.[6]

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[5] See NITL-27, at 14 ("the scope of BNSF's rights * * * is [not] only a matter of the private agreement of the parties. * * * [The Board's] decisions converted that agreement from a private settlement to an integral part of the mechanism by which the Board implemented its own statutory responsibility to protect the public interest.")

[6] As explained in BNSF's July 25th comments and as further established by NIT League in its comments, it is important that the Board clarify the definition of a "2-to-1" point so that the shipping community can determine with certainty whether new facilities, existing transloads and new transloads not on a trackage rights line are entitled to service from BNSF under the Settlement Agreement. See BNSF-93, at 3; NITL-27, at 9 and n.2. Further, there are instances in which UP's position deprives

a. Scope of the BNSF Settlement Agreement

Initially, even assuming that UP is correct in its view that the "basic structure" of the BNSF Settlement Agreement was to provide competition to all "2-to-1" shippers, that structure was altered by the Board's determination that indirect siting and transloading competition also needed to be preserved at "2-to-1" points. Decision No. 44, 1 S.T.B. 233, 391-93 (1996). In addition, as set forth in BNSF's July 25th comments (BNSF-93, at 6-8), UP's argument also contradicts the testimony of its witnesses in the UP/SP merger proceeding[7] that they intended to preserve all pre-merger competition without any qualification that the presence of an actual "2-to-1" shipper was required.[8]

Further, UP's position is contrary to the agreed to language in Section 8(i) of the Restated and Amended BNSF Settlement Agreement that it is the intent of UP and BNSF to preserve two-carrier competition for all "shippers who had competition by means of siting, transload or build-in/build-out from only UP and SP pre-merger." See Joint Submission of Restated and Amended BNSF Settlement Agreement (UP/SP-386

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shippers of their pre-merger competitive options. See BNSF-93, at 8 n.7 (Refrigerated Distribution Specialists example at Tracy, CA).

[7] In this regard, it is possible that UP will submit a verified statement to try to qualify or explain the cited testimony. The Board, BNSF and shippers should, however, be entitled to rely on the testimony given during the proceeding rather than written statements crafted over five years later. In addition, any such effort by UP would be directly contrary to UP's statements in its pleadings that, for example, all transloading options would be preserved. See BNSF-93, at 4 n.2.

[8] In addition, in Decision No. 44, the Board noted that UP did not restrict "2-to-1" points to those having at least one shipper that could be served directly or through reciprocal switching by UP and SP, and no other Class I railroad. Instead, as the Board stated, UP and SP "added points on shortline railroads reachable by connections to UP and SP, but by no other Class I railroad. Further, they added any point that had what they considered to be a bona fide build-in, build-out, or transload option prior to the merger." Decision No. 44, 1 S.T.B. at 391 n.127 (emphasis original).

and BNSF-92), at 33. As reflected by the inclusion of Reno, NV (where there was no actual "2-to-1" shipper at the time of the merger) as a "2-to-1" point, such competition existed regardless of the presence of such a shipper.

Finally, and most importantly, UP does not argue that such a definition is not needed to preserve pre-merger competition. The reason UP does not do so is obvious: indirect siting and transload competition existed before the merger regardless of whether or not there was an actual "2-to-1" shipper at a 6-digit SPLC location, and the Board quite rightly modified the BNSF Settlement Agreement to ensure that such competition would be preserved.[9]

Similarly, in its comments, NIT League points out that a

> shipper considering locating today at a rail station listed for service in 1995 by both UP and SP would, but for the merger of UP and SP, have that "competitive pressure" available to obtain a rate and service package from the two railroads, regardless of whether there was another *shipper* at that location open to both UP and SP in 1995. Thus, it is necessary at this point in time to define "2-to-1" points as geographic locations that were open to service by both UP and SP in 1995 (regardless of the existence of a shipper open to both UP and SP in 1995), in order to replicate, through competition provided by BNSF today, the "competitive pressure" that would have existed today but for the changes wrought by the merger of the UP and SP.

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[9] Given the undisputed existence of such pre-merger indirect competition, UP should be required to explain how, if its position that there must be an actual "2-to-1" shipper at a geographic location were to be adopted, that indirect competition is to be preserved at locations where there is no such shipper. UP provides no such explanation in its July 25th Opposition or in the attached verified statement of John H. Rebensdorf.

NITL-27, at 10 (emphasis in original; quoting Decision No. 44, 1 S.T.B. at 393).[10] See also American Chemistry Council's Comments Regarding Unresolved Issues Relating to the Restated and Amended BNSF Settlement Agreement (ACC-1), at 3 ("BNSF's proposed definition is in accordance with the overall logic of the settlement agreements to preserve all forms of competition at two-to-one points").

b. NIT League's Position

In addition, UP's contention that the Board has previously rejected a proposal by NIT League to use 6-digit SPLCs to define "2-to-1" points is also incorrect. Rather, the Board rejected the proposals (which were not made by NIT League) to use BEAs and 4-digit SPLCs to "redefin[e] 2-to-1 points." Decision No. 44, 1 S.T.B. at 372.[11] As for 6-digit SPLCs, as NIT League explains, NIT League did not argue that 6-digit SPLCs should be used to define "2-to-1" points. See NITL-27, at 11. Instead, NIT League submitted evidence about 6-digit SPLCs in connection with its contentions about the "overall reduction in competition to be caused by the UP/SP merger, in support of the League's proposed remedy, namely, divestiture of various SP lines to other carriers." Ibid. The Board, however, found that, when put forward in support of an argument for divestiture, this approach tended to "aggregate traffic that will experience various types of competitive problems," and that a more nuanced, less intrusive approach than

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[10] NIT League also explains that the use of 6-digit SPLCs to define "2-to-1" points is "particularly appropriate because in 1995, both UP and SP held out to the shipping public, in their tariffs, that they each in fact served that geographic location." NITL-27, at 10 (emphasis in original).

[11] As NIT League points out, UP's block quotation of this portion of Decision No. 44 artfully omitted the terms "BEA" and "6-digit SPLC" in an apparent effort to make it look like the Board had expressly rejected the use of 6-digit SPLCs to define "2-to-1" points. See NITL-27, at 12 (discussing block quotation in UP/SP-387).

divestiture for addressing such competitive harms was appropriate. Decision No. 44, 1 S.T.B. at 392. Agreeing with various protestants that UP and SP had "not gone far enough" in addressing the loss of indirect competition which would occur as a result of the merger, the Board then proceeded to impose conditions designed to preserve that competition. Id., at 393.

Thus, contrary to UP's claims, the Board's rejection of NIT League's 6-digit SPLC analysis did not constitute a conclusion that it is inappropriate to use 6-digit SPLCs to identify "2-to-1" points for the purposes of determining whether a new facility, an existing transload or a transload that is not built on a trackage rights line should be open to BNSF service under the Settlement Agreement in order to preserve pre-merger competition. Rather, as BNSF established in its July 25th Comments (and as NIT League persuasively argues in its Reply Comments), the use of 6-digit SPLCs for identifying geographic locations where pre-merger competition should be preserved is especially appropriate and logical, and there is nothing in the Board's decision which supports UP's position that there must be at least one actual "2-to-1" shipper at a location before the Board's remedies designed to protect pre-merger indirect siting and transloading competition apply.

2. Definition Of Transload Facilities

UP argues that BNSF's proposed definitions of "Existing Transload Facilities" and "New Transload Facilities" would potentially result in BNSF access to every exclusively-served industry on the trackage rights lines.[12] UP claims this would be contrary to the

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[12] UP also questions whether there is a need for a definition of "Existing Transload Facilities" because, in its view, the parties have identified all such facilities at "2-to-1" points, and it is unlikely that any additional facilities will be identified. UP's argument is, however, based on its narrow definition of a "2-to-1" point, and if, as BNSF, NIT League,

Board's statement that the transload condition should be applied in a manner that "would not result in direct BNSF access" to such industries, and UP proposes to impose a restriction that would preclude the operator of a transload facility to which BNSF would have access from having any ownership interest in the product being transloaded. However, as explained in BNSF's July 25th comments, the Board has already addressed UP's concern in this regard and held that UP is adequately protected against this potential risk. UP's proposal to prohibit BNSF access to private transloads should therefore be rejected.

First, if BNSF serves a shipper's "private" transload facility, BNSF will not be obtaining direct access to what were UP's or SP's exclusively-served shippers along the trackage rights lines. Instead, from the shipper's point of view, the access that BNSF will be obtaining will be indirect and attenuated, because, under the "legitimate" transload condition, the shipper will be required to incur significant additional expenses in shipping its product via the BNSF-served transload, over and above the "costs that would be incurred in providing [or obtaining] direct rail service." Decision No. 61, at 12. See also Decision No. 44, 1 S.T.B. at 372 ("Transloading * * * results in additional costs, as freight is first loaded into a truck, and then reloaded into a freight car, or the reverse.").

Second, as mentioned, the Board already has addressed "UP/SP's concern that a literal reading of the transload condition will allow BNSF to operate as if it directly

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and ACC believe the Board should do, the Board adopts BNSF's definition of such a point, then it is important that a clear definition of an Existing Transload Facility be set forth so that qualifying facilities can receive the benefit of the two carrier competitive service they lost as a result of the UP/SP merger.

reached all exclusively served UP/SP shippers on the trackage rights lines." Decision No. 61, at 12 (emphasis original). The Board addressed this concern by imposing the requirement that a transload must be "legitimate" to qualify for BNSF service under the transload condition – that is, the transload must "entail both the construction of a rail transload facility as that term is used in the industry and operating costs above and beyond the costs that would be incurred in providing direct rail service." Id. (emphasis original); see also NITL-27, at 13 (noting that the Board addressed the concerns raised here by UP in Decision Nos. 61 and 75, when it stated and applied the requirement that a transload be legitimate in order to qualify for BNSF service under the UP/SP merger transload condition). What UP seeks to do here, however, is impose an additional requirement over and above the legitimate transload requirement. See NITL-27, at 13 ("UP would now have the Board engraft a new requirement, namely, that 'the operator of [the transload facility] has no ownership of the [product] being transloaded.'") (emphasis in original; quoting UP-proposed alternative on page 8 of the Red-Lined Version of the Proposed Restated and Amended BNSF Settlement Agreement, in UP/SP-386/BNSF-92).

UP's proposed additional requirement would deprive shippers of an option for obtaining two-carrier service that they would have had if the UP/SP merger had not occurred. After all, prior to the UP/SP merger an exclusively-served UP shipper could obtain SP service either by utilizing a transload operated by someone else (such as SP or an independent third party) or by constructing and operating its own "private" transload facility. Under UP's proposal, the latter option would not be available to shippers wishing to utilize a transload to obtain BNSF service (regardless of where they

located the transload). Thus, UP's proposed additional restriction on the application of the transload condition would be inconsistent with the Board's intent "to preserve the indirect UP vs. SP competition provided by * * * transload options." Decision No. 61, at 10. See also ACC-1, at 5 (BNSF's definition "better reflects the intention of the parties and the Board to replicate all actual and potential competition that existed between UP and SP pre-merger.").[13]

Further, UP's proposed prohibition on private transload facilities would detract from the other primary purpose of the transload condition – that is, to preserve BNSF's ability to secure and maintain sufficient traffic density. BNSF's ability to do so was a cause for concern to many parties in the UP/SP merger proceeding, and the Board acted to enhance and preserve that ability. The Board has rejected prior efforts by UP to narrow the new facilities and new transload conditions in ways that would adversely affect BNSF's ability to develop and maintain traffic density (See Decision No. 61, at 12; Decision No. 86, at 5), and it should do likewise here.

Finally, perhaps recognizing that the Board has previously rejected the premise of its argument that privately-owned transload facilities should not be within the scope of the transload condition, UP tries another argument that the Board has also previously rejected. UP argues that a "shipper whose facility was served by SP [sh]ould be required to build its transload facility on a line owned by UP before the merger or vice versa." UP/SP-387, at 22. The Board rejected precisely this argument by UP when it

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[13] As NIT League notes, UP's position would also impose an additional barrier on a shipper's use of the transload condition. In addition to meeting the other requirements imposed by the Board, the shipper would have to find an independent operator for the facility and overcome whatever operational problems might arise as a result of the facility's separate ownership and control. NITL-27, at 13.

denied UP's petition seeking clarification or reconsideration of the new facilities and transload conditions (UP/SP-275) in Decision No. 61, and held that the transload condition should be read literally to permit BNSF to "serve any new transload facility" on a trackage rights line. Decision No. 61, at 7 (emphasis added). It should again do likewise here.

Accordingly, the Board should reject UP's effort to relitigate the scope of the condition and to impose a new requirement on the condition. The Board should instead adhere to its prior ruling that the condition as imposed by the Board adequately protects UP while at the same time ensuring that the dual competition preservation and traffic density purposes of the condition are met.[14] Indeed, the fact that there has not been any significant number of new private transload facilities built by exclusively-served shippers on the trackage rights lines indicates that the protection the Board imposed has worked and that there is no need to revise or restrict the condition. See also ACC-1, at 5 ("There is no reason at this late date to engraft upon the new facilities condition an exclusion of private transload facilities.").

3. Trackage Rights Restrictions

UP argues that the restrictions on BNSF's trackage rights between Elvas and Stockton, CA and in the Houston-Memphis-St. Louis corridor should remain in place because the restrictions were agreed to in the settlement agreement negotiations between UP, BNSF and, with respect to the Houston-Memphis-St. Louis corridor, CMA.

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[14] It should be noted that UP is incorrect in its assertion that the Board did not anticipate or intend that some exclusively-served UP shippers would be opened to BNSF as a result of the transload condition. Indeed, the Board expressly stated that "BNSF will be allowed to access exclusively served shippers only by a legitimate transload operation." Dec. No. 61, at 12.

However, even assuming UP is correct, the conditions imposed by the Board to preserve pre-merger competition and to enable BNSF to achieve adequate traffic density would override any such intentions of the parties.

a. Elvas-Stockton Trackage Rights

While UP and BNSF disagree over the exact circumstances which led to the grant of trackage rights on the former SP line between Elvas and Stockton to BNSF,[15] there is no doubt that those trackage rights were included in the BNSF Settlement Agreement when the Board held in Decision No. 44 that BNSF could "serve any new facility at any point on any SP or UP segment over which it has been granted trackage rights * * *." Decision No. 44, 1 S.T.B. at 373 (emphasis deleted and added). The Board could hardly have been any clearer in requiring that the new facilities condition apply to all of the trackage rights BNSF received under the Settlement Agreement.[16]

Indeed, as noted in BNSF's July 25th comments (BNSF-93, at 15), UP recognized the applicability of the new facilities condition to these trackage rights when

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[15] In this regard, UP continues to assert that it granted BNSF these trackage rights only as a "special accommodation" and that it should not be penalized for its "generosity" in enabling BNSF to avoid having to construct a difficult and costly connection to the UP line at Haggin Junction, CA. However, as explained in BNSF's July 25th Comments (BNSF-93, at 13-14), a competitive route from SP's line in the Central Corridor to Stockton where the trackage rights lines join BNSF's system is critical to BNSF's ability to provide competitive service in the Central Corridor, and BNSF should have the right to access new facilities on the former SP line – just as it does on all other trackage rights lines – in order to both preserve pre-merger competition and maintain traffic density.

[16] The fact that the restrictions were set forth in the version of the Settlement Agreement that was before the Board when the Board approved the UP/SP merger does not, as UP argues, indicate in any way that the Board approved of the restrictions. The Board approved the Settlement Agreement only as modified by the Board's conditions, and the Board held the new facilities condition would apply to all trackage rights lines.

it granted BNSF access to new facilities constructed by Southdown Cement at Polk and Willamette Industries at Elk Grove. In its July 25th Opposition, UP asserted that it granted BNSF access to these two shippers to provide them with rail alternatives during UP's service crisis in 1997-98. UP/SP-387, at 20. However, access to the two shippers was not granted to BNSF by UP until 2000, well after the service crisis had abated. Moreover, if UP's grant of access had been based on reasons related to the service crisis, the access granted could have been expected to be temporary in nature rather than the permanent access which was granted.

Thus, UP's efforts to distinguish the Elvas-Stockton trackage rights from the other trackage rights granted in the Settlement Agreement should be rejected, and the Board should hold that the trackage rights are no different from any of the other trackage rights which the Board determined needed to be enhanced to enable BNSF to provide effective replacement competition.

b. Houston-Memphis-St. Louis Corridor Trackage Rights

UP argues that the restrictions on BNSF's use of its trackage rights on the UP and SP lines north of Bald Knob and Fair Oaks, AR should be retained. The two disputed restrictions which UP wishes to retain are, as stated in Section 6c of the BNSF Settlement Agreement, (i) a limitation on BNSF's ability to enter or exit the trackage rights lines between Memphis and Valley Junction, IL, and (ii) a geographic limit on traffic BNSF can handle on these lines to traffic to, from, or through Texas and Louisiana. UP's argument is based on its claim that UP, BNSF and CMA agreed that BNSF would use those trackage rights only to serve what UP has labeled "St. Louis Gateway" traffic. UP asserts that the two restrictions were imposed because CMA's concern was limited to BNSF's ability to compete effectively for St. Louis Gateway

traffic, and thus BNSF did not need to use the trackage rights lines for any other reason and would use its own lines between Memphis and St. Louis for traffic unrelated to the UP/SP merger. However, as explained below, the language of the existing Settlement Agreement and the Board's decisions do not support the restrictions, and the relevant concerns are broader than simply BNSF's ability to reach St. Louis in an effective competitive manner.

(i) Entry/Exit Restriction

First, as to the entry/exit restriction, UP has proposed to delete the existing language in Section 6c of the Settlement Agreement which expressly subjects the restriction to BNSF's separate right pursuant to Section 9l of the Settlement Agreement to connect with its own lines from the trackage rights lines. UP has, however, provided no justification as to why this language should be deleted. In fact, UP does not even mention the existence of the language in any of its pleadings.[17] Moreover, the language of Section 9l giving BNSF the right to connect from the trackage rights lines to its own lines was included in the original September 25, 1995 BNSF Settlement Agreement, and it is clear from the language of Section 6c that, when the exit/entry restriction was subsequently included in the Second Supplemental Agreement, the parties intended that BNSF's previously-existing right to connect with its own lines would apply notwithstanding the restriction. Such an interpretation does not read the restriction on BNSF's right to exit or enter this portion of the trackage rights lines out of the Settlement Agreement since there were at least two shortlines (the Missouri & Northern Arkansas

[17] Presumptively, UP will address this language in its reply comments, but, regardless of what UP may say, the fact remains that the plain meaning of the language (which was drafted by UP) gives BNSF the right to connect with its own lines pursuant to Section 9l.

Railroad at Diaz, AR and the Jackson & Southern Railroad at Delta, MO) operating at the time of the merger to which the restriction would be applicable. Further, the Second Supplemental Agreement was executed by UP and BNSF in order to incorporate various terms and conditions from the CMA Agreement into the BNSF Settlement Agreement. However, contrary to UP's assertions, the CMA Agreement itself does not contain any restriction on BNSF's right to enter or exit these trackage rights lines or, for that matter, any of the other trackage rights lines.

Second, even assuming that the parties to the CMA Agreement were concerned primarily (or even exclusively) about BNSF's ability to compete effectively for St. Louis traffic when they granted BNSF trackage rights north of Bald Knob and Fair Oaks, the Board had broader concerns in mind when it enhanced BNSF's right to provide service in the Houston-Memphis-St. Louis corridor. For instance, as with all of the trackage rights lines, the Board was concerned about BNSF's ability to acquire and maintain sufficient traffic density in the corridor, and it rejected UP's attempt on reconsideration to restrict BNSF's right to serve new facilities on UP's line north of Bald Knob as inconsistent with the traffic density justification underlying the new facilities and transload conditions. See Decision No. 61, at 11. In fact, the Board noted that, by granting BNSF trackage rights over the UP line as well as the SP line in the corridor in order to address the problem of a directional flow handicap, UP exacerbated the insufficient traffic density problem. Ibid. The Board therefore refused "to jeopardize BNSF's ability to achieve sufficient traffic density on these lines", and allowing the exit/entry restriction to remain in place or otherwise restricting BNSF's use of the lines would jeopardize that ability as well since BNSF's ability to compete in the most

effective way (and to secure and maintain traffic density) would be adversely affected. Ibid.

Third, the Board's expansion of the new facilities and build-in/build-out conditions in Decision No. 44 substantially enhanced BNSF's rights to serve shippers in the Houston-Memphis-St. Louis corridor, and, as Entergy and NIT League have pointed out in their comments (ESI-33, at 2, and NITL-27, at 15-16), the adoption of UP's position would significantly affect BNSF's ability to provide competitive service in the Houston-Memphis-St. Louis corridor by increasing BNSF's cost of service and shippers' cost of equipment.[18] Not only would the restriction on entry and exit thereby prevent BNSF from providing a competitive replacement service for SP's pre-merger service, it would also eliminate specific pre-merger joint-line routings that BNSF could have offered by interchanging with SP at Jonesboro and UP at Hoxie.[19]

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[18] NIT League also urges the Board to "avoid where possible imposing unnecessary operational restrictions on BNSF's trackage rights." NITL-27, at 15.

[19] In its comments, Entergy provides a specific example of how the entry/exit restriction could adversely affect BNSF's competitiveness to provide service to its White Bluff Station. As shown by Entergy (ESI-33, at 14 n.12), requiring BNSF to route Powder River Basin unit coal trains past Jonesboro to Memphis and then return back to the SP line and to do likewise from the UP line in returning to the Powder River Basin would add approximately 166 miles to BNSF's route. While UP can be expected to assert that this additional mileage would not affect BNSF's competitiveness, there is no doubt that, at least to some degree, BNSF will be less competitive because, not only would its routing have additional mileage involved, but Entergy's cost of equipment could increase, BNSF could potentially be required to utilize additional crews, and BNSF transit and cycle times and its ability to guarantee competitive levels of service could be adversely affected. In addition, BNSF would be forced to incur significant expenses to construct and/or rehabilitate the necessary connections and lines in Memphis, thereby further increasing its cost of service. As Entergy suggests, UP's position seems to "have no purpose other than to restrict BNSF's ability to compete on an even playing field * * *." ESI-33, at 2.

(ii) Geographic Limit

As to the second restriction which purports to limit the traffic BNSF can handle on the UP and SP lines north of Bald Knob and Fair Oaks to traffic to, from or through Texas and Louisiana, it should be noted that in its July 25th Opposition UP has interpreted the restriction to permit BNSF to use the lines to carry merger-related traffic involving points in Texas, Louisiana and Arkansas. UP/SP-387, at 17. However, even this reading of the restriction cannot stand since the Board gave BNSF the right to serve new facilities and transloads on all of its trackage rights lines, including both the UP and SP lines north of Bald Knob and Fair Oaks. For instance, if UP's position were to be adopted, then BNSF would be restricted in its ability to provide service to a new facility locating on either the UP or SP line in Missouri. Accordingly, BNSF should be able to carry traffic to and from points to which it has access located anywhere on the full length of its trackage rights lines in the Houston-Memphis-St. Louis corridor.

In sum, the Board should clarify that, by reason of the express language in the existing BNSF Settlement Agreement, BNSF has the right, pursuant to Section 9I, to interchange with its own lines from its trackage rights over the UP and SP lines north of Bald Knob and Fair Oaks. In addition, while it is not BNSF's intent to routinely route its traffic unrelated to the merger to and from the Southeast over these trackage rights lines, the Board should hold that the restriction on the traffic that can be carried over the subject trackage rights lines should be deleted from the BNSF Settlement Agreement so that BNSF will be able to have the routing flexibility it needs to implement and achieve the network system efficiencies and to maintain sufficient traffic densities in the corridor needed to effectively replace SP. At a minimum, the Board should hold that BNSF can use the trackage rights lines north of Bald Knob and Fair Oaks not only to provide

competitive service to all shippers located in the corridor to which BNSF obtained access (such as Entergy's White Bluff Station), but also to all merger-related traffic moving both within and beyond the corridor itself. Indeed, as mentioned, UP has recognized that BNSF should be able to use the trackage rights lines for merger-related traffic. See UP/SP-387, at 17.

4. Team Tracks

UP does not contest that UP and SP competed via team tracks before their merger. Rather, UP argues that it should not be required to sell unused team tracks to BNSF because the parties agreed to replicate the pre-merger competition that team tracks provided by enabling BNSF to build its own rail-served facilities along the trackage rights, including team tracks.

While it is true that BNSF has the right under the Settlement Agreement to build its own team tracks, the reality is, as explained in BNSF's July 25th Comments, that the process for establishing team tracks is far from the simplistic picture UP paints. See BNSF-93, at 18-20. For example, BNSF must first negotiate to locate and acquire property suitable for such a facility. It must then seek UP's approval of BNSF's engineering plans for the track and rely upon UP's engineering department to install connecting and access tracks and switches. It must then seek UP's approval of BNSF's proposed service plan. Such an extended process handicaps BNSF's ability to compete via team tracks, which are, as UP recognizes, often somewhat flexible and transitory.

A requirement that UP sell team tracks that it no longer uses to BNSF at normal and customary costs and charges would, notwithstanding UP's protestations, pose little burden on UP. In fact, one wonders why UP objects so strenuously to such a

requirement if it does not perceive that it will gain a competitive advantage by refusing to sell unused team tracks to BNSF. Further, UP's concern that it may want to use the tracks for some other purpose can be resolved simply by clarifying that UP's obligation to offer the unused team tracks to BNSF only arises if UP has no use whatsoever for the tracks, as team tracks or otherwise.

## II. OTHER UNRESOLVED ISSUES

### A. GTM MILL RATE DISPUTE

Since their July 2nd submissions, the parties have continued their discussions about and exchanged further correspondence concerning the proper method for the adjustment to be made annually to the trackage rights fees (GTM mill rate) which BNSF pays for the use of the trackage rights lines. While the parties have not yet resolved all of their differences with respect to their dispute, they have narrowed the differences and reached agreement on several points.

It is critical to BNSF's ability to provide competitive service over the trackage rights lines that this dispute be resolved in a way that fairly and accurately reflects changes in UP's costs. The present adjustment mechanism was agreed to by the parties and imposed by the Board as a condition of the UP/SP merger as a result of concerns expressed by CMA (now ACC), and the issue of the impact of the trackage rights fees on BNSF's ability to provide competitive operations over the trackage rights lines was of concern not only to ACC but also to numerous other parties to the UP/SP merger proceeding.

In the event BNSF and UP are unable to resolve their remaining differences with respect to the adjustment of the GTM mill rate, the ACC has indicated that it will consider invoking its rights under the CMA Agreement to request an audit of the

adjustment calculations. See ACC-1, at 8. Accordingly, given the importance of the proper resolution of this dispute, BNSF is prepared to take the necessary steps to have the issue promptly resolved.

B. I-5 PROPORTIONAL RATE AGREEMENT

Since their July 2nd submissions, the parties have also continued their discussions concerning the I-5 Proportional Rate Agreement. The parties are continuing to evaluate the results of the preliminary audit report of BNSF's compliance under the Agreement, and they have been able to make progress in resolving a number of their differences. In the event the parties are unable to resolve the remaining differences, those differences may need to be resolved through arbitration or by the Board.

III. CONTINUATION OF OVERSIGHT

As set forth in BNSF's July 25th Comments, oversight should continue until the unresolved issues relating to the amendment of the BNSF Settlement Agreement have been resolved. In addition, the outstanding issues relating to the parties' compliance with the BNSF Settlement Agreement and other merger conditions should be addressed by the Board before oversight ends if the parties can not resolve their differences. ACC has expressed its agreement with BNSF's view that oversight should continue until all such issues are resolved.[20] See ACC-1, at 8. ACC further agrees with BNSF's position that the Board should clarify that, "even after the formal oversight period ends, it will

[20] BNSF notes that the State of Utah has also requested that oversight be extended – for a period of one year – to, inter alia, permit the completion of an audit of Utah rail rates that the State requested during the UP/SP merger proceeding. The State asserts that the rate audit will enable the Board to evaluate whether the conditions imposed by the Board have enabled BNSF to be an effective competitor to UP in the Central Corridor.

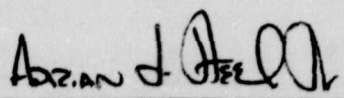
continue to entertain petitions to resolve disputes that the interested parties have been unable to resolve to interpret or enforce the merger conditions." Ibid. See also Comments of Cowboy Railroad Development Company (CRDC-1), at 3 (Board should clarify that "oversight jurisdiction will continue and will be exercised upon an appropriate request.").

## CONCLUSION

For the reasons set forth in BNSF's July 25th comments and above, BNSF respectfully submits that the BNSF Settlement Agreement should be modified as proposed by BNSF, as supported by NIT League, ACC and Entergy, to ensure that BNSF can, over both the short and long term, provide the effective replacement competition which the Board envisioned and to which UP committed when the UP/SP merger was approved. BNSF further requests that oversight be continued until the disputed issues set forth above are resolved and that the Board confirm that, after oversight has ended, it will consider and promptly act upon issues of general applicability relating to BNSF's access to shippers under the BNSF Settlement

Agreement as well as issues relating to the parties' compliance with the merger conditions.

Respectfully submitted,

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September 19, 2001

## CERTIFICATE OF SERVICE

I do hereby certify that copies of The Burlington Northern and Santa Fe Railway Company's Comments to UP's Fifth Annual Oversight Report and on Unresolved Issues Relating to the Restated and Amended BNSF Settlement Agreement (BNSF-94) are being served on all parties of record.

Adrian L. Steel, Jr.

APPENDIX 1

# EXCERPTS FROM

# JULY 1, 1996 ORAL ARGUMENT

# FINANCE DOCKET NO. 32760

really unalloyedly positive.

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(1) If you look at the last 15 years, the (2) number of class one railroads has declined by two- (3) thirds in this country. (4) Now, has that led to increases in rates as (5) the anti-trust theorists of the Justice Department (6) might argue? No, it hasn't. There has been a 50 (7) percent decline in real rates, real rail rates. (8) And that can only happen if competition is (9) vigorous. You can't say well, it's because of (10) productivity or its because of deregulation because it (11) wouldn't be passed on to the shipper in lower rates if (12) the competition weren't forcing it to happen. (13) Now, you have ruled again and again that (14) two strong railroads is what is the sine qua non of (15) competition in the rail industry. (16) Now, railroading isn't like widget making. (17) You don't need and you can't have dozens of producers (18) in a market. We had a Mr. Sheppard here for some of (19) these parties and say there isn't any competition in (20) the market unless you have five players in the market. (21) Well, he hasn't seen railroading if that's (22) his opinion. Railroading is incredibly resource

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(1) capital intensive, tremendous fixed costs. And the (2) only way to achieve many efficiencies, not all (3) efficiencies, but many efficiencies, is through (4) merger. (5) You don't want to merge down to one. (6) Competition is vital. We are in favor of competition. (7) This merger is pro-competitive. We are not (8) eliminating rail option for any shipper in the west (9) through this merger. (10) Every shipper that has a choice today will (11) have a choice after this merger, and a better choice. (12) And I'm not denigrating competition. I'm (13) in favor of it. We believe in it. We think and (14) believe we're promoting it through this transaction.

(15) CHAIRPERSON MORGAN: But there are (16) opponents to this merger that are supporting (17) divestiture and indicate that divestiture would not (18) undercut the principal benefits of this merger. Would (19) you care to comment on that?

(20) MR. ROACH: I'd love to comment on that. (21) They are dead wrong. Divestiture will gut the (22) benefits of this merger. All the divestiture

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(1) proposals that are on the table will gut the benefits (2) of this merger. Now why –

(3) CHAIRPERSON MORGAN: And why is that?

(4) MR. ROACH: – is that? Why is that? (5) First of all divestiture will wipe-out single-line (6) service for hundreds of thousands of customers, (7) hundreds of thousands of shipments per year. (8) What you're doing is you're re-Balkanizing (9) the railroads. Instead of consolidating them and (10) achieving single-line service increases, you are (11) eliminating single-line service. (12) You are taking all those coal shippers in (13) Utah and Colorado, for example the MRLs divestiture (14) proposal, who today – even today, before this merge (15) have single-line routes over the SP out of those (16) states and into the midwestern gateways, the west (17) coast, the south-central United States. (18) And you're eliminating those single-line (19) routes. You're saying, well now we're going to take (20) this line, the Rio Grande Line, and against your will, (21) involuntarily – because all the Utah coal producers (22) oppose divestiture.

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(1) We're going to take that and we're going (2) to force the Applicants to sell it to a fellow named (3) Dennis Washington who would like to make a lot of (4) money out of this transaction and run his own (5) railroad. (6) At that point, those coal shippers have (7) two line rail routes instead of single-line. And (8) furthermore, they've got routes that are must more (9) circuitous and much less efficient than the routes (10) that they'll have with this merger. (11) We're going to create a new coal route (12) straight out of Utah and Colorado across Kansas on (13) what UP called the KP line, which will be upgraded, (14) that saves hundreds of miles of mountainous circuity (15) that the SP has to do now across either the Tennessee (16) Pass or down from Denver to Pueblo and back across (17) Kansas. (18) Mr. Washington's proposal would (19) reinstitute all those bad routes, plus add (20) interchanges in the middle of the congested Kansas (21) City terminal. (22) And you have the same thing at the west

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(1) end. Where we achieve mileage savings in the central (2) corridor and the divestiture wipes out those mileage (3) savings. (4) Now, what about in the south-central (5) region from Houston up to Memphis, for example, where (6) some of these parties would like to see divestiture? (7) We have serious capacity constraints in (8) those markets. One of the big benefits of this merger (9) is that we will be able to run the lines from Memphis (10) down to Houston and various other lines in Texas on (11) what's called a directional basis. (12) UP has a single-line, single-track line. (13) SP has a single-track line. Today, they're both (14) operated in both directions, which yields a lot of (15) interference, train meets. It can be done. It's done (16) all the time. Dispatchers put trains in sidings, but (17) it limits your capacity sharply when you have to run (18) a single-track line in both directions. (19) With the merger, we can take one of those (20) routes and make it the northbound route, and one of (21) them to make it the southbound route. (22) We have two large, excellent,

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(1) classification yards: one in Pine Bluff and one in (2) Little Rock. Today, they're used by UP for both north (3) and southbound traffic, which complicates and lowers (4) the capacity of the yard. (5) And the same thing with SP. Under our (6) plan, the yard would be specialized for blocking in (7) one direction, tremendously increasing its capacity. (8) Now, you force us to divest one of those (9) lines, we're back with the inefficient operation. (10) We're back having to spend a lot of capital to add (11) capacity. We no longer can achieve the tremendous (12) improvements in blocking that this merger will bring (13) about. (14) Now "blocking" sounds sort of, you know, (15) technical and unexciting. But blocking is really one (16) of the parts of efficient railroading and switching (17) You don't want to switch a car any more (18) times that you have to. It adds tremendously to (19) delay, tremendously to cost. (20) What you want to do is to pre-block as (21) early in the shipment as possible for as far down the (22) road as you can pre-block. You want to pre-block in

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(1) Houston to take it al the way to New York City or (2) Albany and so forth. (3) We can do that with this merger because we (4) consolidate volumes while preserving competition for (5) every shipper that has it now and retaining enough (6) traffic for BN/Santa Fe to be fully competitive. (7) But if you force the divestiture, you're (8) handing over a large chunk of the traffic that his (9) exclusively served. It's not competitive traffic. (10) What these divestiture people want is to (11) take over non-competitive traffic.

(12) CHAIRPERSON MORGAN: But

size.
(6) MR. ROACH: Absolutely. And that's why we (7) have a five-year implementation period.
(8) VICE CHAIRPERSON SIMMONS: And we'll be (9) looking at you every year.
(10) MR. ROACH: Not – well, that's the (11) oversight and that's fine. But I'm referring to the (12) implementation period in the operating plan, and (13) that's five year, which is unusual. It's (14) traditionally three years. (15) We concluded we need five. WE need five (16) partly to just understand everything fully out there, (17) and part of it to achieve the capital investments (18) which are tremendous and very extensive to upgrade the (19) Southern Pacific system and get the potential out of (20) those routes that's sitting there unachieved for the (21) United States and international economy.
(22) CHAIRPERSON MORGAN: And let me stop you

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(1) there on oversight because there's a lot in the record (2) about oversight being meaningless and window-dressing (3) and so forth. (4) Is there a way to make that kind of (5) oversight provision have more meaning to it, if that (6) indeed is a concern. I know it's in the CMA (7) agreement.
(8) MR. ROACH: Well, I've got to tell you (9) that Union Pacific views the oversight process as (10) tremendously meaningful, indeed daunting if you like, (11) because really what it says is we may end up having (12) five more of those proceedings where all my friends in (13) the rail bar and Washington are having at us. (14) If we don't deliver for the shippers, if (15) BN/Santa Fe doesn't deliver, we're going to have (16) another proceeding. You're going to hear about it. (17) The shippers will come to you with complaints. (18) Now, you may be asking how do you need to (19) design the process to obtain information and how much (20) should you reach out? And that's important. (21) Although again, my first response is I don't think (22) you're going to have to try very hard. I think they

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(1) will come to you if they have concerns. (2) But secondly, I think it's fairly (3) straight-forward what you can do. You can direct (4) inquiries to UP/SP with respect to rates and service. (5) You can inquire of BN/Santa Fe. You can (6) inquire of the key shippers that have been parties in (7) this case. (8) And you will have unrestricted power to (9) impose additional conditions if appropriate. That is (10) not the case under the statute normally. There has to (11) be a showing of new evidence or material error or (12) significant change in circumstances. (13) So, this is a significant provision and a (14) significant proposal by the Applicants. That would (15) include divestiture. (16) We think divestiture is a horrendous idea. (17) We vigorously oppose it. But there's no reason that (18) in a year or two or three, if you conclude that it is (19) appropriate, you can't require it. (20) This isn't like a lot of anti-trust (21) lawyers would normally say you can't unscramble the (22) omelette. You can't order divestiture. These rail

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(1) lines are very discreet and distinct. (2) Locomotives are discreet and distinct. (3) And if two years from now you conclude that you want (4) to order the SP line from Houston to Memphis and an (5) appropriate number of locomotives, et cetera, to be (6) divested, there's no reason you can't do that.
(7) COMMISSIONER OWEN: Mr. Roach, along that (8) line, then why did Mr. Davidson be quoted in The (9) Washington Post recently about the divestiture and (10) then exactly what lines might you be talking about?
(11) MR. ROACH: Commissioner Owen, I have (12) notebook where I've collected all the false reports (13) during this case. I should say, a set of notebooks.
(14) COMMISSIONER OWEN: I have a few of those.
(15) MR. ROACH: I don't know the exact (16) quotation you're referring to, but the position of the (17) Applicants and what, to my knowledge, Mr. Davidson has (18) said to anyone who has asked, is that we vigorously (19) oppose divestiture. We have serious questions about (20) whether we could go forward with this transaction if (21) the divestiture proposals that have been put on the (22) table by Conrail or KCS or MRL were granted.

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(1) Now, you know, if you were to order to us (2) to divest five miles somewhere, we'd have a fiduciary (3) duty to our shareholders to think about whether we go (4) forward with the transaction. And I'm sure we would (5) go forward.
(6) COMMISSIONER OWEN: Along that line, it's (7) also been stated that Conrail might be the last one to (8) dispose of their property too or divest too. (9) If that were the case and they did equal (10) service on those other lines, then would it not be (11) your responsibility fiduciary-wise to your (12) stockholders to sell to Conrail if that were the case, (13) if you ever got to that point?
(14) MR. ROACH: Well, it's a complicated (15) question in this sense: nobody has explained what the (16) process for divestiture would be. Part of the fault (17) there lies with Conrail and KCS because they (18) consciously chose not to file an application for this. (19) Instead they want to delay the case, so (20) they said let's have a second round of proceedings. (21) If you followed tradition and left it to (22) the Applicants to select the party to whom they would

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(1) sell, within their business judgement, with the Board (2) retaining authority to review that and decide whether (3) it passed muster, then UP would have to look – (4) assuming we went down this road at all, we might (5) conclude immediately that it just doesn't – the (6) numbers don't add up. (7) We would have to look at the economic (8) value of various alternatives. And part of that is (9) how much someone offers you. And part of it is how (10) much traffic he is going to take away if he buys the (11) line. (12) Now again, I don't think anybody has said (13) any railroad would be ruled out. And if they did, you (14) know, we have problems of understanding between (15) executives and reporters all the time and nuance. (16) But Conrail would cost UP/SP a lot more (17) than some other players simply because Conrail (18) exclusively serves the entire chemical industry in the (19) northeast. (20) And if they come down to Houston and serve (21) all the UP and SP points down there, you know, our (22) projections would indicate they're going to take very,

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(1) very large shares of that business. (2) Now, I come back to my basic question (3) which is why in heaven's name would you do this as a (4) competitive remedy? (5) These are shippers that are not losing (6) competition. All the shippers that have competition (7) will have it preserved under the BN/Santa Fe (8) settlement. And the very point of these divestiture (9) proposals is for the acquires to get their hands on (10) the shippers that are exclusively served. That's what (11) they want. (12) But those are the shippers that don't (13) experience any reduction in competition. There's a (14) complete disconnect there. There's no

competitive (15) problem. Or to put it in terms of your law, which is (16) important to precedence, it's egregiously over-broad. (17) It's like, you know, solving a problem (18) with a nuclear warhead instead of a surgical strike. (19) And no one has ever explained the rationale for that. (20) All you hear from the proponents of divestiture is (21) trackage rights aren't good enough. Let's have (22) divestiture.

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(1) But they never say, "And boy, will we ever (2) make out like bandits because these shippers who have (3) no say in the matter, are going to end up being served (4) by us instead of served by the railroad that serves (5) them now. And they're going to have worse service, (6) but too bad because they're not able to vote on this (7) matter."
(8) CHAIRPERSON MORGAN: Now, let me stop you (9) right there. In terms of trackage rights, now one of (10) the concerns that the opponents have raised is that (11) the trackage rights agreement really represents (12) collusion between UP and BN/Santa Fe. Can you just (13) respond to that?
(14) MR. ROACH: Yes. Let me comment on the (15) trackage rights agreement and also a little bit on (16) collusion. (17) I heard the Senator say earlier this (18) morning that it's a terrible thing to let UP choose (19) the party to whom it's going to grant rights. (20) Well, UP didn't want to grant rights to (21) BN/Santa Fe as a commercial matter. That's the last (22) thing UP would have wanted as a commercial matter.

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(1) BN/Santa Fe has a comprehensive western (2) rail network that exceeds that of any other railroad. (3) And if we had granted trackage rights to KCS, the (4) potential traffic diversion would have a been a (5) fraction of what it would have been with BN/Santa Fe. (6) Why did we do it? We didn't do it because (7) of some sweetheart deal or collusion. We did it (8) because our shippers all told us that no one else (9) could fit the bill. There just wasn't anyone else (10) that could fit the bill. (11) Mr. Davidson talked to Exxon and the major (12) chemical shippers as we were in the process of (13) negotiating to determine – to find someone who would (14) take these trackage rights. (15) And he was uniformly told, "I don't want (16) a KCS. I don't want an IC. I want a railroad that (17) can get me where SP and UP can get me, or preferably (18) even more places."
Which is exactly what BN/Santa Fe (19) does. (20) I mean, the magic of this solution is that (21) you're talking here about shippers that are only (22) served by UP and SP today. So, what they have today

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(1) is a choice of access to UP points and SP points and (2) all the major gateways. (3) With the merger and the settlement, they (4) are better off because first of all, they've got UP (5) and SP merged and with greater efficiency, an (6) operating ratio that will drop five points, savings of (7) $580 million a year in costs, much more efficient (8) operations with the directional running, et cetera, et (9) cetera. (10) And they've got service by BN/Santa Fe, (11) which gives them single-line access to Minot, North (12) Dakota and all kinds of places that they can't get to (13) now. (14) It's a boon for these shippers. It's a (15) tremendous improvement in competition.
(16) CHAIRPERSON MORGAN: The concern that they (17) have raised is that because trackage rights is a (18) little bit different relationship from an ownership (19) situation, that somehow the landlord, which is in this (20) case UP/SP, has more power over operations, over (21) traffic, and over a whole lot of other things as it (22) relates to real competition. Could you respond to

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(1) that?
(2) MR. ROACH: Yes. We have entered into a (3) comprehensive, written protocol to govern dispatching (4) of BN/Santa Fe trains and of UP trains on BN/Santa Fe (5) lines too.
(6) CHAIRPERSON MORGAN: And that's on the (7) CMA?
(8) MR. ROACH: That is attached to Mr. King's (9) rebuttal statement. And yes, it is referenced in the (10) CMA agreement. The final version of it is attached to (11) Mr. King's rebuttal statement. (12) Now, there's a history of this. As you (13) undoubtedly know, because it's been brought up by (14) parties to this case, SP some years ago, accused UP of (15) discriminating against its trains. (16) And UP took tremendous umbrage at that and (17) there was a huge proceeding on the subject in the (18) UP/CN&W merger case, and then off in federal court. (19) There was massive discovery. And in the end, what SP (20) concluded was that there had not been discrimination. (21) And SP paid the rent that they owed, $60 (22) million, all before this merger was in anybody's mind.

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(1) It wasn't – it had nothing to do with trying to bury (2) an issue. (3) It was a full-scale inquiry and an (4) enlightened resolution. Now, were there delays to SP (5) trains? Yes, there were delays to SP trains, and (6) that's why it was a hard problem. (7) But the reason was, as it turned out when (8) the operating people got together and studied specific (9) incidents, studied the overall situation, it was a (10) communications problem more than anything else. (11) SP has primitive systems. They could not (12) and did not tell UP when a train was going to be (13) arriving or what priority it was supposed to have. (14) The train crew would end up sitting on a (15) siding and they would think they were being (16) discriminated against. (17) But the problem was that SP wasn't telling (18) UP, and UP wasn't doing enough to ask. And what we (19) did was we agreed on procedures that would ensure (20) communications. (21) Now that we have technological advances, (22) we can do a lot of this in real time. WE can have

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(1) computers on the trains and have a dispatching center (2) tied in directly. (3) And we took the base of those (4) understandings and built on them with BN/Santa Fe for (5) this case. And we added other features such that the (6) BN/Santa Fe manager will be physically in the Harriman (7) Dispatching Center in Omaha to see how the BN/Santa Fe (8) trains are dispatched. (9) He's not going to see any commercially (10) sensitive information or rates or anything like that. (11) But he's going to see his train arrive. He's going to (12) know it's priority and he's going to be able to (13) confirm that it's appropriately dispatched. (14) There are sanctions in the agreement. (15) There's reporting. There's monitoring, et cetera. (16) Now, the last thing I'll say because it's (17) something that any rail operating person would say, so (18) I had better say it, is that UP, SP and BN/Santa Fe (19) are not going to wrongfully hammer each other's trains (20) because they're dependent on the other just ask much (21) as the other is dependent on them. (22) And that isn't to say to there's going to

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(1) be collusion or anything bad. But it does say that – (2) you know, somebody said these rights are (3) unprecedented. They're not unprecedented at all. (4) All the railroads in the west and the east (5)

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September 19, 2001

VIA HAND DELIVERY

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

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

→ 203485

Finance Docket No. 32760 (Sub-No. 21), Union Pacific Corporation, et al. --
Control and Merger -- Southern Pacific Rail Corporation, et al. (Oversight)

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are the original and twenty-five (25) copies of The Burlington Northern and Santa Fe Railway Company's Reply to UP's Fifth Annual Oversight Report and on Unresolved Issues Relating to the Restated and Amended BNSF Settlement Agreement (BNSF-94). Also enclosed is a 3.5 inch disk containing the text of the filing in WordPerfect 9 format.

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

Sincerely,

Erika Z. Jones/cls

Erika Z. Jones

Enclosures

cc: All Parties of Record

BNSF-94



BEFORE THE
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 32760

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

-- CONTROL AND MERGER --

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

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Finance Docket No. 32760 (Sub-No. 21) → 203485

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)

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# BNSF REPLY COMMENTS TO UP'S FIFTH ANNUAL OVERSIGHT REPORT AND ON UNRESOLVED ISSUES RELATING TO THE RESTATED AND AMENDED BNSF SETTLEMENT AGREEMENT

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The Burlington Northern and Santa Fe Railway Company ("BNSF") submits the following reply comments to (i) UP's "Fifth Annual Oversight Report" filed on July 2, 2001 (UP/SP-384); (ii) UP's "Report on Issues Arising Under the BNSF Settlement

Agreement" also filed on July 2, 2001 (UP/SP-385); (iii) UP's "Opposition to Substantive Changes to the BNSF Settlement Agreement" filed on July 25, 2001 (UP/SP-387); and (iv) the comments filed on August 17, 2001, by various parties with respect to the unresolved issues relating to the Restated and Amended BNSF Settlement Agreement.[1]

## INTRODUCTION

In its Fifth Annual Oversight Report, UP presented information and data on the various public benefits it claims have been achieved as a result of the UP/SP merger. BNSF agrees that, after what UP itself has called an "infamous start," many of the benefits projected by the Applicants have been achieved, and that, overall, BNSF has been able to provide effective competitive service utilizing the rights it received pursuant to the BNSF Settlement Agreement and the conditions imposed by the Surface Transportation Board ("Board") on the merger. However, as set forth in BNSF's "Fifth Annual and Cumulative Progress Report" filed on July 2, 2001 (BNSF-PR-20), and in its "Comments on Unresolved Issues Relating to the Restated and Amended BNSF Settlement Agreement" filed on July 25, 2001 (BNSF-93), there are issues remaining as to whether the conditions the Board imposed "have effectively addressed the competitive issues they were intended to remedy." Decision No. 16, Finance Docket No. 32760 (Sub-No. 21), at 13. These issues need to be resolved before formal oversight is ended so that each individual shipper that lost two carrier competition as a

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[1] The City Public Service Board of San Antonio, TX filed comments (CPSB-15) in which it noted that the proposed Restated and Amended BNSF Settlement Agreement does not conform in certain respects to the prior agreement reached between CPSB, UP and BNSF as to the language necessary to implement the Board's decisions concerning service by BNSF to CPSB's Elmendorf, TX station. As CPSB reports in its comments, BNSF and UP have agreed to incorporate the language previously agreed upon by CPSB, UP and BNSF in the final Restated and Amended BNSF Settlement Agreement.

result of the UP/SP merger can be assured that the competition will be preserved and so that BNSF has the ability to provide competitive replacement service to all such shippers both now and in the future.

Section I of these Reply Comments addresses the unresolved issues relating to the amendment of the BNSF Settlement Agreement. Section II discusses the status of the parties' discussions on other unresolved issues, including issues relating to the adjustment of the trackage rights fees and to the I-5 Proportional Rate Agreement. Finally, Section III addresses the need for the continuation of formal oversight until such time as the Board resolves the issues raised in oversight, including the amendment of the Settlement Agreement and any other pending issues.

## I. AMENDMENT OF THE BNSF SETTLEMENT AGREEMENT

### A. BNSF'S PROPOSED ALTERNATIVES DO NOT CONSTITUTE IMPERMISSIBLE SUBSTANTIVE CHANGES TO THE BNSF SETTLEMENT AGREEMENT

Much of UP's opposition to BNSF's proposed alternatives on the unresolved Settlement Agreement issues rests on the erroneous premise that BNSF's positions on the issues would result in "substantive changes" to the Settlement Agreement – changes that, in UP's view, would expand BNSF's rights and fundamentally alter the conditions imposed by the Board in approving the UP/SP merger. UP/SP-387, at 2. Based on that premise, UP asserts that the adoption of BNSF's alternatives would constitute unlawful retroactive regulation, contravene Board policy favoring private settlement agreements, and violate BNSF's promises in the BNSF Settlement Agreement. UP further argues that it would be unfair to impose additional conditions five years after consummation of the merger. As is shown below, however, UP's premise is without foundation, and, in any event, UP expressly accepted the possibility

of further conditions necessary to preserve competition even if BNSF's proposed alternatives could somehow be construed to be new or additional conditions on the merger.

1. UP Has Mischaracterized BNSF's Proposed Alternatives

UP's characterization of BNSF's proposed alternatives is clearly incorrect. As NIT League recognizes, BNSF is not seeking new rights or conditions. Instead, BNSF merely is seeking authoritative clarifications of its existing rights under the Settlement Agreement – clarifications necessitated and justified by the parties' long-standing and, as yet, unresolved disputes over key issues and definitions under the Agreement; various Board decisions explaining and elaborating upon the conditions imposed in the UP/SP merger; and, most importantly, the need to ensure that pre-merger competitive options which shippers enjoyed are preserved. See Reply Comments on Unresolved Issues Relating to the Restated and Amended BNSF Settlement Agreement submitted by The National Industrial Transportation League (NITL-27), at 3-5. Thus, contrary to UP's characterization of BNSF's proposed alternatives, BNSF is, in fact, seeking only to codify the basic principles that have emerged from the Board's decisions and to clarify basic definitions and practices, so that (a) UP, BNSF, and the shipping community will have the benefit of the certainty that comes from clear, authoritative definitions and principles in the BNSF Settlement Agreement as modified by the Board and (b) all shippers who would have benefited from competition between UP and SP, and no other railroad, but for the UP/SP merger will have the benefit of such competition. [2]

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[2] In addition, with respect to several of the unresolved issues, it is UP, not BNSF, that is seeking a change. For instance, UP seeks to impose a new restriction on the Board's transload condition that would exclude private transloads. Similarly, UP proposes to delete the language in Section 6c of the original Settlement Agreement

Further, according to UP's own statements and representations, the overall purpose of the BNSF Settlement Agreement was to preserve pre-merger competition for "every" shipper. See, e.g., Applicants' Rebuttal – Volume 1, Narrative (UP/SP-230), at 89 (Stating that, as a result of the BNSF Settlement Agreement, "every affected shipper will gain stronger competition") (emphasis in original); Transcript of UP/SP Oral Argument, July 1, 1996, at 45, 63 ("We are not eliminating rail option[s] for any shipper in the west through this merger. * * * All the shippers that have competition will have it preserved under the BN/Santa Fe settlement.")[3] In light of these representations, it is disingenuous for UP to now claim that proposals intended to ensure the preservation of such competition for "every" shipper somehow constitute retroactive regulation, violate the Board's policy in favor of settlement agreements, or constitute a breach of BNSF's promises under the Settlement Agreement. Rather, having secured the Board's approval of the merger, UP seeks – as it has on numerous occasions throughout the 5-year oversight period – to have the BNSF Settlement Agreement and the Board's implementing conditions read narrowly rather than in a way that would protect "every potential competitive concern." See UP/SP-384, at 54 ("The Merger Conditions Addressed Every Potential Competitive Concern").

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(Section 6(d) of the amended Settlement Agreement) that expressly incorporates the right of BNSF set forth in Section 9l (original) (Section 9(m) (amended)) to connect with its own lines from the trackage rights lines. And, UP wants to classify BNSF's trackage rights between Elvas and Stockton as overhead trackage rights even though it has already acknowledged BNSF's right to serve two new shipper facilities on that line. Thus, UP's concern about changes being made after the Board's decision approving the merger would seem to apply as much, if not more, to UP's proposals as to BNSF's proposals.

[3] Excerpts of the oral argument transcript cited herein are included in Appendix 1 filed with these Reply Comments.

2. UP Has Expressly Accepted The Possibility Of Additional Conditions

Moreover, UP's extended arguments about the impropriety and unfairness of the retroactive imposition of conditions in this proceeding (UP/SP-387, at 3-8) are inconsistent with the explicit commitments that UP made prior to the Board's approval of the UP/SP merger. For instance, in oral argument, UP's counsel stated that, unlike "the case under the statute normally," the Board will "have unrestricted power to impose additional conditions, if appropriate," including divestiture. Transcript of UP/SP Oral Argument, July 1, 1996, at 59. Similarly, in the CMA Agreement, UP expressly agreed (i) that it would submit to an oversight process in which the Board would determine whether the Settlement Agreement "has effectively addressed the competitive issues it was intended to address" and (ii) that "[t]he Board shall have authority to impose additional remedial conditions." CMA Agreement ¶ 14 in UP/SP-219. See also UP/SP-230, at 21 ("The Board would have the authority to impose additional remedial conditions that it found to be called for."); Rebensdorf Rebuttal Verified Statement, at 11 (UP/SP-231, vol. 2, part C) (same). As set forth above, UP's pleadings and witnesses have stated that the BNSF Settlement Agreement was intended to preserve all existing pre-merger UP/SP competition. Accordingly, even if UP were correct in characterizing BNSF's proposed alternatives as requests for new conditions that in some other merger proceeding could not be imposed at this point, UP's retroactivity argument is unavailing here since BNSF's proposals are necessary to preserve such pre-merger competition.

In addition, UP's argument (UP/SP-387, at 3, 5) that BNSF's alternatives are unnecessary in light of BNSF's success in competing through its trackage rights operations is misconceived. The fact that BNSF's trackage rights operations are a

commercial success and that BNSF is generally an adequate competitive replacement for the loss of SP service does not mean that BNSF's proposals for the amended Settlement Agreement are unnecessary to assure that all shippers, including new shippers and users of new transloads in the future, are able to avail themselves of BNSF service to replace the loss of one of two competitive rail alternatives that otherwise would have resulted from the UP/SP merger. Further, the Board's conditions were intended to preserve competition and to enable BNSF to maintain sufficient traffic density on the trackage rights lines, not only in the present but also over the entire 99 year term of the Settlement Agreement. Thus, it is critical that all necessary modifications and clarifications be undertaken so that BNSF can provide fully competitive service over the long-term as a replacement for SP.[4]

### B. BNSF'S PROPOSED ALTERNATIVES ARE NECESSARY TO PRESERVE PRE-MERGER COMPETITION AND TO MAINTAIN BNSF'S ABILITY TO PROVIDE FULLY EFFECTIVE REPLACEMENT COMPETITION

Turning to BNSF's specific proposals, UP generally does not assert that BNSF's proposed modifications are unnecessary to preserve pre-merger competition or to enable BNSF to achieve adequate traffic density over the long term – the two stated purposes of the Board-imposed conditions at issue. Rather, the focus of UP's opposition is (i) that, when the BNSF Settlement Agreement was executed, UP and BNSF did not intend to protect the particular pre-merger competition which BNSF's

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[4] In fact, the Board has previously rejected this argument by UP. In Decision No. 86, the Board held that the fact that it had recognized in its general oversight decisions that BNSF was providing fully competitive service did not mean, as UP claimed, that "the traffic density rationale can no longer 'be taken seriously'." Decision No. 86 (served July 12, 1999), at 5 (quoting UP/SP-365, at 2). The Board noted that the "new facilities condition was intended to be a permanent solution for both traffic density and competitive problems, and it continues to be necessary for both purposes." Ibid.

alternatives seek to protect, or (ii) that the Board has previously rejected BNSF's position. Neither ground justifies the denial of BNSF's proposed alternatives. As to the first, the Board's decisions override UP's and BNSF's intent and, if the Board determines, for example, that in order to fully preserve pre-merger indirect siting and transloading competition, "2-to-1" points should be defined by 6-digit Standard Point Location Codes ("SPLCs") regardless of whether an actual "2-to-1" shipper was located at the geographic point, the Board's determination would prevail.[5] As to the second, UP is simply incorrect. The Board has not previously rejected BNSF's position on any of its proposed alternatives. In fact, as shown below, the Board has previously rejected a number of the positions UP has asserted in its pleadings.

1. Definition of "2-to-1" Points

UP argues that BNSF's proposed use of 6-digit SPLCs to define "2-to-1" points should be rejected because UP and BNSF negotiated the BNSF Settlement Agreement on the basis of a definition of such points which required the presence of at least one actual "2-to-1" shipper and because, in UP's view, the Board rejected a definition of such points based on 6-digit SPLCs in Decision No. 44. Neither reason justifies the denial of BNSF's proposed definition.[6]

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[5] See NITL-27, at 14 ("the scope of BNSF's rights * * * is [not] only a matter of the private agreement of the parties. * * * [The Board's] decisions converted that agreement from a private settlement to an integral part of the mechanism by which the Board implemented its own statutory responsibility to protect the public interest.")

[6] As explained in BNSF's July 25th comments and as further established by NIT League in its comments, it is important that the Board clarify the definition of a "2-to-1" point so that the shipping community can determine with certainty whether new facilities, existing transloads and new transloads not on a trackage rights line are entitled to service from BNSF under the Settlement Agreement. See BNSF-93, at 3; NITL-27, at 9 and n.2. Further, there are instances in which UP's position deprives

a. Scope of the BNSF Settlement Agreement

Initially, even assuming that UP is correct in its view that the "basic structure" of the BNSF Settlement Agreement was to provide competition to all "2-to-1" shippers, that structure was altered by the Board's determination that indirect siting and transloading competition also needed to be preserved at "2-to-1" points. Decision No. 44, 1 S.T.B. 233, 391-93 (1996). In addition, as set forth in BNSF's July 25th comments (BNSF-93, at 6-8), UP's argument also contradicts the testimony of its witnesses in the UP/SP merger proceeding[7] that they intended to preserve all pre-merger competition without any qualification that the presence of an actual "2-to-1" shipper was required.[8]

Further, UP's position is contrary to the agreed to language in Section 8(i) of the Restated and Amended BNSF Settlement Agreement that it is the intent of UP and BNSF to preserve two-carrier competition for all "shippers who had competition by means of siting, transload or build-in/build-out from only UP and SP pre-merger." See Joint Submission of Restated and Amended BNSF Settlement Agreement (UP/SP-386

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shippers of their pre-merger competitive options. See BNSF-93, at 8 n.7 (Refrigerated Distribution Specialists example at Tracy, CA).

[7] In this regard, it is possible that UP will submit a verified statement to try to qualify or explain the cited testimony. The Board, BNSF and shippers should, however, be entitled to rely on the testimony given during the proceeding rather than written statements crafted over five years later. In addition, any such effort by UP would be directly contrary to UP's statements in its pleadings that, for example, all transloading options would be preserved. See BNSF-93, at 4 n.2.

[8] In addition, in Decision No. 44, the Board noted that UP did not restrict "2-to-1" points to those having at least one shipper that could be served directly or through reciprocal switching by UP and SP, and no other Class I railroad. Instead, as the Board stated, UP and SP "added points on shortline railroads reachable by connections to UP and SP, but by no other Class I railroad. Further, they added any point that had what they considered to be a bona fide build-in, build-out, or transload option prior to the merger." Decision No. 44, 1 S.T.B. at 391 n.127 (emphasis original).

and BNSF-92), at 33. As reflected by the inclusion of Reno, NV (where there was no actual "2-to-1" shipper at the time of the merger) as a "2-to-1" point, such competition existed regardless of the presence of such a shipper.

Finally, and most importantly, UP does not argue that such a definition is not needed to preserve pre-merger competition. The reason UP does not do so is obvious: indirect siting and transload competition existed before the merger regardless of whether or not there was an actual "2-to-1" shipper at a 6-digit SPLC location, and the Board quite rightly modified the BNSF Settlement Agreement to ensure that such competition would be preserved.[9]

Similarly, in its comments, NIT League points out that a

> shipper considering locating today at a rail station listed for service in 1995 by both UP and SP would, but for the merger of UP and SP, have that "competitive pressure" available to obtain a rate and service package from the two railroads, regardless of whether there was another *shipper* at that location open to both UP and SP in 1995. Thus, it is necessary at this point in time to define "2-to-1" points as geographic locations that were open to service by both UP and SP in 1995 (regardless of the existence of a shipper open to both UP and SP in 1995), in order to replicate, through competition provided by BNSF today, the "competitive pressure" that would have existed today but for the changes wrought by the merger of the UP and SP.

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[9] Given the undisputed existence of such pre-merger indirect competition, UP should be required to explain how, if its position that there must be an actual "2-to-1" shipper at a geographic location were to be adopted, that indirect competition is to be preserved at locations where there is no such shipper. UP provides no such explanation in its July 25th Opposition or in the attached verified statement of John H. Rebensdorf.

NITL-27, at 10 (emphasis in original; quoting Decision No. 44, 1 S.T.B. at 393).[10] See also American Chemistry Council's Comments Regarding Unresolved Issues Relating to the Restated and Amended BNSF Settlement Agreement (ACC-1), at 3 ("BNSF's proposed definition is in accordance with the overall logic of the settlement agreements to preserve all forms of competition at two-to-one points").

b. NIT League's Position

In addition, UP's contention that the Board has previously rejected a proposal by NIT League to use 6-digit SPLCs to define "2-to-1" points is also incorrect. Rather, the Board rejected the proposals (which were not made by NIT League) to use BEAs and 4-digit SPLCs to "redefin[e] 2-to-1 points." Decision No. 44, 1 S.T.B. at 372.[11] As for 6-digit SPLCs, as NIT League explains, NIT League did not argue that 6-digit SPLCs should be used to define "2-to-1" points. See NITL-27, at 11. Instead, NIT League submitted evidence about 6-digit SPLCs in connection with its contentions about the "overall reduction in competition to be caused by the UP/SP merger, in support of the League's proposed remedy, namely, divestiture of various SP lines to other carriers." Ibid. The Board, however, found that, when put forward in support of an argument for divestiture, this approach tended to "aggregate traffic that will experience various types of competitive problems," and that a more nuanced, less intrusive approach than

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[10] NIT League also explains that the use of 6-digit SPLCs to define "2-to-1" points is "particularly appropriate because in 1995, both UP and SP held out to the shipping public, in their tariffs, that they each in fact served that geographic location." NITL-27, at 10 (emphasis in original).

[11] As NIT League points out, UP's block quotation of this portion of Decision No. 44 artfully omitted the terms "BEA" and "4-digit SPLC" in an apparent effort to make it look like the Board had expressly rejected the use of 6-digit SPLCs to define "2-to-1" points. See NITL-27, at 12 (discussing block quotation in UP/SP-387).

divestiture for addressing such competitive harms was appropriate. Decision No. 44, 1 S.T.B. at 392. Agreeing with various protestants that UP and SP had "not gone far enough" in addressing the loss of indirect competition which would occur as a result of the merger, the Board then proceeded to impose conditions designed to preserve that competition. Id., at 393.

Thus, contrary to UP's claims, the Board's rejection of NIT League's 6-digit SPLC analysis did not constitute a conclusion that it is inappropriate to use 6-digit SPLCs to identify "2-to-1" points for the purposes of determining whether a new facility, an existing transload or a transload that is not built on a trackage rights line should be open to BNSF service under the Settlement Agreement in order to preserve pre-merger competition. Rather, as BNSF established in its July 25th Comments (and as NIT League persuasively argues in its Reply Comments), the use of 6-digit SPLCs for identifying geographic locations where pre-merger competition should be preserved is especially appropriate and logical, and there is nothing in the Board's decision which supports UP's position that there must be at least one actual "2-to-1" shipper at a location before the Board's remedies designed to protect pre-merger indirect siting and transloading competition apply.

2. Definition Of Transload Facilities

UP argues that BNSF's proposed definitions of "Existing Transload Facilities" and "New Transload Facilities" would potentially result in BNSF access to every exclusively-served industry on the trackage rights lines.[12] UP claims this would be contrary to the

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[12] UP also questions whether there is a need for a definition of "Existing Transload Facilities" because, in its view, the parties have identified all such facilities at "2-to-1" points, and it is unlikely that any additional facilities will be identified. UP's argument is, however, based on its narrow definition of a "2-to-1" point, and if, as BNSF, NIT League,

Board's statement that the transload condition should be applied in a manner that "would not result in direct BNSF access" to such industries and UP proposes to impose a restriction that would preclude the operator of a transload facility to which BNSF would have access from having any ownership interest in the product being transloaded. However, as explained in BNSF's July 25th comments, the Board has already addressed UP's concern in this regard and held that UP is adequately protected against this potential risk. UP's proposal to prohibit BNSF access to private transloads should therefore be rejected.

First, if BNSF serves a shipper's "private" transload facility, BNSF will not be obtaining direct access to what were UP's or SP's exclusively-served shippers along the trackage rights lines. Instead, from the shipper's point of view, the access that BNSF will be obtaining will be indirect and attenuated, because, under the "legitimate" transload condition, the shipper will be required to incur significant additional expenses in shipping its product via the BNSF-served transload, over and above the "costs that would be incurred in providing [or obtaining] direct rail service." Decision No. 61, at 12. See also Decision No. 44, 1 S.T.B. at 372 ("Transloading * * * results in additional costs, as freight is first loaded into a truck, and then reloaded into a freight car, or the reverse.").

Second, as mentioned, the Board already has addressed "UP/SP's concern that a literal reading of the transload condition will allow BNSF to operate as if it directly

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and ACC believe the Board should do, the Board adopts BNSF's definition of such a point, then it is important that a clear definition of an Existing Transload Facility be set forth so that qualifying facilities can receive the benefit of the two carrier competitive service they lost as a result of the UP/SP merger.

reached all exclusively served UP/SP shippers on the trackage rights lines." Decision No. 61, at 12 (emphasis original). The Board addressed this concern by imposing the requirement that a transload must be "legitimate" to qualify for BNSF service under the transload condition – that is, the transload must "entail both the construction of a rail transload facility as that term is used in the industry and operating costs above and beyond the costs that would be incurred in providing direct rail service." Id. (emphasis original); see also NITL-27, at 13 (noting that the Board addressed the concerns raised here by UP in Decision Nos. 61 and 75, when it stated and applied the requirement that a transload be legitimate in order to qualify for BNSF service under the UP/SP merger transload condition). What UP seeks to do here, however, is impose an additional requirement over and above the legitimate transload requirement. See NITL-27, at 13 ("UP would now have the Board engraft a new requirement, namely, that 'the operator of [the transload facility] has no ownership of the [product] being transloaded.'") (emphasis in original; quoting UP-proposed alternative on page 8 of the Red-Lined Version of the Proposed Restated and Amended BNSF Settlement Agreement, in UP/SP-386/BNSF-92).

UP's proposed additional requirement would deprive shippers of an option for obtaining two-carrier service that they would have had if the UP/SP merger had not occurred. After all, prior to the UP/SP merger an exclusively-served UP shipper could obtain SP service either by utilizing a transload operated by someone else (such as SP or an independent third party) or by constructing and operating its own "private" transload facility. Under UP's proposal, the latter option would not be available to shippers wishing to utilize a transload to obtain BNSF service (regardless of where they

located the transload). Thus, UP's proposed additional restriction on the application of the transload condition would be inconsistent with the Board's intent "to preserve the indirect UP vs. SP competition provided by * * * transload options." Decision No. 61, at 10. See also ACC-1, at 5 (BNSF's definition "better reflects the intention of the parties and the Board to replicate all actual and potential competition that existed between UP and SP pre-merger.").[13]

Further, UP's proposed prohibition on private transload facilities would detract from the other primary purpose of the transload condition – that is, to preserve BNSF's ability to secure and maintain sufficient traffic density. BNSF's ability to do so was a cause for concern to many parties in the UP/SP merger proceeding, and the Board acted to enhance and preserve that ability. The Board has rejected prior efforts by UP to narrow the new facilities and new transload conditions in ways that would adversely affect BNSF's ability to develop and maintain traffic density (See Decision No. 61, at 12; Decision No. 86, at 5), and it should do likewise here.

Finally, perhaps recognizing that the Board has previously rejected the premise of its argument that privately-owned transload facilities should not be within the scope of the transload condition, UP tries another argument that the Board has also previously rejected. UP argues that a "shipper whose facility was served by SP [sh]ould be required to build its transload facility on a line owned by UP before the merger or vice versa." UP/SP-387, at 22. The Board rejected precisely this argument by UP when it

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[13] As NIT League notes, UP's position would also impose an additional barrier on a shipper's use of the transload condition. In addition to meeting the other requirements imposed by the Board, the shipper would have to find an independent operator for the facility and overcome whatever operational problems might arise as a result of the facility's separate ownership and control. NITL-27, at 13.

denied UP's petition seeking clarification or reconsideration of the new facilities and transload conditions (UP/SP-275) in Decision No. 61, and held that the transload condition should be read literally to permit BNSF to "serve any new transload facility" on a trackage rights line. Decision No. 61, at 7 (emphasis added). It should again do likewise here.

Accordingly, the Board should reject UP's effort to relitigate the scope of the condition and to impose a new requirement on the condition. The Board should instead adhere to its prior ruling that the condition as imposed by the Board adequately protects UP while at the same time ensuring that the dual competition preservation and traffic density purposes of the condition are met.[14] Indeed, the fact that there has not been any significant number of new private transload facilities built by exclusively-served shippers on the trackage rights lines indicates that the protection the Board imposed has worked and that there is no need to revise or restrict the condition. See also ACC-1, at 5 ("There is no reason at this late date to engraft upon the new facilities condition an exclusion of private transload facilities.").

3. Trackage Rights Restrictions

UP argues that the restrictions on BNSF's trackage rights between Elvas and Stockton, CA and in the Houston-Memphis-St. Louis corridor should remain in place because the restrictions were agreed to in the settlement agreement negotiations between UP, BNSF and, with respect to the Houston-Memphis-St. Louis corridor, CMA.

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[14] It should be noted that UP is incorrect in its assertion that the Board did not anticipate or intend that some exclusively-served UP shippers would be opened to BNSF as a result of the transload condition. Indeed, the Board expressly stated that "BNSF will be allowed to access exclusively served shippers only by a legitimate transload operation." Dec. No. 61, at 12.

However, even assuming UP is correct, the conditions imposed by the Board to preserve pre-merger competition and to enable BNSF to achieve adequate traffic density would override any such intentions of the parties.

a. Elvas-Stockton Trackage Rights

While UP and BNSF disagree over the exact circumstances which led to the grant of trackage rights on the former SP line between Elvas and Stockton to BNSF,[15] there is no doubt that those trackage rights were included in the BNSF Settlement Agreement when the Board held in Decision No. 44 that BNSF could "serve any new facility at any point on any SP or UP segment over which it has been granted trackage rights * * *." Decision No. 44, 1 S.T.B. at 373 (emphasis deleted and added). The Board could hardly have been any clearer in requiring that the new facilities condition apply to all of the trackage rights BNSF received under the Settlement Agreement.[16]

Indeed, as noted in BNSF's July 25th comments (BNSF-93, at 15), UP recognized the applicability of the new facilities condition to these trackage rights when

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[15] In this regard, UP continues to assert that it granted BNSF these trackage rights only as a "special accommodation" and that it should not be penalized for its "generosity" in enabling BNSF to avoid having to construct a difficult and costly connection to the UP line at Haggin Junction, CA. However, as explained in BNSF's July 25th Comments (BNSF-93, at 13-14), a competitive route from SP's line in the Central Corridor to Stockton where the trackage rights lines join BNSF's system is critical to BNSF's ability to provide competitive service in the Central Corridor, and BNSF should have the right to access new facilities on the former SP line – just as it does on all other trackage rights lines – in order to both preserve pre-merger competition and maintain traffic density.

[16] The fact that the restrictions were set forth in the version of the Settlement Agreement that was before the Board when the Board approved the UP/SP merger does not, as UP argues, indicate in any way that the Board approved of the restrictions. The Board approved the Settlement Agreement only as modified by the Board's conditions, and the Board held the new facilities condition would apply to all trackage rights lines.

it granted BNSF access to new facilities constructed by Southdown Cement at Polk and Willamette Industries at Elk Grove. In its July 25th Opposition, UP asserted that it granted BNSF access to these two shippers to provide them with rail alternatives during UP's service crisis in 1997-98. UP/SP-387, at 20. However, access to the two shippers was not granted to BNSF by UP until 2000, well after the service crisis had abated. Moreover, if UP's grant of access had been based on reasons related to the service crisis, the access granted could have been expected to be temporary in nature rather than the permanent access which was granted.

Thus, UP's efforts to distinguish the Elvas-Stockton trackage rights from the other trackage rights granted in the Settlement Agreement should be rejected, and the Board should hold that the trackage rights are no different from any of the other trackage rights which the Board determined needed to be enhanced to enable BNSF to provide effective replacement competition.

b. Houston-Memphis-St. Louis Corridor Trackage Rights

UP argues that the restrictions on BNSF's use of its trackage rights on the UP and SP lines north of Bald Knob and Fair Oaks, AR should be retained. The two disputed restrictions which UP wishes to retain are, as stated in Section 6c of the BNSF Settlement Agreement, (i) a limitation on BNSF's ability to enter or exit the trackage rights lines between Memphis and Valley Junction, IL, and (ii) a geographic limit on traffic BNSF can handle on these lines to traffic to, from, or through Texas and Louisiana. UP's argument is based on its claim that UP, BNSF and CMA agreed that BNSF would use those trackage rights only to serve what UP has labeled "St. Louis Gateway" traffic. UP asserts that the two restrictions were imposed because CMA's concern was limited to BNSF's ability to compete effectively for St. Louis Gateway

traffic, and thus BNSF did not need to use the trackage rights lines for any other reason and would use its own lines between Memphis and St. Louis for traffic unrelated to the UP/SP merger. However, as explained below, the language of the existing Settlement Agreement and the Board's decisions do not support the restrictions, and the relevant concerns are broader than simply BNSF's ability to reach St. Louis in an effective competitive manner.

(i) Entry/Exit Restriction

First, as to the entry/exit restriction, UP has proposed to delete the existing language in Section 6c of the Settlement Agreement which expressly subjects the restriction to BNSF's separate right pursuant to Section 9I of the Settlement Agreement to connect with its own lines from the trackage rights lines. UP has, however, provided no justification as to why this language should be deleted. In fact, UP does not even mention the existence of the language in any of its pleadings.[17] Moreover, the language of Section 9I giving BNSF the right to connect from the trackage rights lines to its own lines was included in the original September 25, 1995 BNSF Settlement Agreement, and it is clear from the language of Section 6c that, when the exit/entry restriction was subsequently included in the Second Supplemental Agreement, the parties intended that BNSF's previously-existing right to connect with its own lines would apply notwithstanding the restriction.[18] Such an interpretation does not read the restriction on

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[17] Presumptively, UP will address this language in its reply comments, but, regardless of what UP may say, the fact remains that the plain meaning of the language (which was drafted by UP) gives BNSF the right to connect with its own lines pursuant to Section 9I.

[18] Under the original September 25, 1995 BNSF Settlement Agreement, BNSF had the unqualified right to connect from its own lines with the former SP line at Jonesboro, AR and Rockview, MO under Section 9I of that Agreement. There is absolutely no

BNSF's right to exit or enter this portion of the trackage rights lines out of the Settlement Agreement since there were at least two shortlines (the Missouri & Northern Arkansas Railroad at Diaz, AR and the Jackson & Southern Railroad at Delta, MO) operating at the time of the merger to which the restriction would be applicable. Further, the Second Supplemental Agreement was executed by UP and BNSF in order to incorporate various terms and conditions from the CMA Agreement into the BNSF Settlement Agreement. However, contrary to UP's assertions, the CMA Agreement itself does not contain any restriction on BNSF's right to enter or exit these trackage rights lines or, for that matter, any of the other trackage rights lines.

Second, even assuming that the parties to the CMA Agreement were concerned primarily (or even exclusively) about BNSF's ability to compete effectively for St. Louis traffic when they granted BNSF trackage rights north of Bald Knob and Fair Oaks, the Board had broader concerns in mind when it enhanced BNSF's right to provide service in the Houston-Memphis-St. Louis corridor. For instance, as with all of the trackage rights lines, the Board was concerned about BNSF's ability to acquire and maintain sufficient traffic density in the corridor, and it rejected UP's attempt on reconsideration to restrict BNSF's right to serve new facilities on UP's line north of Bald Knob as inconsistent with the traffic density justification underlying the new facilities and transload conditions. See Decision No. 61, at 11. In fact, the Board noted that, by granting BNSF trackage rights over the UP line as well as the SP line in the corridor in

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indication that the parties intended to deprive BNSF of that right, and in fact the parties did not. Instead, they included language in Section 6c which not only explicitly preserved BNSF's then existing right to connect with the former SP line, but also provided BNSF with the right to connect with the UP line.

order to address the problem of a directional flow handicap, UP exacerbated the insufficient traffic density problem. Ibid. The Board therefore refused "to jeopardize BNSF's ability to achieve sufficient traffic density on these lines", and allowing the exit/entry restriction to remain in place or otherwise restricting BNSF's use of the lines would jeopardize that ability as well since BNSF's ability to compete in the most effective way (and to secure and maintain traffic density) would be adversely affected. Ibid.

Third, the Board's expansion of the new facilities and build-in/build-out conditions in Decision No. 44 substantially enhanced BNSF's rights to serve shippers in the Houston-Memphis-St. Louis corridor, and, as Entergy and NIT League have pointed out in their comments (ESI-33, at 2, and NITL-27, at 15-16), the adoption of UP's position would significantly affect BNSF's ability to provide competitive service in the Houston-Memphis-St. Louis corridor by increasing BNSF's cost of service and shippers' cost of equipment.[19] Not only would the restriction on entry and exit thereby prevent BNSF from providing a competitive replacement service for SP's pre-merger service, it would also eliminate specific pre-merger joint-line routings that BNSF could have offered by interchanging with SP at Jonesboro and UP at Hoxie.[20]

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[19] NIT League also urges the Board to "avoid where possible imposing unnecessary operational restrictions on BNSF's trackage rights." NITL-27, at 15.

[20] In its comments, Entergy provides a specific example of how the entry/exit restriction could adversely affect BNSF's competitiveness to provide service to its White Bluff Station. As shown by Entergy (ESI-33, at 14 n.12), requiring BNSF to route Powder River Basin unit coal trains past Jonesboro to Memphis and then return back to the SP line and to do likewise from the UP line in returning to the Powder River Basin would add approximately 166 miles to BNSF's route. While UP can be expected to assert that this additional mileage would not affect BNSF's competitiveness, there is no doubt that, at least to some degree, BNSF will be less competitive because, not only

(ii) Geographic Limit

As to the second restriction which purports to limit the traffic BNSF can handle on the UP and SP lines north of Bald Knob and Fair Oaks to traffic to, from or through Texas and Louisiana, it should be noted that in its July 25th Opposition UP has interpreted the restriction to permit BNSF to use the lines to carry merger-related traffic involving points in Texas, Louisiana and Arkansas. UP/SP-387, at 17. However, even this reading of the restriction cannot stand since the Board gave BNSF the right to serve new facilities and transloads on all of its trackage rights lines, including both the UP and SP lines north of Bald Knob and Fair Oaks. For instance, if UP's position were to be adopted, then BNSF would be restricted in its ability to provide service to a new facility locating on either the UP or SP line in Missouri. Accordingly, BNSF should be able to carry traffic to and from points to which it has access located anywhere on the full length of its trackage rights lines in the Houston-Memphis-St. Louis corridor.

In sum, the Board should clarify that, by reason of the express language in the existing BNSF Settlement Agreement, BNSF has the right, pursuant to Section 9I, to interchange with its own lines from its trackage rights over the UP and SP lines north of Bald Knob and Fair Oaks. In addition, while it is not BNSF's intent to routinely route its traffic unrelated to the merger to and from the Southeast over these trackage rights lines, the Board should hold that the restriction on the traffic that can be carried over the

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would its routing have additional mileage involved, but Entergy's cost of equipment could increase, BNSF could potentially be required to utilize additional crews, and BNSF transit and cycle times and its ability to guarantee competitive levels of service could be adversely affected. In addition, BNSF would be forced to incur significant expenses to construct and/or rehabilitate the necessary connections and lines in Memphis, thereby further increasing its cost of service. As Entergy suggests, UP's position seems to "have no purpose other than to restrict BNSF's ability to compete on an even playing field * * *." ESI-33, at 2.

subject trackage rights lines should be deleted from the BNSF Settlement Agreement so that BNSF will be able to have the routing flexibility it needs to implement and achieve the network system efficiencies and to maintain sufficient traffic densities in the corridor needed to effectively replace SP. At a minimum, the Board should hold that BNSF can use the trackage rights lines north of Bald Knob and Fair Oaks not only to provide competitive service to all shippers located in the corridor to which BNSF obtained access (such as Entergy's White Bluff Station), but also to all merger-related traffic moving both within and beyond the corridor itself. Indeed, as mentioned, UP has recognized that BNSF should be able to use the trackage rights lines for merger-related traffic. See UP/SP-387, at 17.

4. Team Tracks

UP does not contest that UP and SP competed via team tracks before their merger. Rather, UP argues that it should not be required to sell unused team tracks to BNSF because the parties agreed to replicate the pre-merger competition that team tracks provided by enabling BNSF to build its own rail-served facilities along the trackage rights, including team tracks.

While it is true that BNSF has the right under the Settlement Agreement to build its own team tracks, the reality is, as explained in BNSF's July 25th Comments, that the process for establishing team tracks is far from the simplistic picture UP paints. See BNSF-93, at 18-20. For example, BNSF must first negotiate to locate and acquire property suitable for such a facility. It must then seek UP's approval of BNSF's engineering plans for the track and rely upon UP's engineering department to install connecting and access tracks and switches. It must then seek UP's approval of BNSF's proposed service plan. Such an extended process handicaps BNSF's ability to

compete via team tracks, which are, as UP recognizes, often somewhat flexible and transitory.

A requirement that UP sell team tracks that it no longer uses to BNSF at normal and customary costs and charges would, notwithstanding UP's protestations, pose little burden on UP. In fact, one wonders why UP objects so strenuously to such a requirement if it does not perceive that it will gain a competitive advantage by refusing to sell unused team tracks to BNSF. Further, UP's concern that it may want to use the tracks for some other purpose can be resolved simply by clarifying that UP's obligation to offer the unused team tracks to BNSF only arises if UP has no use whatsoever for the tracks, as team tracks or otherwise.

## II. OTHER UNRESOLVED ISSUES

### A. GTM MILL RATE DISPUTE

Since their July 2nd submissions, the parties have continued their discussions about and exchanged further correspondence concerning the proper method for the adjustment to be made annually to the trackage rights fees (GTM mill rate) which BNSF pays for the use of the trackage rights lines. While the parties have not yet resolved all of their differences with respect to their dispute, they have narrowed the differences and reached agreement on several points.

It is critical to BNSF's ability to provide competitive service over the trackage rights lines that this dispute be resolved in a way that fairly and accurately reflects changes in UP's costs. The present adjustment mechanism was agreed to by the parties and imposed by the Board as a condition of the UP/SP merger as a result of concerns expressed by CMA (now ACC), and the issue of the impact of the trackage rights fees on BNSF's ability to provide competitive operations over the trackage rights

lines was of concern not only to ACC but also to numerous other parties to the UP/SP merger proceeding.

In the event BNSF and UP are unable to resolve their remaining differences with respect to the adjustment of the GTM mill rate, the ACC has indicated that it will consider invoking its rights under the CMA Agreement to request an audit of the adjustment calculations. See ACC-1, at 8. Accordingly, given the importance of the proper resolution of this dispute, BNSF is prepared to take the necessary steps to have the issue promptly resolved.

B. I-5 PROPORTIONAL RATE AGREEMENT

Since their July 2nd submissions, the parties have also continued their discussions concerning the I-5 Proportional Rate Agreement. The parties are continuing to evaluate the results of the preliminary audit report of BNSF's compliance under the Agreement, and they have been able to make progress in resolving a number of their differences. In the event the parties are unable to resolve the remaining differences, those differences may need to be resolved through arbitration or by the Board.

III. CONTINUATION OF OVERSIGHT

As set forth in BNSF's July 25th Comments, oversight should continue until the unresolved issues relating to the amendment of the BNSF Settlement Agreement have been resolved. In addition, the outstanding issues relating to the parties' compliance with the BNSF Settlement Agreement and other merger conditions should be addressed by the Board before oversight ends if the parties can not resolve their differences. ACC has expressed its agreement with BNSF's view that oversight should continue until all

such issues are resolved.[21] See ACC-1, at 8. ACC further agrees with BNSF's position that the Board should clarify that, "even after the formal oversight period ends, it will continue to entertain petitions to resolve disputes that the interested parties have been unable to resolve to interpret or enforce the merger conditions." Ibid. See also Comments of Cowboy Railroad Development Company (CRDC-1), at 3 (Board should clarify that "oversight jurisdiction will continue and will be exercised upon an appropriate request.").

## CONCLUSION

For the reasons set forth in BNSF's July 25th comments and above, BNSF respectfully submits that the BNSF Settlement Agreement should be modified as proposed by BNSF, as supported by NIT League, ACC and Entergy, to ensure that BNSF can, over both the short and long term, provide the effective replacement competition which the Board envisioned and to which UP committed when the UP/SP merger was approved. BNSF further requests that oversight be continued until the disputed issues set forth above are resolved and that the Board confirm that, after oversight has ended, it will consider and promptly act upon issues of general applicability relating to BNSF's access to shippers under the BNSF Settlement

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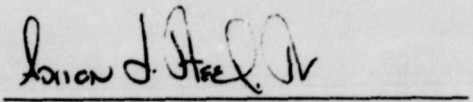
[21] BNSF notes that the State of Utah has also requested that oversight be extended – for a period of one year – to, inter alia, permit the completion of an audit of Utah rail rates that the State requested during the UP/SP merger proceeding. The State asserts that the rate audit will enable the Board to evaluate whether the conditions imposed by the Board have enabled BNSF to be an effective competitor to UP in the Central Corridor.

Agreement as well as issues relating to the parties' compliance with the merger conditions.

Respectfully submitted,

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September 19, 2001

## CERTIFICATE OF SERVICE

I do hereby certify that copies of The Burlington Northern and Santa Fe Railway Company's Comments to UP's Fifth Annual Oversight Report and on Unresolved Issues Relating to the Restated and Amended BNSF Settlement Agreement (BNSF-94) are being served on all parties of record.

Adrian L. Steel, Jr.

# APPENDIX 1

# EXCERPTS FROM

# JULY 1, 1996 ORAL ARGUMENT

# FINANCE DOCKET NO. 32760

really unalloyedly positive.

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(1) If you look at the last 15 years, the (2) number of class one railroads has declined by two- (3) thirds in this country. (4) Now, has that led to increases in rates as (5) the anti-trust theorists of the Justice Department (6) might argue? No, it hasn't. There has been a 50 (7) percent decline in real rates, real rail rates. (8) And that can only happen if competition is (9) vigorous. You can't say well, it's because of (10) productivity or its because of deregulation because it (11) wouldn't be passed on to the shipper in lower rates if (12) the competition weren't forcing it to happen. (13) Now, you have ruled again and again that (14) two strong railroads is what is the sine qua non of (15) competition in the rail industry. (16) Now, railroading isn't like widget making. (17) You don't need and you can't have dozens of producers (18) in a market. We had a Mr. Sheppard here for some of (19) these parties and say there isn't any competition in (20) the market unless you have five players in the market. (21) Well, he hasn't seen railroading if that's (22) his opinion. Railroading is incredibly resource

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(1) capital intensive, tremendous fixed costs. And the (2) only way to achieve many efficiencies, not all (3) efficiencies, but many efficiencies, is through (4) merger. (5) You don't want to merge down to one. (6) Competition is vital. We are in favor of competition. (7) This merger is pro-competitive. We are not (8) eliminating rail option for any shipper in the west (9) through this merger. (10) Every shipper that has a choice today will (11) have a choice after this merger, and a better choice. (12) And I'm not denigrating competition. I'm (13) in favor of it. We believe in it. We think and (14) believe we're promoting it through this transaction.

(15) CHAIRPERSON MORGAN: But there are (16) opponents to this merger that are supporting (17) divestiture and indicate that divestiture would not (18) undercut the principal benefits of this merger. Would (19) you care to comment on that?

(20) MR. ROACH: I'd love to comment on that. (21) They are dead wrong. Divestiture will gut the (22) benefits of this merger. All the divestiture

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(1) proposals that are on the table will gut the benefits (2) of this merger. Now why –

(3) CHAIRPERSON MORGAN: And why is that?

(4) MR. ROACH: – is that? Why is that? (5) First of all divestiture will wipe-out single-line (6) service for hundreds of thousands of customers, (7) hundreds of thousands of shipments per year. (8) What you're doing is you're re-Balkanizing (9) the railroads. Instead of consolidating them and (10) achieving single-line service increases, you are (11) eliminating single-line service. (12) You are taking all those coal shippers in (13) Utah and Colorado for example the MRLs divestiture (14) proposal, who today – even today, before this merger, (15) have single-line routes over the SP out of those (16) states and into the midwestern gateways, the west (17) coast, the south-central United States. (18) And you're eliminating those single-line (19) routes. You're saying, well now we're going to take (20) this line, the Rio Grande Line, and against your will, (21) involuntarily – because all the Utah coal producers (22) oppose divestiture.

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(1) We're going to take that and we're going (2) to force the Applicants to sell it to a fellow named (3) Dennis Washington who would like to make a lot of (4) money out of this transaction and run his own (5) railroad. (6) At that point, those coal shippers have (7) two line rail routes instead of single-line. And (8) furthermore, they've got routes that are must more (9) circuitous and much less efficient than the routes (10) that they'll have with this merger. (11) We're going to create a new coal route (12) straight out of Utah and Colorado across Kansas on (13) what UP called the KP line, which will be upgraded, (14) that saves hundreds of miles of mountainous circuity (15) that the SP has to do now across either the Tennessee (16) Pass or down from Denver to Pueblo and back across (17) Kansas. (18) Mr. Washington's proposal would (19) reinstitute all those bad routes, plus add (20) interchanges in the middle of the congested Kansas (21) City terminal. (22) And you have the same thing at the west

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(1) end. Where we achieve mileage savings in the central (2) corridor and the divestiture wipes out those mileage (3) savings. (4) Now, what about in the south-central (5) region from Houston up to Memphis, for example, where (6) some of these parties would like to see divestiture? (7) We have serious capacity constraints in (8) those markets. One of the big benefits of this merger (9) is that we will be able to run the lines from Memphis (10) down to Houston and various other lines in Texas on (11) what's called a directional basis. (12) UP has a single-line, single-track line. (13) SP has a single-track line. Today, they're both (14) operated in both directions, which yields a lot of (15) interference, train meets. It can be done. It's done (16) all the time. Dispatchers put trains in sidings, but (17) it limits your capacity sharply when you have to run (18) a single-track line in both directions. (19) With the merger, we can take one of those (20) routes and make it the northbound route, and one of (21) them to make it the southbound route. (22) We have two large, excellent,

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(1) classification yards: one in Pine Bluff and one in (2) Little Rock. Today, they're used by UP for both north (3) and southbound traffic, which complicates and lowers (4) the capacity of the yard. (5) And the same thing with SP. Under our (6) plan, the yard would be specialized for blocking in (7) one direction, tremendously increasing its capacity. (8) Now, you force us to divest one of those (9) lines, we're back with the inefficient operation. (10) We're back having to spend a lot of capital to add (11) capacity. We no longer can achieve the tremendous (12) improvements in blocking that this merger will bring (13) about. (14) Now "blocking" sounds sort of, you know, (15) technical and unexciting. But blocking is really one (16) of the parts of efficient railroading and switching. (17) You don't want to switch a car any more (18) times that you have to. It adds tremendously to (19) delay, tremendously to cost. (20) What you want to do is to pre-block as (21) early in the shipment as possible for as far down the (22) road as you can pre-block. You want to pre-block in

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(1) Houston to take it al the way to New York City or (2) Albany and so forth. (3) We can do that with this merger because we (4) consolidate volumes while preserving competition for (5) every shipper that has it now and retaining enough (6) traffic for BN/Santa Fe to be fully competitive. (7) But if you force the divestiture, you're (8) handing over a large chunk of the traffic that his (9) exclusively served. It's not competitive traffic. (10) What these divestiture people want is to (11) take over non-competitive traffic.

(12) CHAIRPERSON MORGAN: But

size.
(6) MR. ROACH: Absolutely. And that's why we (7) have a five-year implementation period.
(8) VICE CHAIRPERSON SIMMONS: And we'll be (9) looking at you every year.
(10) MR. ROACH: Not – well, that's the (11) oversight and that's fine. But I'm referring to the (12) implementation period in the operating plan, and (13) that's five year, which is unusual. It's (14) traditionally three years. (15) We concluded we need five. WE need five (16) partly to just understand everything fully out there, (17) and part of it to achieve the capital investments (18) which are tremendous and very extensive to upgrade the (19) Southern Pacific system and get the potential out of (20) those routes that's sitting there unachieved for the (21) United States and international economy.
(22) CHAIRPERSON MORGAN: And let me stop you

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(1) there on oversight because there's a lot in the record (2) about oversight being meaningless and window-dressing (3) and so forth. (4) Is there a way to make that kind of (5) oversight provision have more meaning to it, if that (6) indeed is a concern. I know it's in the CMA (7) agreement.
(8) MR. ROACH: Well, I've got to tell you (9) that Union Pacific views the oversight process as (10) tremendously meaningful, indeed daunting if you like, (11) because really what it says is we may end up having (12) five more of those proceedings where all my friends in (13) the rail bar and Washington are having at us. (14) If we don't deliver for the shippers, if (15) BN/Santa Fe doesn't deliver, we're going to have (16) another proceeding. You're going to hear about it. (17) The shippers will come to you with complaints. (18) Now, you may be asking how do you need to (19) design the process to obtain information and how much (20) should you reach out? And that's important. (21) Although again, my first response is I don't think (22) you're going to have to try very hard. I think they

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(1) will come to you if they have concerns. (2) But secondly, I think it's fairly (3) straight-forward what you can do. You can direct (4) inquiries to UP/SP with respect to rates and service. (5) You can inquire of BN/Santa Fe. You can (6) inquire of the key shippers that have been parties in (7) this case. (8) And you will have unrestricted power to (9) impose additional conditions if appropriate. That is (10) not the case under the statute normally. There has to (11) be a showing of new evidence or material error or (12) significant change in circumstances. (13) So, this is a significant provision and a (14) significant proposal by the Applicants. That would (15) include divestiture. (16) We think divestiture is a horrendous idea. (17) We vigorously oppose it. But there's no reason that (18) in a year or two or three, if you conclude that it is (19) appropriate, you can't require it. (20) This isn't like a lot of anti-trust (21) lawyers would normally say you can't unscramble the (22) omelette. You can't order divestiture. These rail

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(1) lines are very discreet and distinct. (2) Locomotives are discreet and distinct. (3) And if two years from now you conclude that you want (4) to order the SP line from Houston to Memphis and an (5) appropriate number of locomotives, et cetera, to be (6) divested, there's no reason you can't do that.
(7) COMMISSIONER OWEN: Mr. Roach, along that (8) line, then why did Mr. Davidson be quoted in The (9) Washington Post recently about the divestiture and (10) then exactly what lines might you be talking about?
(11) MR. ROACH: Commissioner Owen, I have (12) notebook where I've collected all the false reports (13) during this case. I should say, a set of notebooks.
(14) COMMISSIONER OWEN: I have a few of those.
(15) MR. ROACH: I don't know the exact (16) quotation you're referring to, but the position of the (17) Applicants and what, to my knowledge, Mr. Davidson has (18) said to anyone who has asked, is that we vigorously (19) oppose divestiture. We have serious questions about (20) whether we could go forward with this transaction if (21) the divestiture proposals that have been put on the (22) table by Conrail or KCS or MRL were granted.

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(1) Now, you know, if you were to order to us (2) to divest five miles somewhere, we'd have a fiduciary (3) duty to our shareholders to think about whether we go (4) forward with the transaction. And I'm sure we would (5) go forward.
(6) COMMISSIONER OWEN: Along that line, it's (7) also been stated that Conrail might be the last one to (8) dispose of their property too or divest too. (9) If that were the case and they did equal (10) service on those other lines, then would it not be (11) your responsibility fiduciary-wise to your (12) stockholders to sell to Conrail if that were the case, (13) if you ever got to that point?
(14) MR. ROACH: Well, it's a complicated (15) question in this sense: nobody has explained what the (16) process for divestiture would be. Part of the fault (17) there lies with Conrail and KCS because they (18) consciously chose not to file an application for this. (19) Instead they want to delay the case, so (20) they said let's have a second round of proceedings. (21) If you followed tradition and left it to (22) the Applicants to select the party to whom they would

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(1) sell, within their business judgement, with the Board (2) retaining authority to review that and decide whether (3) it passed muster, then UP would have to look – (4) assuming we went down this road at all, we might (5) conclude immediately that it just doesn't – the (6) numbers don't add up. (7) We would have to look at the economic (8) value of various alternatives. And part of that is (9) how much someone offers you. And part of it is how (10) much traffic he is going to take away if he buys the (11) line. (12) Now again, I don't think anybody has said (13) any railroad would be ruled out. And if they did, you (14) know, we have problems of understanding between (15) executives and reporters all the time and nuance. (16) But Conrail would cost UP/SP a lot more (17) than some other players simply because Conrail (18) exclusively serves the entire chemical industry in the (19) northeast. (20) And if they come down to Houston and serve (21) all the UP and SP points down there, you know, our (22) projections would indicate they're going to take very,

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(1) very large shares of that business. (2) Now, I come back to my basic question (3) which is why in heaven's name would you do this as a (4) competitive remedy? (5) These are shippers that are not losing (6) competition. All the shippers that have competition (7) will have it preserved under the BN/Santa Fe (8) settlement. And the very point of these divestiture (9) proposals is for the acquires to get their hands on (10) the shippers that ar exclusively served. That's what (11) they want. (12) But those are the shippers that don't (13) experience any reduction in competition. There's a (14 complete disconnect there. There's n

competitive (15) problem. Or to put it in terms of your law, which is (16) important to precedence, it's egregiously over-broad. (17) It's like, you know, solving a problem (18) with a nuclear warhead instead of a surgical strike. (19) And no one has ever explained the rationale for that. (20) All you hear from the proponents of divestiture is (21) trackage rights aren't good enough. Let's have (22) divestiture.

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(1) But they never say, "And boy, will we ever (2) make out like bandits because these shippers who have (3) no say in the matter, are going to end up being served (4) by us instead of served by the railroad that serves (5) them now. And they're going to have worse service, (6) but too bad because they're not able to vote on this (7) matter."
(8) CHAIRPERSON MORGAN: Now, let me stop you (9) right there. In terms of trackage rights, now one of (10) the concerns that the opponents have raised is that (11) the trackage rights agreement really represents (12) collusion between UP and BN/Santa Fe. Can you just (13) respond to that?
(14) MR. ROACH: Yes. Let me comment on the (15) trackage rights agreement and also a little bit on (16) collusion. (17) I heard the Senator say earlier this (18) morning that it's a terrible thing to let UP choose (19) the party to whom it's going to grant rights. (20) Well, UP didn't want to grant rights to (21) BN/Santa Fe as a commercial matter. That's the last (22) thing UP would have wanted as a commercial matter.

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(1) BN/Santa Fe has a comprehensive western (2) rail network that exceeds that of any other railroad. (3) And if we had granted trackage rights to KCS, the (4) potential traffic diversion would have a been a (5) fraction of what it would have been with BN/Santa Fe. (6) Why did we do it? We didn't do it because (7) of some sweetheart deal or collusion. We did it (8) because our shippers all told us that no one else (9) could fit the bill. There just wasn't anyone else (10) that could fit the bill. (11) Mr. Davidson talked to Exxon and the major (12) chemical shippers as we were in the process of (13) negotiating to determine – to find someone who would (14) take these trackage rights. (15) And he was uniformly told, "I don't want (16) a KCS. I don't want an IC. I want a railroad that (17) can get me where SP and UP can get me, or preferably (18) even more places."
Which is exactly what BN/Santa Fe (19) does. (20) I mean, the magic of this solution is that (21) you're talking here about shippers that are only (22) served by UP and SP today. So, what they have today

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(1) is a choice of access to UP points and SP points and (2) all the major gateways. (3) With the merger and the settlement, they (4) are better off because first of all, they've got UP (5) and SP merged and with greater efficiency, an (6) operating ratio that will drop five points, savings of (7) $580 million a year in costs, much more efficient (8) operations with the directional running, et cetera, et (9) cetera. (10) And they've got service by BN/Santa Fe, (11) which gives them single-line access to Minot, North (12) Dakota and all kinds of places that they can't get to (13) now. (14) It's a boon for these shippers. It's a (15) tremendous improvement in competition.
(16) CHAIRPERSON MORGAN: The concern that they (17) have raised is that because trackage rights is a (18) little bit different relationship from an ownership (19) situation, that somehow the landlord, which is in this (20) case UP/SP, has more power over operations, over (21) traffic, and over a whole lot of other things as it (22) relates to real competition. Could you respond to

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(1) that?
(2) MR. ROACH: Yes. We have entered into a (3) comprehensive, written protocol to govern dispatching (4) of BN/Santa Fe trains and of UP trains on BN/Santa Fe (5) lines too.
(6) CHAIRPERSON MORGAN: And that's on the (7) CMA?
(8) MR. ROACH: That is attached to Mr. King's (9) rebuttal statement. And yes, it is referenced in the (10) CMA agreement. The final version of it is attached to (11) Mr. King's rebuttal statement. (12) Now, there's a history of this. As you (13) undoubtedly know, because it's been brought up by (14) parties to this case, SP some years ago, accused UP of (15) discriminating against its trains. (16) And UP took tremendous umbrage at that and (17) there was a huge proceeding on the subject in the (18) UP/CN&W merger case, and then off in federal court. (19) There was massive discovery. And in the end, what SP (20) concluded was that there had not been discrimination. (21) And SP paid the rent that they owed, $60 (22) million, all before this merger was in anybody's mind.

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(1) It wasn't – it had nothing to do with trying to bury (2) an issue. (3) It was a full-scale inquiry and an (4) enlightened resolution. Now, were there delays to SP (5) trains? Yes, there were delays to SP trains, and (6) that's why it was a hard problem. (7) But the reason was, as it turned out when (8) the operating people got together and studied specific (9) incidents, studied the overall situation, it was a (10) communications problem more than anything else. (11) SP has primitive systems. They could not (12) and did not tell UP when a train was going to be (13) arriving or what priority it was supposed to have. (14) The train crew would end up sitting on a (15) siding and they would think they were being (16) discriminated against. (17) But the problem was that SP wasn't telling (18) UP, and UP wasn't doing enough to ask. And what we (19) did was we agreed on procedures that would ensure (20) communications. (21) Now that we have technological advances, (22) we can do a lot of this in real time. WE can have

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(1) computers on the trains and have a dispatching center (2) tied in directly. (3) And we took the base of those (4) understandings and built on them with BN/Santa Fe for (5) this case. And we added other features such that the (6) BN/Santa Fe manager will be physically in the Harriman (7) Dispatching Center in Omaha to see how the BN/Santa Fe (8) trains are dispatched. (9) He's not going to see any commercially (10) sensitive information or rates or anything like that. (11) But he's going to see his train arrive. He's going to (12) know it's priority and he's going to be able to (13) confirm that it's appropriately dispatched. (14) There are sanctions in the agreement. (15) There's reporting. There's monitoring, et cetera. (16) Now, the last thing I'll say because it's (17) something that any rail operating person would say, so (18) I had better say it, is that UP, SP and BN/Santa Fe (19) are not going to wrongfully hammer each other's trains (20) because they're dependent on the other just ask much (21) as the other is dependent on them. (22) And that isn't to say to there's going to

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(1) be collusion or anything bad. But it does say that – (2) you know, somebody said these rights are (3) unprecedented. They're not unprecedented at all. (4) All the railroads in the west and the east (5)

come forward, and we'll study it, talk about it. And, if we've made a mistake, we'll consider that as well.

Q. Now, Mont Belvieu is one of the points that you are granting access to BN/Santa Fe; am I correct?

A. Correct.

Q. And Mont Belvieu, does it have a spur line or industrial line to both carriers?

A. Mont Belvieu is a situation where we looked additionally -- and maybe I should have mentioned this in my overall description of our approach, but where not only is there two-railroad service to a shipper but is there likely be to be two-railroad service to a shipper in the near future.

And so a decision was made that our build-in to Mont Belvieu, UP building its track in to jointly serve those heretofore exclusively SP shippers, was so far downstream, that we had been negotiating with the shippers in good faith, we had progressed an ICC application, we had done track designs, we had talked about environmental problems and had serious ongoing discussions with the shippers, the feeling was let's take the

conservative approach and also include Eldon and Mont Belvieu as two-to-one points, even though today, you know, they are not precisely two-to-one points.

Q. Are there any other situations like Mont Belvieu where UP was proposing to build a line in to a customer served by SP?

A. Well, along with thinking about the Mont Belvieu situation, we looked for any and all other situations, because, if we had found one, then we would have treated it the same way, if the facts were the same. But we didn't. We couldn't find any other situation that was even remotely close to the Mont Belvieu situation.

Q. And what was the length of the track approximately involved in the Mont Belvieu circumstance?

A. Frankly I'm not sure. We didn't use length of track as a criteria. It's not particularly long, I think it's less than ten miles.

Q. Is it eight miles?

A. I could find out the exact miles for you, but I don't know them.

Q. Would you.

question.

THE WITNESS: Our analysis here was in response to Dr. Pittman's assertion that there would be some competitive impact on the moving of all frac sand from the upper Midwest to this BEA, this big BEA in south Texas. Believe me, it's big, it would take all day to drive across it.

And that was the purpose of this work, to respond to that and to point out the factors, you know, involved in these movements, as to why the UP/Katy merger would not have a negative impact on competition.

BY MR. MOLM:

Q. When you evaluated the markets in this proceeding and which you identified them as two-to-one, we have discussed some of the factors, did we discuss all intermodal movements where the shipper may use truck transload to another carrier?

A. I did not get to that. And maybe that was an omission on my part and I apologize. When we finished -- all right. We looked at the two-to-one points, then we looked at the two-to-one corridors. And then the next step to sort of complete the comprehensive look would

involve transloading and source competition.

As far as transloading, we first made sure that we understood that the BN/Santa Fe settlement allows BN/Santa Fe to have bulk transloading facilities, transloading facilities, at each of the two-to-one points, at Salt Lake City or San Antonio, wherever.

Then we looked at the coverage of that network including all of BN/Santa Fe's existing coverage against the current SP map and any transloading opportunities and found that there weren't any gaps, where a shipper today that could say truck to SP and transload, even though he is exclusively served on SP, where he would lose that, he could be able to truck generally to the same point and do it on BN/Santa Fe but, of course, have the benefit of a much better railroad to work with as far as getting to a broader array of markets and being able to provide good service.

Q. So you're saying that a shipper, even though he might not truck transload today in order to access SP, if he could have, you would have counted that as a two-to-one?

A. Well, I mean our review indicates that

the two -- I wouldn't state it the way you've stated it. Okay. You've got all the two-to-one points that are there, you've got the existing BN/Santa Fe network. We could not identify any existing customers nor the likelihood of any significant customers that would be disadvantaged from a truck transload standpoint versus where they are today, by trucking in to the BN/Santa Fe point as opposed to trucking to an SP point today. We looked at the numerous existing transloads and we also scoured the map by sort of plotting semicircles over them and couldn't find a place where even a future shipper would be disadvantaged.

Q. Am I correct in understanding then that, so long as the shipper was not disadvantaged, he could reach BN/Santa Fe as well as he could have reached SP?

A. Yeah, or maybe UP in a situation.

Q. In a reverse?

A. Yeah, UP or SP.

Q. Would you go to page 42 of your testimony. I want to recall this correctly, but earlier we were discussing a movement in a corridor where you stated BN and Santa Fe had

BEFORE THE

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

-- CONTROL 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

Washington, D.C.

Tuesday, February 6, 1996

Continued deposition of RICHARD PETERSON, a witness herein, called for examination by counsel for the Parties in the above-entitled matter, pursuant to agreement, the witness being previously duly sworn, taken at the offices of Covington & Burling, 1201 Pennsylvania Avenue, N.W., Washington, D.C., 20044, at 10:00 a.m., Tuesday, February 6, 1996, and the proceedings being taken down by Stenotype by MARY GRACE PRESTO, RPR, and transcribed under her direction.

like to have marked as an exhibit a list which I prepared and is so marked at the bottom.

(Peterson Exhibit No. 1 was marked for identification.)

BY MR. STONE:

Q. Now, for the record, I will say that this list is a list -- and let me just distribute copies to the others, and first to your counsel, Mr. Peterson.

This is a list that was prepared for my client and it, to my understanding, is derived from both publicly available sources of stations and SPLCs and to some extent perhaps confirmed by the UP and SP traffic tapes in this proceeding. Could I just ask you to go down the list here, and let me say further, because I perhaps didn't, we believe that these are 2-to-1 points, that is, these SPLCs are served by both the UP and the SP and no other railroad currently.

Could you go down the list and tell me whether you've considered these points and made any determination about whether they are or should be 2-to-1 points?

A. Okay. First, let me indicate our process for identifying 2-to-1 points and I think

that will help the explanation as we go along. We looked first for all of these six-digit SPLCs where both UP and SP were present and then present with no other railroad. So you're correct, this is a good jumping off point to the analysis. This is the first of many steps required to identify customers that are actually 2-to-1 customers. Could take -- well, Woodland, California is a good example. I could take several others.

We would look at Woodland, California, that SPLC would show both UP and SP. Actually, it would show now probably an SP shortline serving Woodland and a spinoff from SP. And then we would embark on the real essence of our study and that is to determine competitively served customers. And those customers could be served in a number of ways. They could be served by TOFC/COFC service and would determine that Woodland is near ramps of UP and SP and Santa Fe so it's not 2-to-1 in that regard.

For automotive traffic, auto ramps could be located at nearby points and cover a town of this size. And then you turn to the car load traffic. And I think, as we discussed

yesterday, car load business can be served to reciprocal switching, it can be served through a joint facility agreement or, in fact, it can be a case where an industry has direct industry spurs from both carriers.

The situation at Woodland is that there is no physical track connection between UP, and again, it's a UP shortline, which is another reason this wouldn't be a 2-to-1 point because that shortline will be able to connect to BN/Santa Fe at west Sacramento following the settlement.

Q. You referred to a UP shortline and previously you referred to an SP shortline.

A. Right.

Q. Did you mean UP shortline?

A. Yes. Woodland is actually on the north California railroad, which is an SP shortline, and the Yolo shortline, which is a UP spinoff. But Yolo I believe will be free to interchange with BN/Santa Fe at west Sacramento, California after the settlement.

But leaving those factors aside, there is no physical track connection at Woodland. There is a highway between them. In fact, a

quick store has been built between our track and the SP's and along with some other things, would make it impossible to build a track connection, so that none of the industries have the benefit of reciprocal switching because there is no interchange there.

We then checked the joint facility agreements to see if perhaps some industries were covered by an agreement where SP would switch our cars and deliver them to us at some point but no such agreement exists and there are no industries that have direct spurs from both UP and SP. So there are no 2-to-1 customers at Woodland. I believe the similar explanation would apply to most of these points.

Most of those are -- many of these are points where there is no rail traffic. I'm looking at the second to the last City of Industry, California is a place where there is a lot of rail traffic. Again, there is no physical track connection between UP and SP, no interchange takes place, no jointly served industries of any kind.

Texarkana, I believe that's an error. KCS serves Texarkana. I would be glad to take

answer you gave a moment ago regarding this Exhibit 1, you said that in most cases, there are not any industries that are served by both UP and SP. And again, that somehow sounds like a qualification to your general rule that whether or not there is actually traffic moving by both UP and SP, that points were considered 2-to-1 so long as there was at least the possibility of service by both UP and SP and no other carriers. Was your statement intended to be some qualification to that general rule?

A. Well, my statement was intended to describe our process. Our process identified as a first step, not a final step but a first step, these six-digit SPLCs where we and SP both served. However, then, regardless of volume, we identified whether or not there were industries that in fact had service from both railroads.

For example, an industry could have shipped 100 cars in 1993, maybe it had a -- for whatever reason, shipped none in '94, still was recognized as a rail shipper, was in the switching tariff as being open to SP and there was an interchange that was still open to allow the reciprocal switch to happen, then that

Q. Why is Reno, Nevada accessible to BN/Santa Fe for only intermodal and automotive traffic?

A. In Reno, years ago there was a track connection that connected the WP, now UP line, with SP's line. And before the interstate was built, the main highway ran through town between Sparks and Reno and this sort of little connecting spur crossed it and it was deemed highly desirable to get rid of that track and that crossing of that busy highway. And so that track has been eliminated and so there is no physical track connection between UP and SP at Reno.

Q. Isn't there a Reno switching district?

A. And therefore, no industries that are 2-to-1 industries.

Q. Is there no switching in Reno?

A. There is no reciprocal switching in Reno. As I say, years ago there was.

Q. Are shippers on the pared track between Weso, Nevada and Alazon, Nevada considered two shippers?

A. Yes.

Q. If a shipper on UP can now truck his

ORIGINAL



BEFORE THE

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

-- CONTROL 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

Washington, D.C.

Saturday, February 10, 1996

Continued deposition of RICHARD B. PETERSON, a witness herein, called for examination by counsel for the Parties in the above-entitled matter, pursuant to agreement, the witness being previously duly sworn, taken at the offices of Covington & Burling, 1201 Pennsylvania Avenue, N.W., Washington, D.C., 20044, at 9:05 a.m., Saturday, February 10, 1996, and the proceedings being taken down by Stenotype by JAN A. WILLIAMS, RPR, and transcribed under her direction.

conversation with UP account manager Salt Lake. So again here's an industry that's jointly served, and this is some of the information that supports that.

Q. Would you go to page 203. This indicates, does it not, that this is a listing of UP/SP two-to-one points, specifically in Utah, Nevada, and Northern California?

A. And Southern California as well.

Q. And Southern California?

A. Correct. I mean this may have been an early draft or early -- an early list.

Q. Why do you say early list?

A. Well, the reasons are, for example, we listed Reno, Nevada, here. That was later determined that, while it was an SPLC served by both SP and UP, that there actually were no two-to-one shippers. So Reno was opened only to intermodal and auto traffic.

So I mean this is sort of the first cut at it, the first level of the identification process where we identified SPLC numbers for -- well, we identified each location where UP and SP both served the same SPLC number. That indicated that the track -- we each had a track there. It

didn't mean that there were any customers that were two-to-one served. That would have been the case say in Reno, Nevada. So this is the first step.

Q. So some of these points would have been eliminated in later steps?

A. Yes, or refined in that certainly all the customers at these points weren't two-to-one customers. But, with the exception of Reno, I think possibly all of these places have at least one two-to-one customer.

Q. Can you tell me whether there were any points added subsequent to this listing?

A. Well, probably were, yeah. Well, again this is, what, as you say Utah, Nevada, and Northern California, and then Southern California. We would need to compare this to the listing in the agreement and perhaps we could find -- is there a date on this? September 29. Yeah, September 29 would be after the agreement. And it's probably pretty close. There may be some points in the omnibus section.

Q. Just to compare the agreement to this?

A. Yes.

Q. Let's move on then.

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-- CONTROL 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

Washington, D.C.

Monday, January 22, 1996

Deposition of JOHN H. REBENSDORF, a witness herein, called for examination by counsel for the Parties in the above-entitled matter, pursuant to agreement, the witness being duly sworn by JAN A. WILLIAMS, RPR, a Notary Public in and for the District of Columbia, taken at the offices of Covington & Burling, 1201 Pennsylvania Avenue, N.W., Washington, D.C., 20044, at 10:15 a.m., Monday, January 22, 1996, and the proceedings being taken down by Stenotype by JAN A. WILLIAMS, RPR, and transcribed under her direction.

trying to identify competitive solutions was to eliminate two-to-one situations. And my question is were there any two-to-one customers with traffic between Houston and El Paso served by only UP and SP and no other railroad and which would, therefore, be served only by the surviving railroad in the event of a merger?

A. I don't know the answer to that.

Q. And the same question as between Houston and Brownsville?

A. Again I don't know the answer to that. What we have done, as I stated in the application and my verified statement, is, whenever a customer was served by the two railroads and only the two railroads or a short line that was only connected to the two railroads, we opened that up to the competitive alternative. And that was made clear that's what we would do in all of the discussions that we had with the various parties that were interested in coming in and providing a competitive alternative.

Q. Did you ever consider quite apart from what may have been actually extended to Conrail or KCS a response to the proposal that would have excluded from the subject on the table aspects

SP, either directly or through reciprocal switch.

Q. So that would BN/SF have access to a new customer where service would have been opened -- where the facility would have been opened to service by both UP and SP but in this case also an additional railroad?

A. Are you defining a three-to-two point?

Q. I don't think so. I'm trying to get some particularity here and perhaps I'm not being precise. When you define two-to-one points, I thought you earlier told me that that was a point at which a customer was served by both UP and SP and no other railroad; is that right?

A. That is correct.

Q. In the situation described in paragraph C which relates to geographic limits on access to new industry, where UP and SP could have provided service to a newly constructed facility prior to the merger, does BN/SF have access to that new facility, whether or not it is only UP and SP that provided service prior to the merger?

MR. ROACH: Well, I object to the form of the question. We're dropping the context, we're dropping the context. We're only talking

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-- CONTROL 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

Washington, D.C.

Monday, February 12, 1996

Continued deposition of JOHN H. REBENSDORF, a witness herein, called for examination by counsel for the Parties in the above-entitled matter, pursuant to agreement, the witness being previously duly sworn, taken at the offices of Covington & Burling, 1201 Pennsylvania Avenue, N.W., Washington, D.C., 20044, at 9:25 a.m., Monday, February 12, 1996, and the proceedings being taken down by Stenotype by JAN A. WILLIAMS, RPR, and transcribed under her direction.

involvement in that particular decision.

Q. Okay. And you've said that you-all's working definition of two-to-one point was any point that, at the time of the merger, was served by both UP and SP; is that generally correct?

A. It's customers that were served by UP, SP, and no other carrier.

Q. You would agree with me, would you not, that there could be other definitions of two-to-one points?

MR. ROACH: Object to the form.

BY MR. LUBEL:

Q. You said someone else could define two-to-one points differently?

MR. ROACH: Object to the form of the question.

THE WITNESS: I'm only familiar with the definition that we used. And to me that's the only definition that makes any sense.

BY MR. LUBEL:

Q. Well, have you heard or are you aware of instances where two-to-one points or the concept of two-to-one was defined as two railroads serving a business economic area, a BEA, and that, if two railroads are serving the

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BEFORE THE
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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

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# UNION PACIFIC'S REPLY TO COMMENTS ON THE RESTATED AND AMENDED BNSF SETTLEMENT AGREEMENT

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September 19, 2001

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-- CONTROL AND MERGER --
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TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
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RIO GRANDE WESTERN RAILROAD COMPANY -- OVERSIGHT

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**UNION PACIFIC'S REPLY TO COMMENTS ON THE RESTATED AND AMENDED BNSF SETTLEMENT AGREEMENT**

**INTRODUCTION**

UP and BNSF continue to disagree about four BNSF proposals to make substantive modifications to the BNSF Settlement Agreement. UP and BNSF addressed these proposals in separate filings on July 25, 2001. They suggested that interested parties comment on these issues by August 17, 2001, so that UP and BNSF could reply to each other and to any other comments. See BNSF-93 & UP/SP-387. Three parties filed comments – NITL, ACC (formerly CMA), and Entergy.[1] The commenting parties, biased in favor of expanding access to UP-served facilities, largely echoed BNSF's arguments.

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[1] CPSB filed comments noting several respects in which the current draft of the BNSF Settlement Agreement does not conform the prior agreement among CPSB, BNSF, and UP regarding amendments to the BNSF Settlement Agreement. See CPSB-15, p. 4. As CPSB notes, UP and BNSF intend to correct these oversights. See id.

**DISCUSSION**

In each of its proposals, BNSF seeks to add or delete an express term of the BNSF Settlement Agreement without identifying any failure of the Board's conditions that would justify any change.[2]

First, BNSF wants to adopt a definition of "2-to-1 Points" that the Board rejected. The Board adopted the definition that UP seeks to preserve, and it imposed the new industries, transload, and build-out conditions to address the competitive issues that BNSF and its supporters describe. Five years of oversight have demonstrated that the Board's conditions have effectively preserved competition.

Second, BNSF wants the Board to strike from the BNSF Settlement Agreement two operating limitations that BNSF accepted and the Board imposed. These limitations were carefully crafted to allow BNSF effectively to replace the competition that SP had provided prior to the UP/SP merger without providing BNSF an unjustified commercial advantage. BNSF and its supporters fail to show that the restrictions prevent BNSF from providing the competition that the Board expected.

Third, BNSF wants the Board to give BNSF a new right to purchase or lease tracks that UP or SP used as "team tracks" before the merger. This right does not appear in the BNSF Settlement Agreement, and BNSF competes effectively without it.

Finally, BNSF wants the Board to allow any shipper on a BNSF trackage rights line to construct a private "transload" facility and obtain BNSF service. BNSF's proposal violates the Board's direction that the transload condition should "not result in direct BNSF

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[2] BNSF's proposals thus violate BNSF's promise in Section 14 of the BNSF Settlement Agreement that it would not seek any additional conditions on the merger. See UP/SP-22, p. 338.

access to what were UP's or SP's exclusively served shippers along the trackage rights lines." Decision No. 75, 2 S.T.B. 697, 702 (1997). UP proposes that the Board not define the term "transload facility" but instead resolve disagreements on a case-by-case basis if any arise.

The Board should resolve these four disputes by rejecting BNSF's request to alter the BNSF Settlement Agreement and the Board's conditions. The Board should not impose new burdens on the UP/SP merger. See Guilford Transportation Industries, Inc. – Control – Boston & Maine Corp., 5 I.C.C.2d 202, 206 (1988).

A. The Board Should Not Adopt a Rejected Definition of "2-to-1 Points"

BNSF wants to expand the definition of "2-to-1 Points" by using six-digit SPLC codes to identify such points, a proposal the Board rejected in 1996. BNSF argues that the current definition fails to preserve indirect competition where UP and SP lines were in close proximity. Specifically, BNSF claims that shippers have lost "build-out and transloading options" as well as "flexibility . . . in locating new facilities on UP or SP lines." BNSF-93, p. 4. NITL and ACC support BNSF's position.

The Board rejected this proposal during the merger proceeding, choosing instead to impose three new conditions to preserve indirect competition. The Board adopted the definition of "2-to-1" points as those locations where at least one shipping facility had pre-merger rail access to both UP and SP, whether via direct rail service, reciprocal switching, joint facility or other arrangements, and no other railroad. Rather than defining "2-to-1" points using SPLC codes, the Board replicated and greatly expanded pre-merger indirect competition by imposing the new industries, transload, and build-out conditions. The Board thus secured indirect competition for UP and SP shippers. BNSF and its supporters want to expand shippers' pre-merger competitive options.

1. The Board Adopted the Definition of "2-to-1" Points as Locations Where at Least One Shipping Facility Was Served By UP and SP and No Other Railroad

The Board embraced the BNSF Settlement Agreement's concept that "2-to-1" points are those locations where at least one shipping facility had pre-merger rail access to both UP and SP and no other carrier. The Board explicitly stated this understanding: "BNSF's trackage rights will permit it to serve only certain specified points, those at which a shipper goes from two to one directly serving carrier." Decision No. 44, 1 S.T.B. 233, 372 (1996). The Board recognized that the applicants had "identified 2-to-1 points as those that can be served directly, or through reciprocal switching, by UP and SP but by no other Class I railroad." Id. at 390-91. It noted that the applicants had "carefully checked actual accessibility" in identifying "2-to-1" points. Id. at 391 n.127.[3]

The applicants used this definition consistently throughout the merger proceedings. The application describes "2-to-1" points as "every location where any shipper is open today to service by both UP and SP and no other railroad." UP/SP-230, Narrative at 134. Applicants' testimony adhered to this definition. See UP/SP-22, Rebensdorf V.S. at 296 ("The focus of UP/SP's efforts was to preserve competition for '2-to-1' customers. To that end, we identified all geographic points on the combined UP/SP system where both UP and SP and no

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[3] The Board's post-merger decisions reflect that it understands that "2-to-1" points are locations with at least one "2-to-1" shipping facility – that is, a shipping facility open to rail service by both UP and SP and no other railroad. See, e.g., Ex Parte No. 582 (Sub-No. 1), Major Rail Consolidation Procedures, Decision served June 11, 2001, p. 18 (describing "2-to-1 points" as points where there would be a "loss of direct competition" between merging railroads).

NITL argues that the definition of "2-to-1" points has been the subject of longstanding conflict. NITL-27, p. 4. NITL apparently refers to issues that UP and BNSF resolved by adopting their "2-to-1 Point Identification Protocol," not to conflicts about the basic definition of "2-to-1" points. Consistent with the existing definition of "2-to-1" points, BNSF and UP developed a procedure for determining whether particular shipper facilities were "2-to-1" facilities. See UP/SP-386 & BNSF-92, Joint Submission of Restated and Amended BNSF Settlement Agreement, Ex. E.

other railroad provided service to one or more customers."); UP/SP-231, Peterson V.S. at 30 (explaining that City of Industry, California, was not a "2-to-1" point, even though UP and SP served that six-digit SPLC, because no "2-to-1" shipping facilities were present); Peterson Dep. at 215-17 (explaining that Woodland, California, was not a "2-to-1" point even though UP and SP served that six-digit SPLC, because no "2-to-1" shipping facilities were present).

Exhibit A of the BNSF Settlement Agreement did not alter this definition by including Reno as a "2-to-1" point, as BNSF and ACC assert. See BNSF-93, p. 5 n.4; ACC-1, p. 3. They argue that Reno, Nevada's appearance on Exhibit A disproves that a "2-to-1" shipper must be present for a point to be a "2-to-1" point. But Reno was not treated as a "2-to-1" point: Under the original Settlement Agreement, BNSF was not allowed to serve new industries in Reno, as it was at "2-to-1" points. BNSF's right to serve Reno was limited to "intermodal and automotive [traffic] only." See UP/SP-22, p. 341; see also Peterson Dep. at 277 (explaining that BNSF's rights at Reno were limited to intermodal and automotive traffic); id. at 1163-64 (explaining that Reno was not a "2-to-1" point). As the applicants explained during the merger proceedings, UP and BNSF agreed to include certain locations on Exhibit A that were not "2-to-1" points because they determined that BNSF access was required to preserve specifically identified competitive situations. Reno was included because UP and SP had competing intermodal ramps in Reno and BNSF expressed an interest in gaining access to that market. See Peterson Dep. at 73 (explaining that by granting BNSF access to intermodal traffic in Reno, "all intermodal situations would be covered").

The fact that the parties listed Reno and several other locations (including Halsted, Mont Belvieu, and Eldon, Texas) where the merger had a special potential to affect competition does not indicate that the applicants intended to use a broad, SPLC-based definition of "2-to-1" points. See, e.g., Peterson Dep. at 80-81 (explaining that the applicants listed Eldon

and Mont Belvieu "even though . . . they are not precisely two-to-one points" because UP had plans to construct a build-in to shipping facilities in those locations). The Board has recognized that not all of the points listed in Exhibit A are "2-to-1" points for purposes of the conditions it imposed. See Decision No. 57, served Nov. 20, 1996, p. 7 (denying LCRA at Halsted "2-to-1" status for purposes of the contract modification condition even though Halsted was listed in Exhibit A).

BNSF and ACC also claim that the applicants promised to define "2-to-1" points broadly in order to address any loss of competition. See BNSF-93, p. 4 n.2; ACC-1, p. 3. Applicants' testimony shows, however, that the applicants consistently maintained that a broad definition was not necessary. Applicants believed that indirect competition would be preserved not only through BNSF's access to "2-to-1" points, but also through shippers' access to BNSF's existing rail network.[4] The applicants never departed from the Settlement Agreement's definition of "2-to-1" points.[5]

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[4] As BNSF notes, one of the applicants' witnesses, Mr. Richard B. Peterson, testified that applicants had used six-digit SPLCs to analyze the merger's potential competitive effects. See BNSF-93, pp. 6-7. Mr. Peterson explained, though, that SPLCs were used merely as a tool to develop the universe of potential "2-to-1" points and to reveal situations in which the merger might diminish indirect competition, including source competition and competition from transloads and build-ins. See Peterson Dep. at 75, 86-88; see also id. at 221 ("Our process identified as a first step, not a final step but a first step, these six-digit SPLCs where we and SP both served.").

[5] See, e.g., UP/SP-231, Peterson V.S. at 30 (discussing City of Industry, California); Peterson Dep. at 215-17 (discussing Woodland, California); Rebensdorf Dep. at 133 ("whenever a customer was served by the two railroads and only the two railroads or a short line that only connected to the two railroads, we opened that up to the competitive alternative"); id. at 187 (Question: "When you define two-to-one points, I thought you earlier told me that that was a point at which a customer was served by both UP and SP and no other railroad; is that right?" Answer: "That is correct."); id. at 643 (Question: "Okay. And you've said that you-all's working definition of two-to-one point was any point that, at the time of the merger, was served by both UP and SP; is that generally correct?" Answer: "It's the customers that were served by UP, SP and no other carrier.").

NITL agrees that the applicants' position has always been clear. NITL says that "it is very clear" that "UP's position" was "then (as now) focused on 'actual accessibility' to prescribe the limits of curative access by BNSF." NITL-27, p. 11.

Finally, BNSF also understood and accepted the same definition. The original version of the Settlement Agreement limited BNSF's access to new industries at "2-to-1" points 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." See UP/SP-22, pp. 318-27, §§ 1(c), 4(c), 5(c), 6(d). If "2-to-1" points were to be defined using six-digit SPLCs, as BNSF now claims, there would have been no reason to define BNSF's right to serve new facilities in terms of reciprocal switching limits. Accordingly, BNSF is attempting to rewrite the agreement it signed and helped present to the Board.

2. The Board Preserved Indirect Competition by Expanding the New Facilities, Transload, and Build-out Conditions

Instead of using SPLCs to define "2-to-1" points, the Board expanded the new industries, transload, and build-out provisions of the BNSF Settlement Agreement and the CMA agreement to protect against the loss of indirect competition. When it imposed these merger conditions, the Board explicitly rejected the definition of "2-to-1" points that BNSF and its supporters advocate.

The Board concluded that the original BNSF Settlement Agreement, even as modified by the CMA agreement, did not sufficiently preserve indirect competition. See Decision No. 44, 1 S.T.B. at 372. DOJ, DOT, and others persuaded it that the merger might diminish indirect competition where UP and SP could have competed for the siting of new industries or by using transloads or build-outs. See id. The Board thus imposed additional

conditions specifically to ensure that indirect competition would be preserved. See id. at 393. The Board preserved indirect competition with its new industries, transload, and build-out conditions, which vastly expanded the locations at which BNSF would gain access to new industries, transloads, and build-out opportunities. See id.

The Board rejected proposals to redefine "2-to-1" points using SPLCs because they were too broad and intrusive:

> In essence, the problem with protestants' 2-to-1 analysis is that they aggregate traffic that will experience various types of competitive problems that we think are readily susceptible to different types of remedies. . . . [T]here are less intrusive ways and more focused ways of [addressing the loss of indirect competition], which are adopted here.

Id. at 392-93. The Board explained that it would protect indirect competition with targeted conditions giving BNSF expanded access to new industries, transloads and build-outs:

> Rather than redefining 2-to-1 points as those within some arbitrary proximity to two rail carriers (a BEA or 4-digit SPLC), and thus treating direct and indirect rail competition as equivalent, as DOJ, KCS, and others have suggested, we have devised specific conditions directly addressing . . . the competitive problems that have been raised . . . .

Id. at 372 (footnote omitted).[6]

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[6] Although the Board described these conditions as "focused," they actually create competition that is far more extensive than UP and SP provided to each other. BNSF gained access to new shippers on UP and SP lines that are dozens and even hundreds of miles from any competing rail line. A prime example is BNSF's access to American Soda's new soda ash facility located along the former DRGW line at Parachute, Colorado. See UP/SP-384, p. 127. BNSF also gained the right to serve new transload facilities on UP and SP lines regardless of whether the facilities were being used to transload to or from points on the other railroad's lines. As a result, BNSF gained the right to serve new transloads even if they were being used to transload to exclusively served points on the same railroad's lines. See UP/SP-384, pp. 122-23; see also Decision No. 61, served Nov. 19, 1996, p. 12.

Acknowledging that the Board rejected a SPLC-based definition, BNSF and NITL try to distinguish the Board's conclusion. BNSF argues that the Board found a loss of indirect competition under UP's definition of "2-to-1" points but rejected a SPLC-based remedy because the problem was "susceptible to different types of remedies." BNSF-93, p. 5 n.3. We agree, and BNSF answers its own argument. As BNSF itself recognizes, the Board "acted to preserve exactly the type of indirect competition which . . . would have been lost at 6-digit SPLCs." Id. A six-digit SPLC definition of "2-to-1" points is not required because the Board found "less intrusive ways and more focused ways" of preserving indirect competition. Decision No. 44, 1 S.T.B. at 392-93.

NITL similarly argues the Board rejected UP's "very clear" position that BNSF access to "2-to-1" points would be sufficient. NITL-27, pp. 11-12. Again, we agree. The Board's response, however, was not to expand the definition of "2-to-1" points, but instead to expand the new industries, transload, and build-out conditions.

NITL also argues that the Board rejected the use of four-digit SPLCs to define "2-to-1" points, but not the six-digit SPLCs. NITL-27, p. 12. NITL is mistaken. The Board rejected all "arbitrary" measures of "proximity." Decision No. 44, 1 S.T.B. at 372. Moreover, the Board specifically rejected NITL's six-digit SPLC proposal because it "aggregate[d] traffic that will experience various types of competitive problems that we think are readily susceptible to different types of remedies." Id. at 392.[7]

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[7] In rejecting NITL's analysis the Board did not merely reject divestiture as a remedy, as NITL claims. NITL-27, p. 12. The Board explained that its new industries, transload, and build-out conditions maintained indirect competition. See Decision No. 44, 1 S.T.B. at 393.

3. BNSF Provides Effective Indirect Competition Using the Board's Conditions

The Board's new industries, transload, and build-out conditions have effectively preserved indirect competition. These conditions give BNSF far greater ability to compete indirectly than a SPLC-based definition of "2-to-1" points. The Board awarded BNSF competitive opportunities not only at "2-to-1" points, but also on over 4,000 miles of lines over which BNSF received trackage rights.[8] BNSF may serve all new industries, all new transloads, and all build-ins and build-outs not only at "2-to-1" points but also on all the trackage rights lines. Indeed, BNSF can reach build-ins and build-outs between former SP and UP points anywhere on the UP system.

BNSF and UP document BNSF's effective use of the new industries, transload, and build-out conditions. See UP/SP-384, pp. 93-95, 104-105, 122-127; BNSF-PR-20, pp. 62-63. BNSF reports that "[t]hrough its marketing and sales campaigns, [it] has identified more than 500 '2-to-1' shipper facilities, more than 430 customers on '2-to-1' shortlines, 17 existing transload facilities at '2-to-1' points, [and] more than 60 shipper facilities accessed by virtue of conditions in the [CMA] Agreement." BNSF-PR-20, p. 5. BNSF further reports that it has identified and made its service available to more than 20 new facilities and more than 20 transload facilities on the UP/SP lines. Id. at 62-63. BNSF is aggressively using opportunities to build new lines to serve UP shippers. On August 30, BNSF sought Board authority to construct a 13-mile build-in to several plastics and chemical customers in the Bayport Industrial District southeast of Houston. BNSF will use its build-in rights under the Settlement Agreement to

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[8] We discuss one exception – the trackage rights that BNSF received between Elvas and Stockton, California – below in Section B.2.

obtain trackage rights between Houston and the build-in connection. See Finance Docket No. 34079, San Jacinto Rail Ltd. – Authority to Construct – & The Burlington Northern & Santa Fe Ry. – Authority to Operate – Petition for an Exemption From 49 U.S.C. § 10901 – Build-Out to the Bayport Loop Near Houston, Harris County, Texas, filed Aug. 30, 2001. BNSF also reports that its "build-in to UCC's Seadrift plant is currently planned and is being progressed," and it expects to serve a build-out from Entergy's White Bluff Station in Arkansas to a former SP line. BNSF-PR-20, p. 63. No party complains that it lost a competitive option because of the definition of "2-to-1" points.

BNSF contends that shippers lost pre-merger indirect competition provided by a transload operated by Refrigerated Distribution Specialists ("RDS") at Tracy, California. The facility was on SP, and BNSF argues that nearby exclusively served UP shippers lost the competition that this transload had provided. See BNSF-93, p. 8 n.7. UP is not aware of any nearby exclusively served UP shippers that used RDS.

More importantly, the Board's conditions preserved indirect competition in the Tracy area. BNSF can serve transloads at Lyoth, California, a "2-to-1" point within two miles of the RDS facility. Moreover, BNSF has its own line along which a transload operation could be established in Stockton, only 19 miles from Tracy. BNSF asserts that RDS is not unique, but it does not identify other examples. BNSF-93, p. 8 n.7.

BNSF mistakenly implies that the merger eliminated competition where UP and SP competed through captive short-lines. Id. Applicants preserved this type of competition in identifying "2-to-1" points. In fact, Lyoth was deemed a "2-to-1" point because it was served by both UP and California Northern Railroad, a captive SP short-line. See also Decision No. 44, 1

S.T.B. at 391 n.127 (recognizing that in defining "2-to-1" points, the applicants added points on shortline railroads reachable by connections to UP and SP, but no other Class I railroad).[9]

B. The Board Should Not Revoke Operating Restrictions to Which BNSF Agreed

BNSF and its supporters want the Board to excise two sets of operating restrictions from the BNSF Settlement Agreement. One limits BNSF's St. Louis Gateway trackage rights, and the other restricts BNSF's trackage rights between Elvas and Stockton, California. The restrictions were carefully calibrated efforts to resolve competitive concerns without providing BNSF a purely commercial advantage. BNSF and its supporters argue that it would be more efficient for BNSF to operate free from these restrictions, but neither BNSF nor any of its supporters shows that the conditions must be deleted in order to preserve pre-merger competition.

1. The St. Louis Gateway Restrictions

The Settlement Agreement contains two express restrictions on BNSF's St. Louis Gateway trackage rights: (1) BNSF trains may not enter or leave the trackage rights at intermediate points north of Bald Knob and Fair Oaks, Arkansas (the "entry/exit restriction"); and (2) BNSF may not use the trackage rights to carry any traffic other than traffic to or from Texas, Louisiana, and points listed in Exhibit A to the Settlement Agreement (the "geographic restriction"). BNSF argues the restrictions are inconsistent with the Board's reaffirmation in

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[9] NITL claims that there is a dispute about whether Woodland, California, is a "2-to-1" point. NITL-27, p. 9 n.2. UP is unaware of any such dispute. NITL apparently mentions Woodland because it appeared on a list of SPLCs that both UP and SP served, and applicants' witness Peterson was asked why it was not a "2-to-1" point. Mr. Peterson provided a detailed explanation of why Woodland was not a "2-to-1" point, and his explanation demonstrated both that applicants' had a consistent understanding that the definition was not based on SPLCs and that the merger would not harm indirect competition at Woodland. See Peterson Dep. at 214-17 (explaining that there "are no 2-to-1 customers at Woodland," and that indirect competition is not harmed because "Woodland is near [intermodal] ramps of UP and SP and Santa Fe").

Decision No. 61 that the new industries and new transloads conditions applied to the St. Louis Gateway trackage rights, but the Board never suggested that the routing restrictions must be removed. See Decision No. 61, served Nov. 19, 1996, p. 11. BNSF also argues that the restrictions prevent it from using the most efficient route for some traffic, but the relevant question is not whether BNSF has the shortest route, but whether the restrictions prevent it from replacing the competition provided by SP, and they do not.

a. The BNSF Settlement Agreement Restricts BNSF's Rights to Use the St. Louis Gateway Trackage Rights

The St. Louis Gateway trackage rights and restrictions stem from the settlement agreement among the applicants, BNSF, and CMA (now ACC). See UP/SP-219 (submitting the CMA agreement to the Board). BNSF and ACC do not dispute that they agreed to the restrictions. Neither contests John Rebensdorf's testimony that the parties agreed to the restrictions. See UP/SP-387, Rebensdorf V.S. at 3-4. BNSF acknowledges that the parties intended to restrict BNSF's use of the St. Louis Gateway trackage rights. See BNSF-93, p. 18 ("To the extent that UP (and perhaps BNSF) originally intended BNSF's use of these trackage rights lines to be restricted, that intent has clearly been overridden by the Board's decisions."). Finally, ACC does not dispute Mr. Rebensdorf's version of the negotiations – it merely adopts BNSF's argument that the Board silently but implicitly rejected the restrictions on the St. Louis Gateway trackage rights. See ACC-1, p. 6.[10]

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[10] Entergy's assertion that UP offered no evidence that the parties to the CMA agreement intended to restrict BNSF's use of the St. Louis Gateway trackage rights is belied by Mr. Rebensdorf's testimony. ESI-33, p. 11 & n.9. Mr. Rebensdorf testified that UP, BNSF, and CMA intended to restrict BNSF's use of the trackage rights. He explained that "[UP] negotiated these restrictions because BNSF would otherwise have obtained rights to use UP and SP lines that were not necessary to satisfy the only concern about competition, which was whether BNSF could compete for St. Louis Gateway traffic." UP/SP-387, Rebensdorf V.S. at 3. He further (continued...)

When one recalls why the applicants agreed to grant BNSF the St. Louis Gateway trackage rights, it becomes clear why BNSF and CMA agreed to the restrictions. With the agreed restrictions, BNSF replicates pre-merger competition.

In the original BNSF Settlement Agreement, the applicants preserved competition in the Houston-Memphis corridor by granting BNSF rights on SP's line between Houston and Fair Oaks, and on UP and SP track connecting the Houston-Fair Oaks line to Memphis, where BNSF had its own line to St. Louis and other eastern connections. See Map No. 1. CMA objected that those rights were insufficient for two reasons: first, BNSF would be unable to operate with the flow of the applicants' planned directional operations in the Missouri-Texas corridor, and second, BNSF's route from Houston to the St. Louis Gateway via Memphis might be less efficient than SP's pre-merger route.

In order to gain CMA's support for the merger, the applicants negotiated an agreement with BNSF and CMA that resolved both issues. In order to resolve CMA's concern about BNSF's ability to operate with the flow of the applicants' directional operations, the applicants granted BNSF rights to use not only the SP lines but also UP's parallel lines between Houston and Bald Knob, Arkansas, and between Bald Knob and Fair Oaks, Arkansas. In order to resolve CMA's concern about BNSF's route from Houston to the St. Louis Gateway via Memphis, the applicants granted BNSF rights to use UP's line between Bald Knob and Dexter

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explained that "[BNSF, CMA, and the applicants] agreed that BNSF could not enter or exit the trackage rights over the UP and SP lines north of Bald Knob and Fair Oaks on the UP line to Memphis." Id. at 4. Mr. Rebensdorf provides the only competent testimony as to the parties' intent, and his testimony is that the parties agreed to the restrictions. BNSF and ACC do not dispute his testimony.

Jct., Missouri, SP's line between Fair Oaks and Dexter Jct., and the joint UP/SP lines north to Valley Junction, Illinois (the St. Louis Gateway). See Map No. 1.

The applicants, BNSF, and CMA also agreed to restrict BNSF's use of these additional rights so they would address CMA's concerns without allowing BNSF to gain additional benefits not necessary to replicate pre-merger competition. UP/SP-387, Rebensdorf V.S. at 3-5.

The St. Louis Gateway trackage rights and restrictions, along with the other provisions of the CMA agreement, were incorporated in the Second Supplemental Agreement to the BNSF Settlement Agreement. See UP/SP-266, Ex. A., p. 12, § 5d. The relevant language, drafted as an amendment to Section 6(c) of the original Settlement Agreement and now contained in Section 6(d) of the Restated and Amended BNSF Settlement Agreement, provides:

> "Except as provided by Section 9(l) of this Agreement, BNSF shall not have the right to enter or exit at intermediate points on UP's and SP's lines between Memphis and Valley Junction, IL. Traffic to be handled over the UP and SP lines between Memphis and Valley Junction, IL is limited to traffic that moves through, originates in, or terminates in Texas or Louisiana except that traffic originating or terminating at points listed on Exhibit A under the caption 'Points Referred to in Section 6c' may also be handled over these lines."[11]

*The Entry/Exit Restriction*. Section 6(d) expressly states the agreement among the applicants, BNSF, and CMA that "BNSF shall not have the right to enter or exit at intermediate

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[11] Section 9(l) of the original Settlement Agreement provides: "BNSF shall have the right to connect for movement in all directions with the trackage rights lines where its present lines (including existing trackage rights), lines to be purchased under this Agreement, and the trackage rights lines intersect." UP/SP-22, p. 335. The relevant language in Section 9(l) of the original Settlement Agreement is now contained in Section 9(m) of the Restated and Amended BNSF Settlement Agreement. The language has been slightly modified, but the modification has no bearing on the present dispute. See UP/SP-398 & BNSF-92, Proposed Restated and Amended BNSF Settlement Agreement, p. 43.

points on UP's and SP's lines between Memphis and Valley Junction, IL." BNSF and Entergy argue that the reference to "Section 9(l)" negates the entry restriction, but they are incorrect. Their reading would render the restriction in Section (d) meaningless.

When Section 6(d) is read in the context of the entire Settlement Agreement, the reference to Section 9(l) simply confirms BNSF's right to establish connections between its own lines and the trackage rights lines with respect to all of the trackage rights granted in Section 6 except for the trackage rights over the UP and SP lines between Memphis and Valley Junction (the St. Louis Gateway).[12] Any other reading is nonsensical. The first clause would nullify the second.

BNSF, NITL, and Entergy suggest a different interpretation, but their interpretation is obviously incorrect because it presupposes that BNSF has rights it lacks under the Settlement Agreement. It would also render meaningless Section 6(d)'s restrictive language. BNSF, NITL, and Entergy argue that the net effect of Section 6(d) is to allow BNSF to connect with its own lines between Memphis and Valley Junction, but not with the lines of any other carriers between those points. See BNSF-93, p. 16 n.12; NITL-27, p. 16; ESI-33, pp. 5, 9-10. The flaw in their interpretation is that the Settlement Agreement gives BNSF no right to connect

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[12] UP believes that the Section 6(d) language could be improved, and it has suggested striking the reference to Section 9(l). The problem is that if one reads it without regard to the context of the BNSF agreement, the statement that BNSF "shall not have the right to enter or exit at intermediate points" on the St. Louis Gateway trackage rights lines might appear to conflict with the reference to Section 9(l), which provides BNSF with a general "right to connect, for movement in all directions . . .where its present lines . . . and the trackage rights lines intersect." If BNSF or others are concerned that eliminating the reference to Section 9(l) would have some additional significance, UP would agree to replace, "Except as provided in Section 9(l)," with "Notwithstanding the provision in Section 9(l)," or some other similar, clarifying language that would clearly indicate that BNSF retains the right to connect between its present lines and the trackage rights granted in Section 6 at all locations except points north of Bald Knob and Fair Oaks.

with the lines of other railroads unless specifically identified.[13] Thus, under this proposed reading, the restrictive language in Section 6(d), which UP, BNSF, and CMA agreed to include in the Settlement Agreement, would have no effect. It would merely prevent BNSF from doing what it had no right to do in the first place.

The issue does not involve interpreting an ambiguous provision or choosing among several reasonable meanings.[14] Rather, it involves the cardinal rule of contract interpretation that one must seek ways to avoid nullifying contract provisions or rendering them meaningless.[15] It also involves the cardinal rule of contract interpretation that more specific terms, such as the restriction language, are given greater weight than more general language, such as the reference to Section 9(l).[16]

BNSF appears to recognize this flaw in its argument, because it says that it "does not rest its argument . . . solely on the presence" of the reference to Section 9(l). BNSF-93, p. 16 n.12. In fact, BNSF never asserts that the reference to Section 9(l) was intended to moot the restrictive language in Section 6(d). BNSF relies instead on Decision No. 61, which we address below.

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[13] Thus, for example, Section 6(d) expressly grants BNSF the right to interchange with certain specifically identified carriers at designated locations.

[14] Even if the provision were truly ambiguous, the Board would be required to "ground [its interpretation] in the . . . contemporaneous understanding of the parties." United States v. Western Electric Co., 12 F.3d 225, 230 (D.C. Cir. 1993). Mr. Rebensdorf provides undisputed evidence that the parties intended to restrict BNSF's use of the St. Louis Gateway trackage rights. See note 10, supra.

[15] See, e.g., Restatement (Second) of Contracts § 203(a) ("an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect"); see also id. § 202(2) ("A writing is interpreted as a whole . . . .").

[16] See, e.g. id. § 203(c) ("specific terms and exact terms are given greater weight than general language").

Entergy argues half-heartedly that a different interpretation would leave the Section 6(d)'s restrictive language in place. It argues that the restriction precludes BNSF from connecting with the lines of other carriers between Memphis and Valley Junction even if it later acquired ownership of or operating rights over those lines. ESI-33, p. 5 & n.5. Again, however, Entergy ignores the Settlement Agreement's other provisions that make its interpretation nonsensical. BNSF has no right to connect with newly acquired routes even in the absence of Section 6(d)'s restrictive language, since Section 9(l) allows BNSF to connect only with its "present lines." Entergy's reading would thus also render the Section 6(d) restrictive language meaningless.

*The Geographic Restriction*. Section 6(d) provides: "Traffic to be handled over the UP and SP lines between Memphis and Valley Junction, IL is limited to traffic that moves through, originates in, or terminates in Texas or Louisiana except that traffic originating or terminating at points listed on Exhibit A under the caption 'Points Referred to in Section 6c' may also be handled over these lines." This provision prevents BNSF from using UP's lines to handle traffic that BNSF routed over its own Memphis-St. Louis line before the merger, principally traffic from BNSF's line into the Southeastern U.S. Neither BNSF nor its supporters suggest any reason why the Board would want to eliminate this restriction from the Settlement Agreement. Moreover, the reason for this restriction was understood by all involved: BNSF was granted the St. Louis Gateway rights to allow it to handle traffic from regions where it gained access as a result of the Settlement Agreement, not traffic that was already moving on its own lines from locations such as Alabama, Mississippi, and Florida that it served prior to the merger. UP/SP-387, Rebensdorf V.S. at 3. The UP/SP merger did not affect this traffic.

b. The Board's Decision No. 61 Provides No Basis for Striking the St. Louis Gateway Restrictions

BNSF's main argument, that the Board implicitly struck down all restrictions on BNSF's use of the trackage rights lines in Decision No. 61 does not accurately reflect that decision. The Board did not strike down any restrictions in Decision No. 61. It merely declined to reconsider its decision to expand the CMA agreement's new industries and new transload conditions to all of the UP lines over which BNSF received trackage rights. See Decision No. 61, p. 10; Decision No. 44, 1 S.T.B. at 393. The Board explained this would help BNSF achieve sufficient density on the trackage rights lines "to compete efficiently for the 2-to-1 traffic opened up to it by the BNSF agreement." Decision No. 61, p. 10.

BNSF argues that removing the St. Louis Gateway restrictions would increase density on the trackage rights lines and thus further the Board's purpose of ensuring that BNSF's operations are viable. See BNSF-93, pp. 16-18.[17] BNSF's operations are demonstrably viable. Moreover, BNSF's argument proves too much.

The Settlement Agreement contains many provisions that limit BNSF's rights and its traffic density. The most obvious is the provision that confines BNSF to serving "2-to-1" shipper facilities. Yet the Board has repeatedly rejected arguments that BNSF must be able to duplicate SP's pre-merger shipper access in order to replicate the competition that SP provided. See, e.g., Oversight Decision No. 10, 2 S.T.B. 703, 708 (1997); Houston/Gulf Oversight Decision No. 10, served Dec. 21, 1998, pp. 15-17. As another example, the Settlement Agreement restricts BNSF's access to the traffic of shippers open to UP, SP, and KCS at

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[17] ACC merely echoes BNSF's argument. ACC-1, p. 6. Neither NITL nor Entergy adopts BNSF's argument based on Decision No. 61.

Texarkana and Shreveport. BNSF and its supporters do not argue that the Board should strike this restriction, even though it appears in the same paragraph as the St. Louis Gateway restriction.

The Board carefully scrutinized the BNSF Settlement Agreement and CMA agreement and modified only those provisions that it found problematic. For example, the Board required the applicants to remove a geographic restriction relating to BNSF service to Lake Charles-area shippers and also what it described as a "phantom haulage charge." See Decision No. 44, 1 S.T.B. at 429. The Board did not require the applicants to eliminate the St. Louis Gateway restrictions, and there is no reason to assume that it intended to remove them by implication.

In fact, when it approved the UP/SP merger, the Board rejected arguments that additional steps should be taken to increase BNSF's trackage rights density. The Board concluded that, "[g]iven all of the protections set forth in the BNSF agreement (particularly the terms of the CMA agreement) and the additional conditions we are imposing, we believe that BNSF will be able to compete efficiently." Id. at 404-05; see also id. at 405 ("We conclude that all of these factors taken together should result in BNSF having sufficient traffic to make these operations run efficiently.").

In Decision No. 61, the Board did not impose any new conditions or remove any restrictions. The Board reaffirmed the conclusion it had reached when it approved the merger: the BNSF agreement and the CMA agreement, along with the conditions it had already imposed were sufficient to provide BNSF with the traffic density necessary to compete effectively. See Decision No. 61, p. 10. BNSF has proved that the Board was right.

BNSF achieved sufficient traffic density to compete while abiding by the agreed restrictions. BNSF reports that it is averaging 3,335 loaded units per month in the "Gulf North Corridor." See BNSF-PR-20, Att. 8. BNSF is running three high-priority merchandise trains at least five days a week and two local trains. See BNSF-PR-20, pp. 46-47. By way of comparison, NITL had predicted that BNSF would average only 1,302 loaded cars per month and 0.6 trains per day in this corridor. See NITL-9, Crowley V.S., Tbl. 10. BNSF never claims that it will be unable to achieve sufficient density unless the restrictions are removed. It told the Board that it has enough density.[18]

Finally, removing the St. Louis Gateway restrictions would not affect BNSF's ability to achieve sufficient density on the trackage rights lines "to compete efficiently for '2-to-1' traffic." Decision No. 61, p. 10. It would not give BNSF access to any new shipper location or any new customers. It would merely provide BNSF an opportunity to move overhead traffic using UP tracks instead of BNSF tracks.

c. The Board Does Not Need to Strike the St. Louis Gateway Restrictions to Preserve Competition for Entergy's Traffic

BNSF and Entergy argue that removing the entry/exit restriction would allow BNSF to compete more efficiently for traffic to shippers, like Entergy, who receive shipments of PRB coal, because traffic "would most efficiently move over BNSF's lines from the PRB to points of connection with the trackage rights lines at Hoxie and Jonesboro, Arkansas." BNSF-

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[18] BNSF had previously represented to the Board that "we think the densities are sufficient to permit the building of trains that will meet the customers' needs." Decision No. 44, 1 S.T.B. at 405 (quoting BNSF's counsel at oral argument).

93, p. 17; see also ESI-33, p. 8.[19] BNSF might have a slightly more efficient route if it were allowed to connect with the trackage rights lines at Hoxie and Jonesboro, but it is an effective competitive replacement for SP without that extra right.

BNSF is not entitled to the most direct, ideal route in every corridor and for every shipment. Thus, there are many instances in which BNSF's post-merger route is more circuitous than SP's pre-merger routes. Competing railroads rarely have identical routes, yet they compete effectively. As we pointed out in July, BNSF dominates Chicago-Bay Area intermodal traffic using a much longer route than UP uses. See UP/SP-387, p. 16.[20]

The Entergy situation is an example of BNSF's ability to more than replace the competition SP provided without precisely replicating SP's pre-merger route. Using its own tracks and subject to the agreed restrictions, BNSF is a much more effective competitor than SP could have been.

First, there is very little circuity in BNSF's post-merger route as compared to a pre-merger BNSF-SP joint-line route. With the agreed restrictions, BNSF's route for loaded

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[19] Neither BNSF nor its supporters claim that the geographic restriction prevents BNSF from serving as a competitive replacement for SP, which is not surprising, because it only affects traffic that would have moved on BNSF's own line along the Mississippi River between Memphis and St. Louis prior to the merger. See UP/SP-387, Rebensdorf V.S. at 3.

[20] The Board recognized that BNSF's ability to replace SP's competition depended on more than route mileage. The Board considered that SP was "essentially a single-track, low-density, high-cost railroad," which was often unable to capture business even when it could offer a shorter route because "[t]he level of service . . . offered by SP [was] below that offered by its competitors, and declining." Decision No. 44, 1 S.T.B. at 384. The Board also considered that "SP's poor financial condition [had] limited its access to capital necessary to renovate its plant and equipment so as to match the service quality and cost of service of its competitors. Thus, SP [was] a constrained, not a full competitor, with limited impact on the pricing actions of other western carriers." Id. at 390; see also Peterson Dep. at 21-26 (describing the importance of track speed, track capacity, positioning of terminals, and efficiency of classification yards and related facilities that handle traffic en route as factors that affect a railroad's competitiveness in addition to mileages).

trains from the Powder River Basin to the White Bluff turnout will be 1,447 miles. A BNSF-SP route for loaded trains to or from the Powder River Basin to the White Bluff turnout would have been 1,406 miles. Thus, BNSF's post-merger single-line route, with the St. Louis Gateway restrictions in place, is merely 41 miles, or 2.9 percent, longer than a pre-merger BNSF-SP route.[21] This difference has no competitive significance.

Entergy's calculations exaggerate the circuity of BNSF's post-merger route and are incorrect in two respects. Entergy's comparison entirely ignores the mileage from the PRB to BNSF's crossing of the trackage rights lines and thus misleadingly exaggerates a small overall difference in route length. See ESI-33, p. 14 n.12. An accurate comparison must begin with the traffic's point of origin in the PRB, because BNSF competes not on the basis of its route between Jonesboro and White Bluff, but rather on the basis of its route between the PRB and White Bluff. Moreover, Entergy wrongly compares BNSF's theoretical route without the St. Louis Gateway restrictions to BNSF's route with the restrictions in place. That comparison is irrelevant as it does not relate to the impact of the UP/SP merger. The correct comparison is between BNSF's routes before and after the merger: (a) BNSF's route with the restriction in place (BNSF's current option), and (b) a joint-line BNSF-SP route (BNSF's pre-merger option).[22]

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[21] The relevant segments (and miles) for the BNSF-SP route to White Bluff are: PRB (Reno Jct.)-Jonesboro (1,243 miles); Joneboro-Pine Bluff (142 miles); Pine Bluff-White Bluff turnout (21 miles). Empty trains would return using the same route. The relevant segments (and miles) for BNSF's post-merger route to White Bluff are: PRB (Reno Jct.)-Jonesboro (1,243 miles); Jonesboro-West Memphis-Pine Bluff (183 miles); Pine Bluff-White Bluff turnout (21 miles). Empty trains would likely return via a White-Bluff-North Little Rock-Bald Knob-Presley Jct.-Jonesboro routing (221 miles). BNSF's round trip for the BNSF-SP route would be 2,812 miles; its round trip for its post-merger route is 2,911 miles, or merely 3.5 percent longer than a BNSF-SP route.

[22] The difference is that the pre-merger joint line route could not have taken advantage of UP's line between the White Bluff turnout and a connection with BNSF at Hoxie, which is (continued...)

Second, BNSF offers single-line service to Entergy. SP could not provide single-line service because it did not serve the Powder River Basin. BNSF and Entergy argue that, prior to the UP/SP merger, BNSF could have interchanged the coal traffic with SP at Jonesboro. There is no evidence, however, that BNSF would have given up the traffic to SP at Jonesboro or that SP would have agreed to accept such a short haul. Even if they had agreed, it is doubtful that the joint-line rate would have been as favorable or more favorable to Entergy than BNSF's single-line rate.[23] Moreover, BNSF will be moving its trains on lines over which UP has established directional operations, rather than SP's single-track line between Jonesboro and White Bluff. See UP/SP-366, p. 20 (discussing improved train speed and reduced delays from train meets resulting from directional running); UP/SP-344, pp. 23-36 (describing decreased transit times resulting from directional running). BNSF's operations will therefore be more efficient, even with the restrictions, than SP's would have been.

BNSF will provide a more-than-sufficient alternative to a pre-merger BNSF-SP joint line route. BNSF will be able to offer single-line service without negotiating interchange arrangements or revenue demands with a second carrier. BNSF and Entergy will not be dependent on SP, a railroad whose "poor financial condition [had] limited its access to capital

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shorter than the combination of SP's line between the White Bluff turnout and Jonesboro and BNSF's line from Jonesboro to Hoxie.

[23] UP agrees with the Board's statement that "the difference between single-line service and joint-line service is less important in the coal unit train context," Decision No. 44, 1 S.T.B. at 472, but there are nonetheless advantages to single-line service. As applicants' witness Peterson explained: "Joint-line service is inferior not just because of the mechanics of interchange, the delays attendant upon negotiations between two companies, and the difficulty of coordinating two billing and customer service functions, but because separate railroads inevitably and inescapably have differing priorities often based on sharply differing lengths of haul (the so-called 'gateway watershed problem') which prevent them from agreeing on the best rate and service offering for the shipper." See UP/SP-22, Peterson V.S. at 42; see also UP/CNW Decision served Mar. 7, 1995, pp. 66-68.

necessary to renovate its plant and equipment so as to match the service quality and cost of service of its competitors." Decision No. 44, 1 S.T.B. at 390.[24] BNSF will take advantage of the directional operations that UP has established between Houston and Memphis. Finally, BNSF's route to White Bluff will be a mere 2.9 percent longer than a BNSF-SP joint-line route and the round-trip, utilizing directional running, will be merely 3.5 percent longer.

The Board has declined to impose additional conditions simply because some small amount of circuity exists between pre-merger and post-merger competitive routings. The Board recognized that the issue is not whether an alternative route is circuitous, but whether the alternative is "unduly circuitous." Oversight Decision No. 13, served Dec. 18, 1998, p. 16. In Oversight Decision No. 13, the Board rejected AL&M's request for an additional remedial condition. AL&M, a "3-to-2" shortline that had been served by UP, SP and KCS, argued that it should have a direct connection to BNSF in part because KCS's joint-line routings were circuitous as compared to the single-line routings of the post-merger UP. In that case, the KCS-IC route from KCS's connection with AL&M at Monroe to Memphis was 10 percent more circuitous than UP's route, and the KCS-IC route from Monroe to Chicago was 7 percent more circuitous than UP's route. The Board rejected AL&M's argument.[25]

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[24] See also UP/SP-384, Gray V.S. at 13 (explaining that for traffic moving from the Gulf Coast to Midwestern gateways via SP's Houston-St. Louis Corridor, "SP was late by two days or more on 60 percent of its shipments"); id. at 34 (noting that SP did not have funds to finance vital capacity enhancement projects, including "CTC and extended sidings on the 'Rabbit' line northeast of Houston," between Houston and Memphis); id. at 38 (explaining that "SP's investment in track maintenance before the merger was inadequate").

[25] By way of comparison, when the Board granted relief to TUE as a result of circuity concerns and preserved TUE's pre-merger BN-KCS-SP-BN 1,480 mile joint-line route as a competitive option, the next best non-UP/SP-dependent route was BNSF's 1,749 mile single-line route, which was 18.2 percent more circuitous than BNSF's pre-merger joint-line route and 15.8 percent more circuitous than UP's 1,510 mile single-line option. See Decision No. 44, 1 S.T.B. (continued...)

In Entergy's case, the circuity is much less than AL&M faced. Moreover, BNSF has competed effectively for Entergy traffic. Entergy reports that it has negotiated the terms of a rail transportation contract covering BNSF deliveries of PRB coal to White Bluff. See ESI-33, p. 7. Neither BNSF nor Entergy presents any evidence that the benefits of the current contract or the benefits of future competition will be lost if the St. Louis Gateway restriction remains in place.[26]

More important than what BNSF says is what BNSF does not say. BNSF does not claim that it entered into the contract with Entergy without being aware of the St. Louis Gateway restriction. It does not claim that it will seek to void the contract if the St. Louis Gateway restriction remains in place. It does not claim that it will not be competitive for Entergy's business if the restriction remains in place. BNSF bid on Entergy's traffic and won the business, knowing that it might not succeed in striking the St. Louis Gateway restriction. The evidence thus shows that BNSF has been able to use the rights it gained in the merger to serve as an effective competitive replacement for SP.

Like BNSF, Entergy does not claim that BNSF will be unable to provide competitive service. Entergy says that "BNSF has advised Entergy" that the St. Louis Gateway restriction will "significantly reduce the benefits afforded Entergy by the BNSF service." ESI-33, p. 14. Entergy does not claim that it would not have entered into its contract with BNSF if it

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at 471. TUE's situation was thus a far cry from the 2.9 percent circuity about which Entergy complains.

[26] BNSF carefully avoids the relevant test, which is whether its present alternative is as efficient and effective as its pre-merger alternative. BNSF says only that its traffic "would most efficiently move over BNSF's lines from the PRB to points of connection with the trackage rights lines at Hoxie and Jonesboro, AR" and that while it has other routes it will not be able "to compete as effectively against" UP if the St. Louis Gateway restriction remains in place. BNSF-93, p. 17.

were aware of the St. Louis Gateway restriction, or that it will seek to void its contract with BNSF if the restriction remains in place, or that it will not in the future seek to enter into contracts with BNSF.[27]

BNSF and Entergy obviously prefer to obtain a slightly shorter route between the PRB and White Bluff, but in almost every corridor one railroad would have a more efficient route if it were allowed unrestricted access over the lines of its competitors. The UP/SP merger, however, was not a license to restructure the western rail system without regard to competitive realities. See Decision No. 44, 1 S.T.B. at 418 ("We are also disinclined to impose conditions that would broadly restructure the competitive balance among railroads with unpredictable effects."). The Board did not require UP to allow BNSF to replicate all of SP's pre-merger routes. It required only that BNSF serve as an effective competitive replacement for SP. There is no indication that BNSF, with a route only 41 miles longer than the theoretical pre-merger BNSF-SP route, will be unable to provide competitive service to Entergy or to any other shippers that might conceivably be affected by the St. Louis Gateway restriction. Every indication is that BNSF has provided and will provide the competition that the Board expected.

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[27] Entergy is incorrect when it argues that UP's position undermines commitments UP made in settling a dispute with Entergy. UP stands by its commitment, which involved BNSF's use of the Pine Bluff-Little Rock line. The St. Louis Gateway restrictions have nothing to do with BNSF's ability to use the Pine Bluff-Little Rock line. UP never promised Entergy that BNSF would be able to use the Jonesboro and Hoxie connections in providing service to Entergy, and Entergy does not allege that UP made or implied any such promise. See ESI-33, p. 14 & n.11. UP has thus done nothing to interfere with the benefits that Entergy bargained for.

2. The Elvas-Stockton Restriction

BNSF argues that the Elvas-Stockton restriction is similar to restrictions that UP proposed and the Board rejected in Decision No. 61. Once again, BNSF's reliance on Decision No. 61 is flawed because the Board did not strike any operating restrictions in that decision.

UP offered BNSF overhead rights on SP's Elvas-Stockton line to help BNSF avoid the costs of constructing a new connection at Sacramento between two lines over which it had already obtained trackage rights: the UP Feather River Route between Weso, Nevada, and Stockton, California, and the SP Overland Route between Weso, Nevada, and Oakland, California. See Map No. 2. During the merger proceeding, BNSF decided that it wanted to operate intermodal trains between the Midwest and Stockton over SP's Overland Route to Sacramento and then over UP's Feather River Route to Stockton. This would have required BNSF trains to transit between the SP and UP routes at Haggin Junction, but there was (and is) no connection in the southeast quadrant of this junction.

The Settlement Agreement gave BNSF the right to construct a connection at its own expense, but a joint BNSF-UP inspection showed that a connection would be extremely expensive. As an accommodation to BNSF, UP gave BNSF trackage rights to run trains on the SP line from Sacramento (Elvas Tower) to Stockton. This line runs parallel to the UP line over which BNSF already had trackage rights. UP and BNSF expressly agreed that the Elvas-Stockton rights would be for overhead traffic only.

UP explained why it granted the additional rights when it submitted the Second Supplemental Agreement, which reflects UP's and BNSF's explicit agreement that BNSF could not serve new shipper facilities along the Elvas-Stockton line. See UP/SP-266, p. 6; id., Ex. A. p. 2, § 1(a), (b). Neither any party nor the Board ever objected to this restriction.

The Elvas-Stockton trackage rights – rights over an SP line granted as an accommodation to BNSF – are unique and unlike any of the trackage rights lines that the Board addressed in Decision No. 61. The Elvas-Stockton trackage rights involve SP, not UP lines. BNSF explicitly agreed to the restriction on these trackage rights. Furthermore, BNSF did not need the right to serve new industries and new transloads on the Elvas-Stockton line is to preserve competitive options or to ensure that BNSF has sufficient density to compete.

First, as discussed above, in Decision No. 61, the Board simply confirmed that it intended to impose the expanded new industries and transloads conditions in Decision No. 44 to all UP-owned trackage rights lines. It thus rejected UP's request to reconsider its decision to apply the conditions to several segments of UP-owned track. Decision No. 61, p. 4.

The Elvas-Stockton line was not a UP-owned track – the subject of Decision No. 61. It was an SP-owned track, and the parties had made it abundantly clear to the Board that BNSF did not have the right to serve new facilities located on SP's Elvas-Stockton line. See UP/SP-266, Ex. A, p. 2, § 1(a) & (b).[28] There is no indication in Decision No. 44 or Decision No. 61 that the Board intended to remove this one restriction, which was apparent on the face of the BNSF Settlement Agreement, even though, as noted above, the Board scrutinized the agreement and did not hesitate to strike other restrictions that had been placed on BNSF's use of the trackage rights lines. See p. 20, supra.

Second, contrary to BNSF's arguments, the Elvas-Stockton line is not comparable to the Placedo-Harlingen line, which the Board addressed in Decision No. 61. See BNSF-93, p.

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[28] The first amendment contained in the Second Supplemental agreement explicitly provided that BNSF would obtain access to "any new shipper facility . . . on the SP-lines listed in Section 1a (except the line between Elvas (Elvas Interlocking) and Stockton)." UP/SP-266, Ex. A, p. 2, § 1(b) (emphasis added).

14. In Decision No. 61, the Board declined to grant UP's request to reconsider whether the Board should have expanded the new industries and new transload conditions to UP's Placedo-Harlingen line. UP argued that SP had only overhead rights along that line, and thus could not have competed for siting of new industries or using new transloads. The Board replied that SP had its own lines that intersected the Placedo-Harlingen line at its endpoints and in the middle. Consequently, UP shippers could have sited new industries or new transloads on SP lines that intersected the Placedo-Harlingen line at both ends and the middle. SP shippers on those lines could have sited new industries or new transloads on UP's Placedo-Harlingen line. BNSF was not granted trackage rights (and thus the right to site new industries or serve new transloads) on the SP lines in question. Thus, the Board explained, the relief UP sought "would [have] result[ed] in the elimination of competitive siting options that existed prior to the merger." Decision No. 61, p. 11.

The Elvas-Stockton restriction does not similarly eliminate competitive siting options or new transload options that existed prior to the merger for shippers located on or near the Elvas-Stockton line. UP shippers have kept their siting alternatives because BNSF has the right to site new industries and serve new transloads at both ends of the Elvas-Stockton line. SP shippers' siting alternatives also are preserved because BNSF has the right to site new industries and serve new transloads on UP's line between Sacramento and Stockton, over which BNSF gained trackage rights.

Third, contrary to BNSF's arguments, the Elvas-Stockton situation is not comparable to the Craig Junction-SP Junction, Texas, situation that the Board addressed in Decision No. 61. See BNSF-93, p. 14. In Decision No. 61, the Board declined to grant UP's request to reconsider expanding the new industries and new transload conditions to a second

trackage rights line that UP provided BNSF for the purposes of handling CPSB traffic. UP had argued that the second route was an "alternative" route, and that BNSF could already take advantage of the new industries and transload conditions on the line that UP had first provided. The Board disagreed that the second line was an "alternative" route, concluding that "this 'alternative' route is the only route that BNSF and CPSB ever contemplated for this traffic." Decision No. 61, p. 11. Moreover, BNSF had never agreed to restrict its rights to use the second route. See Decision No. 52, served Sept. 10, 1996, pp. 2-5 (noting that UP and CPSB had agreed on the second route, and reserving judgment on BNSF's argument that it was entitled to serve new industries and new transloads on the line).

Upholding the Elvas-Stockton restriction would not similarly limit BNSF's rights on the only route it ever contemplated using or restrict BNSF's rights without its consent. BNSF contemplated using the UP route, not the SP route. BNSF-93, p. 13. BNSF also admits that it agreed to include the restriction in the Settlement Agreement. Id.[29]

Fourth, contrary to BNSF's arguments, removing the restriction on the Elvas-Stockton line is not need to ensure that BNSF has sufficient density on its trackage rights lines. As noted above, the Board did not remove the restriction when it affirmed BNSF's rights under the CMA agreement to ensure that BNSF would have sufficient density. Moreover, as BNSF admits, it never contemplated using the Elvas-Stockton line when it entered into the BNSF

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[29] BNSF suggests that had applicants not granted the Elvas-Stockton rights, it would have fought to obtain an alternative to its contemplated Haggin Junction connection, because the costs of constructing the connection would have been prohibitive. BNSF-93, pp. 13-14. But UP was not obligated to provide alternative routes unless "the trackage rights granted under this Agreement [could not] be implemented because of lack of sufficient legal authority to carry out such grant." UP/SP-22, p. 331. BNSF does not claim that the parties lacked legal authority to proceed with its original plans, and thus it had no ability to force the applicants to provide the additional trackage rights.

Settlement Agreement – and thus neither BNSF nor the Board could have contemplated that BNSF's access to new industries or new transloads on that line would provide traffic density to support its "2-to-1" operations.

In addition, traffic density along BNSF's primary trackage rights line – UP's line between Sacramento and Stockton – is clearly sufficient for BNSF to maintain efficient operations. BNSF uses the UP line as part of its I-5 Corridor route, where it clearly has no traffic density concerns. BNSF reports that it operates three daily southbound trains, two daily northbound trains, and twice weekly intermodal trains, and it boasts that it "has enjoyed strong growth in traffic volumes" in the I-5 Corridor. BNSF-PR-20, p. 53.

Finally, it is irrelevant that UP granted BNSF access to two new shipping facilities on the Elvas-Stockton line.[30] UP erred when it informed BNSF that it had access to those facilities. UP has acknowledged this error and will not seek to undo it. Under UP's proposed draft of the Restated and Amended BNSF Settlement Agreement, BNSF will be allowed to continue to serve both shippers. These two errors provide no reason to give BNSF rights it agreed not to seek.

C. The Board Should Not Impose a New "Team Tracks" Condition

BNSF acknowledges that it presently has no right to use or acquire SP or UP team tracks, and thus that its proposal would add a new term to the BNSF Settlement Agreement. BNSF-93, p. 19. The Board should reject BNSF's team tracks proposal because it would

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30 NITL suggests that this error raises questions about "whether UP originally believed that the trackage rights it granted to BNSF in that corridor were restricted to overhead rights only." NITL-27, p. 5. There is no question, however, that the Elvas-Stockton rights granted in the Second Supplemental Agreement were restricted to overhead traffic. See UP/SP-266, Ex. A, p. 2, § 1(a) & (b).

constitute a new condition on the merger and because such a condition is unnecessary and potentially pernicious. UP already cooperates with BNSF regarding tracks that UP no longer needs.

BNSF's proposal is unnecessary because the BNSF Settlement Agreement effectively addresses any pre-merger UP-SP competition using team tracks. As UP's John Rebensdorf explained, BNSF does not need access to UP's or SP's former team tracks to compete because team tracks are inexpensive to construct. UP/SP-287, Rebensdorf V.S. at 9. Consequently, the BNSF Settlement Agreement simply grants BNSF the right to construct its own team tracks. See BNSF Settlement Agreement § 9(h). Similarly, the agreement obligated BNSF to construct intermodal and automotive facilities, both much more expensive than team tracks.

BNSF acknowledges that it gained the right to construct its own team tracks, but alleges that UP has made it difficult in practice for it to establish its own team tracks. BNSF-93, p. 19. BNSF cites no specifics, providng only empty allegations. BNSF fails to point to a single instance in which it was unable to replicate pre-merger competition between UP and SP because it lacked the rights it now seeks to gain through a new team tracks condition.

BNSF's proposal is not only unnecessary, it would cause disputes and could harm UP's ability to serve its own customers. BNSF asserts that there is "no valid reason for not requiring UP to offer [BNSF] team tracks that it no longer uses or needs," BNSF-93, p. 20, but there are two valid reasons.

First, as Mr. Rebensdorf explained, BNSF's proposal would result in ongoing disputes between UP and BNSF over what constitutes a "team track." Team tracks often are difficult to identify, because they are used only temporarily as team tracks. UP often uses

maintenance tracks, yard tracks, and lead tracks to industries as temporary team tracks. UP keeps no records of these uses, and UP has no record of the tracks that it or SP once designated as team tracks. UP/SP-287, Rebensdorf V.S. at 9-10. If BNSF's proposal were granted, the Board could be forced to referee disputes based on oral histories and speculation about how tracks were used in 1996.

Second, as Mr. Rebensdorf also explained, BNSF's proposal could potentially require UP to sell tracks that it needs for operating purposes. UP uses tracks interchangeably as team tracks and for other purposes. UP needs most of the tracks that once were used as team tracks. UP/SP-287, Rebensdorf V.S. at 9-10. If BNSF's proposal means that UP must offer to sell tracks that were used as team tracks at the time of the merger but that are no longer used as team tracks today, UP might be forced to sell tracks that it needs to serve its customers.

ACC "shares UP's view that BNSF's team track proposal would venture into an area not specifically addressed by the BNSF or CMA settlement agreements." ACC-1, p. 7. It further notes that "for the reasons stated by UP, it would be difficult and intrusive to implement." Id. ACC merely asks the Board to clarify that UP must work cooperatively with BNSF to enable BNSF to construct its own team tracks and ancillary facilities. Id.[31] UP has no objection to this suggestion.

UP will continue to implement in good faith its agreement to allow BNSF to construct, or have constructed for it, team tracks and other ancillary facilities along the trackage rights lines. BNSF Settlement Agreement § 9(h). Moreover, UP has demonstrated throughout the oversight period that it is often willing to lease or sell unused tracks of any type to BNSF. If

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[31] NITL does not comment on this dispute in its filing.

BNSF were to make UP an offer to buy an unused track at a "2-to-1" location, UP would entertain the offer as it has in the past. There is no justification for BNSF's request that the Board impose a new condition on the merger that would force UP to sell former team tracks to BNSF.

D. The Board Should Reject BNSF's Expansive Definition of "Transload Facilities"

The BNSF Settlement Agreement does not contain a definition of "transload facilities." The Board has provided interpretations of this term in specific situations. UP proposed a definition that it believes is consistent with the Board's decisions. BNSF's proposal, by comparison, would potentially allow every shipper on over 4,000 miles of trackage rights lines to build its own new transload and obtain BNSF service. BNSF's definition directly conflicts with the Board's admonitions that the transload condition should be applied "in a manner that would not result in direct BNSF access to what were UP's or SP's exclusively served shippers along the trackage rights lines" and that "only certain types of transload facilities (i.e., only 'legitimate transload operations') would qualify for the use of this condition." Decision No. 75, 2 S.T.B. 697, 699, 702 (1997) (emphasis added).

After reviewing the comments that have been submitted, however, UP has concluded that the Board's approach of resolving disputes on a case-by-case basis is preferable, and neither railroad's definition should be adopted now. Most new transloads create no conflict between the railroads, and those that do arise out of unique circumstances. As a result, attempts to define "transload facilities" in the abstract are likely to create additional conflicts when applied to unique facts.

The Board identified the problems associated with adopting a single definition of "transload facilities" in Oversight Decision No. 10, 2 S.T.B. 703 (1997). The Board explained

that the determination of whether a new transload facility is legitimate or instead amounts to an "overreach" is "fact-specific; it cannot be made in a vacuum, nor can it be broadly defined." Id. at 716. The Board further explained that "each determination will no doubt be unique, given the expected differences in each shipper's circumstances." Id. The Board thus concluded that "broadly applicable rules" were not warranted. Id.

The Board's decisions provide sufficient guidance for the parties to follow and render unnecessary any need for a more specific definition of "transload facilities." In Decision No. 61, the Board explained that the transload condition applied only to "legitimate transload operations" and should not be used to "allow BNSF to operate as if it directly reached all exclusively served UP/SP shippers on the trackage rights lines." Decision No. 61, p. 12. The Board outlined some of the factors to be considered in determining whether a proposed facility was a "legitimate transload operation." These factors included whether the operation necessarily entailed "the construction of a rail transload facility as that term is used in the industry," and whether it entailed "operating costs above and beyond the costs that would be incurred in providing direct rail service." Id.

The Board further clarified the meaning of "transload facilities" in Decision No. 75, which involved a dispute between BNSF and UP over a specific facility's status as a new transload facility. In Decision No. 75, the Board reiterated that its "clearly stated intent in imposing the new facilities and transload condition was to continue and replicate the indirect competition that would otherwise be lost as SP is absorbed into UP," and to do so in a manner that would not result in direct BNSF access to what were UP's or SP's exclusively served shippers along the trackage rights lines. Decision No. 75, 2 S.T.B. at 699. The Board supplied an example of its analysis, explaining that the disputed facility was legitimate because it entailed

"construction and ongoing operational and maintenance costs over and above those that would be incurred" in providing direct rail service, and because it was not a "contrivance to obtain a competitive option that was not available to the shipper prior to the merger." Id. at 701.

No single definition of "transload facilities" can fully capture the considerations the Board has described in its decisions. BNSF's definition is too broad and conflicts with the guidance the Board has provided. A transload whose operator owns the product being transloaded will often be a "contrivance to obtain a competitive option that was not available to the shipper prior to the merger." See Decision No. 75, 2 S.T.B. at 701. Yet BNSF would classify every such transload as "legitimate." UP's definition is too narrow and perhaps too broad. UP's definition would discourage many illegitimate attempts by shippers to build their own "new transloads" adjacent to their existing shipping facilities simply to gain service by a second railroad, but it might also discourage some legitimate activity.

The Board has provided the parties with significant guidance, and as a result of that guidance, there have been few disputes. Where the parties have been unable to agree, the Board provided a quick resolution. UP thus believes that the Board should decline to adopt either definition of "transload facilities," but remain available to resolve disagreements on a case-by-case basis if any arise.

## CONCLUSION

The Board should not allow BNSF to obtain new concessions and add new burdens to the UP/SP merger five years after consummation, especially in light of BNSF's extraordinary success in competing with UP using the conditions imposed by the Board. No commentator has demonstrated a failure of competition or of the Board's conditions. The record

offers no basis for additional or broader conditions. The Board should deny BNSF's attempts to make additional changes to the BNSF Settlement Agreement to BNSF's competitive advantage.

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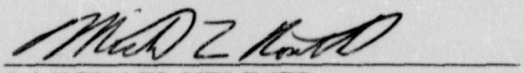

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September 19, 2001

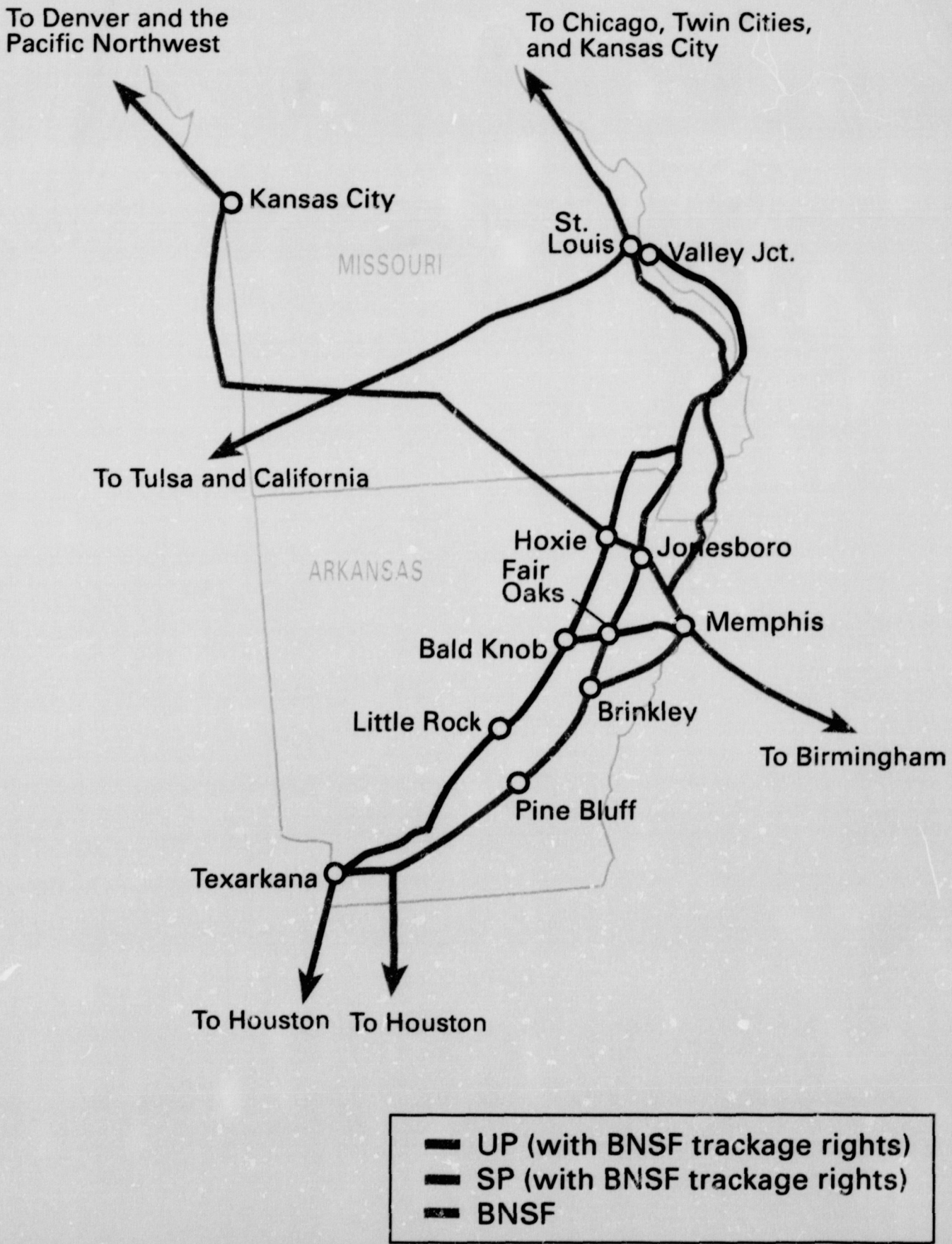
**CERTIFICATE OF SERVICE**

I hereby certify that on this 19th day of September, 2001, I caused a copy of the foregoing "Union Pacific's Reply to Comments on the Restated and Amended BNSF Settlement Agreement" to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all parties of record.

Michael L. Rosenthal

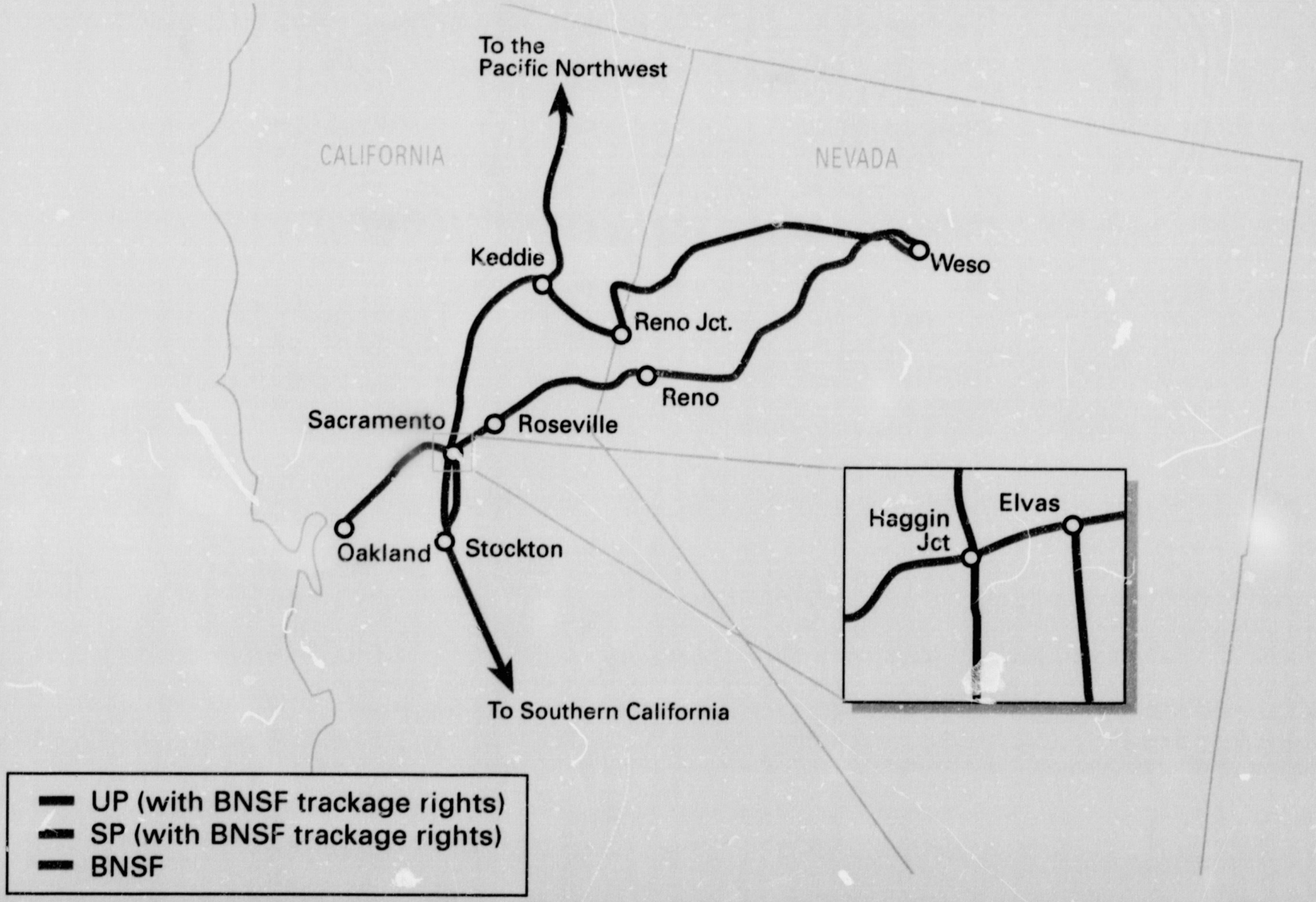
Map # 1

# Bald Knob/Fair Oaks Agreement



Map # 2

# Elvas/Stockton Agreement



Deposition
Excerpts

BEFORE THE

SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

-- CONTROL 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

Washington, D.C.

Monday, February 5, 1996

Deposition of RICHARD B. PETERSON, a witness herein, called for examination by counsel for the Parties in the above-entitled matter, pursuant to agreement, the witness being duly sworn by JAN A. WILLIAMS, RPR, a Notary Public in and for the District of Columbia, taken at the offices of Covington & Burling, 1201 Pennsylvania Avenue, N.W., Washington, D.C., 20044, at 10:10 a.m., Monday, February 5, 1996, and the proceedings being taken down by Stenotype by JAN A. WILLIAMS, RPR, and transcribed under her direction.

sizes, the switching at the different terminals all can contribute to that.

So this analysis was not intended to look at costs for specific movements, it was a more general description of competition and relative costs, though, because the things I mentioned are really surrogates for relative costs, not absolute costs, but relative costs, between the carriers. And we looked at that closely in order to do our analysis.

Q. But your analysis was confined to those factors you enumerated?

A. No.

Q. But you didn't look at variable cost analysis. Did you look at elasticity studies?

A. No.

Q. How did you ascertain whether one railroad had an advantage over another railroad on a particular route?

A. Well, again it's hard to say that one railroad has, you know, an advantage in all respects over another carrier. But clearly we looked at first mileage which is very basic to a carrier's competitiveness. And then -- and I don't think I'll repeat them, we looked at all

those other factors that I mentioned which can also contribute in varying degrees to a railroad's competitiveness.

For example, if you're competing for high-speed intermodal traffic and there's a lot of it between the West Coast and California, then you need to look at track speeds, the amount of double track, what potential schedules each railroad could generate. Those factors are appropriate there.

If you're looking at moving carload business, then other factors come into play. While, in the intermodal area, the strength of your intermodal terminals and their positioning is important, your network of gathering lines and access to carload industry becomes more important as do your switching yards and how efficient they are and how modern they are and how strategically located they are. So you really can't generalize, but we've been doing this a long time and we know the factors that are important in identifying carriers' competitiveness in these major corridors, especially the Western corridors.

MR. ROACH: You said between the West

Coast and California. I think you meant between the West Coast and Chicago.

THE WITNESS: Oh, Chicago, I'm sorry.

BY MR. MOLM:

Q. Let's stick with intermodal traffic for a moment. What are the primary factors you look at, the most important? Is it mileage again?

A. Well, we look at in the case of intermodal traffic many things. I could refer you to the statement and we have a section on intermodal traffic, we deal with intermodal traffic in these corridors.

We also did an extensive intermodal traffic diversion study. But certainly mileage is important, the factors I mentioned a couple minutes ago, track speed, track capacity, intermodal terminals at each of the end points, other train schedules literally, the existing schedules or potential schedules that you're able to put together which in some cases depend on volume but in other cases don't because of the way that traffic can swing and the way that carriers can put on new services.

Q. Well, do you have different factors, different criteria for carload traffic than you

do for intermodal traffic?

A. Well, many of the factors are the same. Certainly your route efficiency is important, perhaps the speed limits and those kinds of things become a little less important, certainly the existence of intermodal terminals aren't relevant. And then, as I said a couple minutes ago, we need to look more at the ability of a carrier to exploit the physical route that he has by serving industries at each end through a gathering network and through the terminals, classification yards and related facilities that exist en route to handle the business.

Q. Wouldn't the efficiency of a classification yard be more important for carload traffic than it would for intermodal traffic?

A. Yes.

Q. What percentage of Union Pacific traffic is carload traffic?

A. Well, it's -- carload traffic can have different definitions. But, when you say percentage, you can measure the percentage based on tonnage, carloads, or revenue. And they come out a lot different. But I think, as far as our intermodal and coal traffic now which go in unit

trains which would not be considered carload traffic, we kind of think on UP of the expedited traffic and the carload traffic and then what's called bulk traffic, bulk traffic being unit grain trains and unit coal trains primarily.

The intermodal and coal I think amount for probably now over half of our units of traffic; half are carloads, carload certainly less than half, I can't recall the exact numbers. I can get them easily for you, though, if you'd like.

Q. Do you use different criteria, different factors for your bulk movements than you do for your intermodal units?

MR. ROACH: Object to the form of the question. Factors with respect to what?

MR. MOLM: What criteria does he use. He enumerated the criteria initially when we started this line of examination. I'm just trying to break it down.

MR. ROACH: Besides the relative competitiveness of routes.

THE WITNESS: Would you repeat the question, please.

BY MR. MOLM:

Q. Do you utilize different criteria, different factors when you're assessing bulk movements such as coal and grain in contrast to intermodal traffic?

A. We use many of the same factors, mileage is important, and so forth, grades become sometimes more important, grades because, whereas, a high-speed intermodal train can be powered up and still make schedule and still operate over heavy grades, bulk trains due to their weight would require a lot more locomotives or in some case helper locomotives or in some cases even to be split into two trains. And so grades become relatively more important.

Track capacity can be important because of the way the slow trains conflict -- slow bulk trains conflict with the high-speed trains. And that's as you well know an important benefit of the -- very important benefit of this merger. Classification yards have less relevance, but servicing facilities are very important and, of course, the route network, to be able to connect efficiently the mines with the primary destinations.

Q. Am I correct in understanding that you

Q. Explain it.

A. Okay. Our goal was to identify all two-to-one competitive situations between UP and SP. We first looked at as you say two-to-one points. And we thought now how are all the ways that UP and SP compete for shippers' business at these two-to-one points.

And we thought, well, one way is by intermodal service, TOFC, COFC service, so we did an analysis of that and found that, with new intermodal service at Salt Lake City and at Reno and BN/Santa Fe's very extensive existing network of intermodal terminals, all intermodal situations would be covered.

We then did the same for automotive business and found pretty much the same answer. With BN/Santa Fe's ability to put in intermodal terminals -- intermodal and automotive facilities at any of the two-to-one points but especially Salt Lake City and Reno, where we and SP both had them, that would cover the SP/UP territory. And we made a complete review of this.

Then we said, well, now we have carload business, your individual carload shippers and how are they served jointly. And really the

administrative functions in railroading.

And we're a participant in that study and that was helpful because we had already done a lot of that work and we put that to good use and identified all the shippers who are open to reciprocal switching at each of these terminals and then got the SP people involved and that made some good cross-checks and we did that.

But it would have been a mistake to stop there. As we discussed earlier, joint facility agreements between railroads allow joint service. And so a guy on my staff got -- and again we're fortunate because our joint facility group has in the last couple years computerized all our joint facility agreements so we have them on summaries of each one in a computer database.

We got those out, they're in my work papers. We went through each one of them to identify the actual areas and customers where there is a joint facility agreement that says SP will run a switch engine and serve the industries on behalf of both UP or SP or whatever.

And we also cast out to our regional salespeople and asked them if they could think of anyplace that we might have missed. And then

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UP/SP-388





BEFORE THE
SURFACE TRANSPORTATION BOARD

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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

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**UNION PACIFIC'S REPLY TO COMMENTS**

The filings in this fifth year of general oversight of the UP/SP merger confirm that the Board may terminate this proceeding. UP's report demonstrated that the UP/SP merger has achieved the public benefits that UP and SP had predicted while enhancing rail competition. BNSF's report confirms that BNSF is an "aggressive and effective competitor" using the rights it obtained in the UP/SP merger. Not a single participant challenged the merger's benefits or presented any evidence that the Board's conditions failed to sustain rail competition. Accordingly, the Board may confidently allow the oversight period for the UP/SP merger to close as scheduled.[1]

In Part I of this short reply, UP summarizes the evidence in UP's and BNSF's 2001 annual oversight reports, which prove that rail competition is stronger than ever in the

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[1] UP understands that its fifth annual report was the final report required under the Board's oversight condition. See Decision No. 44, 1 S.T.B. 233, 420-21 (1996). Unless the Board advises otherwise, UP does not intend to file additional quarterly reports.

West. In Part II, we discuss comments filed by the United States Department of Transportation ("DOT"), the State of Utah ("Utah"), and the Cowboy Railroad Development Company ("CRDC") – the only parties that filed comments in the general oversight proceeding. None of these parties presented evidence of competitive harm or that the Board's conditions have been less than fully effective. In light of the Board's availability to enforce its conditions in the future, general oversight is no longer warranted.

UP responds in a separate filing to comments by BNSF, NITL, ACC (formerly, CMA), and Entergy regarding the four unresolved issues in UP's and BNSF's effo to update the BNSF Settlement Agreement.[2] UP shows that BNSF's proposals for resolving these issues would result in substantive changes to the BNSF Settlement Agreement that are not justified by any loss of effective competition.

## I. THE BOARD'S CONDITIONS PRESERVED AND ENHANCED COMPETITION

For four years in a row, the Board has found that the conditions it imposed on the UP/SP merger prevented competitive harm. Other than to address effects of the service crisis in 1997 and 1998, the Board has found no reason to modify those conditions in this proceeding. The filings this year provide no basis for Board action and no reason to extend general oversight of the UP/SP merger. As summarized below, only UP and BNSF addressed the health of rail competition, and they showed that it is alive and well.

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[2] See UP/SP-389. CPSB filed comments noting several respects in which the current draft of the Settlement Agreement does not conform to the prior agreement among CPSB, BNSF, and UP regarding amendments to the BNSF Settlement Agreement. See CPSB-15, p. 4. As CPSB notes, UP and BNSF intend to correct these drafting oversights. See id.

A. UP's Uncontradicted Evidence Demonstrates That Competition Is Strong

UP's fifth annual oversight report demonstrated that the merger achieved the public benefits UP and SP had predicted and that the Board's conditions effectively preserved and enhanced competition. UP showed that the merger saved the SP system. UP/SP-384, pp. 4-32. The merger also improved safety, expanded single-line service, created shorter and more efficient routes, improved service, lowered UP's costs, and increased capital investment. See id. at 32-41.

Furthermore, the merger, as conditioned by the Board, promoted rail competition in the West. UP showed that the merger strengthened competition for "2-to-1" shippers, "3-to-2" shippers, shippers of key commodities affected by the merger, and shippers in every rail corridor and region of the country affected by the merger. See id. at 58-121. Freight rates over the five-year oversight period did not increase for any traffic group potentially affected by the merger and decreased for most. See id., Confidential App. E. Hundreds of specific examples showed how shippers benefited from the enhanced competition that the merger produced. See id., Confidential App. A through D, F through J. BNSF continued to increase its trackage rights traffic, offering efficient, competitive service. See id., Compliance App. at 8-12. The Board's new industries, transload, and build-out conditions, imposed to preserve indirect competition, ensure that competition will expand long after the oversight period ends. See UP/SP-384, pp. 121-31.

No commentator in this final round of oversight challenged UP's evidence. Because the Board's conditions have been effective, no party has presented evidence during five years of oversight proceedings that the merger has resulted in competitive harm.

B. BNSF's Evidence Confirms That General Oversight Is Not Needed

BNSF's oversight report confirms that BNSF is effectively replacing competition between UP and SP. BNSF correctly claims that it "has been and continues to be an aggressive and effective competitor utilizing the rights it obtained pursuant to the BNSF Settlement Agreement and the conditions imposed by the Board." BNSF-PR-20, p. 2. As it always does, BNSF describes several minor implementation issues of the types that BNSF and UP have been resolving privately for years. These issues, many of which have already been resolved, provide no justification for extending Board oversight.

1. BNSF's Evidence Confirms That the BNSF Settlement Agreement and the Board's Conditions Are Maintaining and Enhancing Competition

By any measure, BNSF has indeed proven to be an "aggressive and effective competitor." BNSF-PR-20, p. 2. As BNSF explains, it "has implemented many new products and services to aggressively compete for traffic that it gained new or expanded access to as a result of the merger conditions." Id. at 6. BNSF reports that "[t]hrough its marketing and sales campaigns, [it] has identified more than 500 '2-to-1' shipper facilities, more than 430 customers on '2-to-1' shortlines, 17 existing transload facilities at '2-to-1' points, [and] more than 60 shipper facilities accessed by virtue of conditions in the [CMA] Agreement." Id. at 5.

BNSF's aggressive marketing efforts have paid off handsomely. BNSF reports that its traffic volume on UP lines has grown steadily over the five-year period, as have its loadings and deliveries. See id. at 5-6. Before the merger, BNSF told the Board "that it would grow the traffic associated with its rights . . . to the size and scale of a new Class I railroad." Id. at 4. BNSF has met that commitment and, in fact, "has exceeded that goal." Id. Even though it has already exceeded its goal, BNSF says that it "anticipates continued customer growth and commercial success of its UP/SP franchise." Id. at 7.

BNSF has competed successfully for the traffic of "2-to-1" shippers using its trackage rights and access rights, and it has benefited shippers by forcing UP to reduce rates to retain the business. See UP/SP-384, Confidential App. B & C. BNSF also reports that it "has served as an effective competitive alternative to UP" in the Central Corridor, meeting "its pre-merger projections for traffic using its Central Corridor rights." BNSF-PR-20, pp. 23-24. BNSF's report on its trackage rights operations further confirms that BNSF is an effective competitor providing efficient, attractive service that includes daily service on all major routes. See id. at 7-56.

BNSF also provides effective indirect competition using the Board's conditions. BNSF reports that it has identified and made its service available to more than twenty new facilities and more than twenty transload facilities on the UP/SP lines. See id. at 62-63. BNSF is aggressively using opportunities to build new lines to serve UP shippers. On August 30, BNSF sought Board authority to construct a 13-mile build-in to several plastics and chemical customers in the Bayport Industrial District southeast of Houston. BNSF will use its build-in rights under the Settlement Agreement to obtain trackage rights between Houston and the build-in connection. See Finance Docket No. 34079, San Jacinto Rail Ltd. -- Authority to Construct – & The Burlington Northern & Santa Fe Ry. – Authority to Operate – Petition for an Exemption From 49 U.S.C. § 10901 – Build-Out to the Bayport Loop Near Houston, Harris County, Texas, filed Aug. 30, 2001. BNSF also reports that its separate "build-in to UCC's Seadrift plant is currently planned and is being progressed," and it expects to serve a build-out from Entergy's White Bluff Station in Arkansas to a former SP line. BNSF-PR-20, p. 63. BNSF is a far more aggressive competitor than SP was or could have hoped to be. See UP/SP-384, Gray V.S. at 39-44 (describing SP's potential strategies for reducing services had the merger not occurred).

BNSF's oversight report leaves no doubt that BNSF has served as an effective replacement for the competition that would otherwise have been lost when UP and SP merged.

2. BNSF's "Issues" Do Not Justify Extending Oversight

As in its prior quarterly reports, BNSF lists a number of "issues" arising out of its operations on UP. The Board has never found a reason to act on BNSF's quarterly list of issues, and this latest list deserves the same treatment. BNSF and UP can and should solve these issues without assistance from the U.S. Government. We agree with the Board's previous statement in response to similar BNSF complaints that there is "no reason why BNSF and UP should not be able to work out these sorts of issues privately." General Oversight Decision No. 13, served Dec. 18, 1998, p. 10 n.34.

UP has relied on the Joint Service Committee and other avenues short of Board intervention to resolve issues that have arisen out of BNSF's activities. For example, BNSF's recent proposal regarding the slotting of unit coal trains into the MERC dock at Superior, Wisconsin, is inconsistent with BNSF's obligations under the Settlement Agreement to provide UP with equal handling, but UP intends to pursue the matter directly with BNSF rather than seek Board intervention. See BNSF Settlement Agreement § 8(c) (granting UP access to the MERC dock).

The railroads are resolving or, in many cases, have already resolved the matters that BNSF describes. Indeed, several of BNSF's "issues" are old complaints that were resolved long ago. The BNSF-UP Joint Service Committee, effective in resolving such matters, is considering others and will continue to meet.

Although BNSF and UP should resolve the remaining issues without Board assistance, we address each issue in an addendum.

3. Other Issues Between BNSF and UP Do Not Require Extension of Oversight

In addition to the issues involving amendments to the BNSF Settlement Agreement, which are discussed in a separate filing, UP and BNSF are attempting to resolve two other disputes. These disputes, which UP has previously outlined for the Board, involve the method for adjusting trackage rights fees under the BNSF Settlement Agreement and the implementation of the I-5 Proportional Rate Agreement under the BNSF Settlement Agreement. See UP/SP-385, pp. 5-9; see also BNSF-PR-20, pp. 118-20. As of now, UP remains hopeful that the parties will be able to resolve their disagreements.

Trackage Rights Fees. Several months ago, BNSF claimed that UP had failed to make required downward adjustments to the trackage rights fees BNSF pays UP under the BNSF Settlement Agreement. BNSF unilaterally withheld trackage rights fees that UP believes BNSF owes. BNSF did not, however, refund the trackage rights payments it receives from UP under the same agreement, even though the two railroads are to pay each other the same fees.

BNSF and UP continue to negotiate several technical disputes regarding the annual adjustment of trackage rights fees to reflect changes in UP costs. Each party has proposed to compromise one or more of these disputes in the other's favor. UP hopes that the remaining disputes can be resolved in the same spirit of cooperation. If the parties do not successfully resolve the remaining issues, they will arbitrate the disputed issues. Board intervention should not be necessary.

I-5 Proportional Rate Agreement. As UP previously reported, UP concluded that it was at a competitive disadvantage in competing with BNSF in the I-5 Corridor. As a result of the UP/SP merger, BNSF obtained a new single-line route between Vancouver, B.C., and Southern California, the first such single-line route in history. UP was to maintain competition

against this single-line route by replicating the pre-merger SP-BNSF interline route in the I-5 Corridor. Under the I-5 Proportional Rate Agreement, BNSF was to provide rate factors for BNSF service north of Portland, Oregon, competitive with the rates BNSF offers for its single-line services. UP uses those rate factors, in combination with its own rates south of Portland, to compete against BNSF.

UP concluded last year that BNSF's rate factors were inflated, depriving UP of the ability to compete effectively. UP notified BNSF of several failures to carry out the I-5 Proportional Rate Agreement. BNSF acknowledged some of these failures and took steps to correct them. For example, it adopted a more accurate method of allocating allowances, rebates, and other rate reductions, replacing its use of incorrect averages. It modified computer programs that had understated shipment weights, thereby increasing the rate factors and reducing UP's competitiveness. BNSF also modified its data systems so that it could report more accurate shipment weights. It corrected its use of inaccurate mileages. It made system changes to exclude revenues associated with voided waybills. BNSF also acknowledged that additional modifications would be necessary, requiring computer work into 2002.

BNSF and UP subsequently commissioned an independent audit of other aspects of BNSF's compliance with the I-5 Proportional Rate Agreement. The audit report and subsequent discussions between the parties identified two significant issues and a number of minor problems. First, the audit confirmed that BNSF, notwithstanding contrary representations to the Board and UP, had failed to reduce its rate factors to account for several credits BNSF gives shippers on movements from the Pacific Northwest to locations not served by UP in the Southwest. BNSF recently proposed a corrective procedure, which UP is reviewing. Second, BNSF acknowledges that it will not permit its shippers who wish to use the I-5 Proportional Rate

Agreement to use the majority of BNSF's freight cars of certain car types. BNSF admits that it inaccurately told both UP and the Board that BNSF would allow UP to participate directly in BNSF's restrictive equipment programs. UP believes that BNSF's policies violate several of BNSF's duties under the I-5 Proportional Rate Agreement, and particularly BNSF's obligation to supply cars without inquiring whether a shipper plans to ship via BNSF's single-line route or via BNSF-UP. UP and BNSF continue to negotiate this dispute. The parties also continue to discuss a number of less significant problems identified by the audit.

UP has not yet determined how it will proceed if these disputes cannot be resolved amicably.

The conclusion of the oversight period would not prevent UP or BNSF or any other party from properly invoking the Board's jurisdiction to address merger-related concerns arising out of Board conditions. The formal oversight process, however, has served its purpose: It has demonstrated that the Board's conditions have worked as intended. Oversight of the UP/SP merger should end.

## II. OTHER COMMENTATORS PRESENT NO EVIDENCE OF COMPETITIVE FAILURE

### A. United States Department of Transportation

DOT says it will "remain neutral" until after it reviews other parties' submissions. DOT-6, p. 2.[3] It comments only on UP's safety record. DOT commends UP on its successful efforts to reduce reportable injuries and to reduce collisions between vehicles and trains at grade

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[3] DOT's deviation from Board's schedule would prevent UP and BNSF from responding to DOT's comments. UP reserves its right to respond to any late comments that DOT may file if the Board accepts DOT's untimely submissions.

crossings, but it expresses concerns that UP's overall rate of train accidents has risen as compared to last year. See id.

As UP's oversight report makes clear, the merger improved safety. Working for UP is safer than working for SP before the merger, and UP continues to improve safety for all of its workers. The consolidated UP/SP injury rate was 230 percent higher in 1993 than in 2001. See UP/SP-384, pp. 32-33. UP has also worked hard to reduce collisions between vehicles and trains at grade crossings. UP has slashed grade-crossing accidents by more than a third since the merger. See id. at 33.

DOT notes a "particular concern" regarding derailments. DOT-6, p. 3. UP has taken specific steps over the past year to increase its focus on preventing derailments. First, at the system level, UP's Derailment Prevention Steering Committee has established "Derailment Prevention Key Initiatives." High-ranking operations officers monitor performance on the key initiatives (e.g., replace mainline jointed rail with continuous welded rail) and present monthly status reports that measure specific, quantifiable indicators (e.g., miles of jointed rail replaced). If a monthly or year-to-date target is not being met, an action plan is developed to correct the situation. Second, at the local level, UP has increased its emphasis on derailment prevention by adding to its superintendents' evaluation process each superintendent's success in meeting personal targets for reduction in derailment incidents and costs.

UP strives to improve its safety record each year. The number of safety incidents can vary from year to year, however, so the overall trend is most important. In the five years since the merger, overall accidents are down 7 percent. Incidents caused by human factors are down 10 percent, equipment-related incidents are down 21 percent. Track-related incidents have risen by 3 percent, reflecting years of deferred maintenance on former SP properties, but the

initiatives established by UP's Derailment Prevention Steering Committee and supported with an aggressive capital budget program should ensure that track-related incidents contribute to the overall downward trend in the very near future.

B. State of Utah

Utah asks the Board to continue oversight for at least one year to evaluate whether the BNSF trackage rights fee has "permitted BNSF to be an effective competitor in the Central Corridor and for shipment of Utah coal." Utah Comments, pp. 3-4. Utah also says that it needs additional time to complete an audit of UP's rail rates in order to develop evidence regarding whether the merger has caused competitive harm. Id. at 3. The Board should deny Utah's request.

1. BNSF Is an Effective Competitor in the Central Corridor

The evidence in five annual oversight proceedings demonstrates that BNSF is an effective competitor in the Central Corridor. See UP/SP-384, pp. 88-100; BNSF-PR-20, pp. 9-23. Moreover, BNSF reports that it "has been able to meet its pre-merger projections for traffic using its Central Corridor rights, and the projections made by [merger opponents] during the UP/SP merger have proven to be overly pessimistic." BNSF-PR-20, p. 23. Utah provides no basis for questioning BNSF's evidence or the Board's prior conclusions that the conditions have worked as intended to preserve competition in the Central Corridor.

Utah should be particularly pleased with the merger's effect on competition for transportation of Utah coal. Utah coal producers and customers have benefited significantly from the UP/SP merger. The merger created a shorter, single-line route between SP-served Utah coal producers and domestic coal users in southern Nevada and Southern California, as well as the Ports of Los Angeles and Long Beach for export to the Pacific Rim. The merger and the

Board's conditions also strengthened competition for Utah coal by providing URC with greater access to Utah coal. Prior to the merger, SP was the dominant coal carrier in Utah, providing exclusive service to a number of facilities. Now, only one active mine in Utah is served by UP exclusively. All of the other mines are either jointly served, served exclusively by URC, or utilize truck-rail facilities. Moreover, BNSF gained a connection with URC when it replaced SP at Provo, and Utah coal producers and customers have benefited from the increased competition provided by BNSF. Rates are down sharply. UP/SP-384, pp. 114-15 & Confidential App. E; see also BNSF-PR-20, pp. 20-21 ("In those instances where BNSF does have access to the coal origins through Utah Railway, it is actively competing with UP. BNSF has and continues to bid for the transportation of such coal in conjunction with Utah Railway."). Utah coal shippers have unquestionably benefited from the merger.

2. UP Is Cooperating With Utah's Rate Audit

UP and Utah agreed during the course of the merger proceeding that, for a period of ten years following the consummation of the merger, UP would not increase rail rates to Utah shippers by a percentage greater than increases for comparable shippers elsewhere. Compliance with this commitment could be verified by an audit conducted at Utah's request. UP recently reaffirmed its commitment to Utah. See Letter from Dick Davidson, UP's Chairman, to Hon. Michael O. Leavitt, Utah's Governor, dated Aug. 21, 2001 (attached as an exhibit hereto). At Utah's request, UP and Utah representatives are exploring how to conduct a rate audit efficiently and cost effectively.

The Board should not extend the oversight proceeding simply to allow Utah to complete its audit. The Board rejected Utah's request to impose a nearly identical audit requirement as a condition to the merger. The Board should not extend oversight to allow Utah

to gather information that the Board has already described as unnecessary, overbroad, and not merger-related. See Decision No. 44, 1 S.T.B. at 486.

Moreover, Utah does not need to extend oversight to preserve its rights under its agreement with UP. First, under UP's agreement with Utah, audits might take place for up to ten years after the merger. Utah therefore understood that oversight would end before UP's commitment expired. Second, Utah could have requested the audit a year ago if it wanted to present the results before oversight ended. Third, Utah does not need oversight because its agreement with UP contains its own enforcement mechanism. UP agreed to provide restitution to affected shippers if their rates increase by a percentage greater than those for comparable shippers elsewhere. Utah does not need Board involvement.

C. Cowboy Railroad Development Company

CRDC claims to be interested in developing alternative railroad transportation for PRB coal moving to the central United States. CRDC does not disclose its members' identities, but its name refers to CNW's "Cowboy Line," a 300-mile line across northern Nebraska, much of which was abandoned years ago and is today a hiking trail owned by the State of Nebraska.

CRDC asks the Board to clarify that it will consider and act promptly to enforce the merger conditions even after oversight concludes. See CRDC-1, p. 3. UP does not object to this request, because the Board inherently has this power. However, CRDC will never be able to show a merger-related loss of competition for PRB coal.

CRDC's consultant claims that, absent the merger, SP could have served as a neutral connection for a theoretical future CRDC line to Kansas City. Should CRDC complete a line to Kansas City, he argues, CRDC might be entitled to trackage rights over SP to replicate the

service that SP could have provided. See CRDC-1, Nelson V.S. at 6-8. This reasoning suffers from several flaws, but three are dispositive.

First, the Board held that the merger did not harm competition by eliminating interline routes for PRB coal. The Board rejected all "vertical foreclosure" claims under its applicable merger rules and policies. See Decision No. 44, 1 S.T.B. at 473. The Board might reach a different conclusion under its new Class I merger rules, but it cannot apply those rules retroactively. See Landgraf v. USI Film Products, 511 U.S. 244 (1994).

Second, CRDC did not serve Kansas City at the time of the merger, so the UP/SP merger could not affect competition the Cowboy Line might have provided. Only UP and BNSF could carry PRB coal at the time of the merger. CRDC did not exist, and no CRDC-SP joint-line routes were eliminated.

Third, CRDC wrongly assumes that the Board can impose new conditions years after a merger to create new competition. At least under the rules that were in effect at the time of the UP/SP merger, the Board may not add new conditions after a merger has been consummated. See Ex Parte No. 582 (Sub-No. 1), Major Rail Consolidation Procedures, Decision served June 11, 2001, pp. 38-40. Once the merger has been consummated and the Board concludes that its conditions are successful, the proceeding must end.

III. CONCLUSION

The Board should conclude that the conditions it imposed on the UP/SP merger have been effective and terminate this oversight proceeding.

Respectfully submitted,

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*Attorneys for Union Pacific Corporation, Union Pacific Railroad Company and Southern Pacific Rail Corporation*

September 19, 2001

**CERTIFICATE OF SERVICE**

I hereby certify that on this 19th day of September, 2001, I caused a copy of the foregoing "Union Pacific's Reply to Comments" to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all parties of record.

Michael L. Rosenthal

ADDENDUM

BNSF IMPLEMENTATION ISSUES

1. AmerenUE at Labadie, MO

Immediately after the Board ruled that BNSF was entitled to serve AmerenUE's facility at Labadie, UP and BNSF began arranging for BNSF's permanent access. UP promptly agreed to provide BNSF with temporary haulage rights from St. Louis to Labadie to serve AmerenUE's plant. BNSF is using these rights until construction is finished on a new connecting track and signals that will allow BNSF to serve AmerenUE via trackage rights from Pacific, Missouri, to Labadie.

2. Track Capacity Issues at Grand Junction/Durham, CO

UP is ensuring that BNSF has the track capacity it needs to serve local industries. As BNSF notes, UP leased BNSF two tracks to provide additional capacity to support BNSF's operations in the Grand Junction area. See BNSF-PR-20, p. 89. UP recently declined BNSF's request to lease a spur track near Durham, Colorado, because UP uses the track to serve its own customers. UP located property in the Durham area that may meet BNSF's needs and has offered to make it available to BNSF.

3. Transwood, Inc. Transload at Ogden, UT

UP is working with Transwood to ensure a smooth transition to a new and improved site on the Utah Central Railway Company ("UCRC"). As UCRC's recent filing demonstrates, plans for Transwood's voluntary relocation were underway well before UP indicated that it needed to cancel Transwood's lease to make more productive use of its property, and "UP's decision to cancel Transwood's existing lease thus in no way jeopardizes existing transload competition." UCRC Comments, p. 4. UCRC's filing also demonstrates that the

relocation will benefit Transwood and area shippers, as well as UCRC, BNSF, and UP. Id. at 3. Transwood is expected to commence operations from that new site this month.

4. Broken Arrow Environmental at Aragonite, UT

UP and BNSF will shortly be able to gain access to Broken Arrow Environmental's new municipal solid waste transload facility. The necessary turnouts and switches have been installed, and all that remains is for UP to complete the installation of insulated joints.

5. Turnouts at Dunphy, NV

As BNSF acknowledges, UP has completed the installation of two mainline turnouts to serve Newmont Gold Company's new transload and distribution center, and BNSF has commenced service. See BNSF-PR-20, p. 93. The first turnout was placed in service for both UP and BNSF in May 2000, only ten weeks after UP met with the customer to plan the construction. The second turnout was completed in October 2000. UP and BNSF had the same ability to serve the customer during the construction period.

6. Track Lease at Fernley, NV

UP has worked cooperatively with BNSF to provide BNSF with track space at Fernley. UP leased space to BNSF until it could construct and place in service its own track on land made available by UP. UP recently notified BNSF that it intended to cancel the lease for the UP track, according to the lease terms, because UP needs the track to serve its own customers. UP has offered to work with BNSF to locate additional real estate that BNSF can purchase or lease for the purpose of building additional track.

7. Interchange Track at McNeil, TX

As BNSF reports, UP constructed a new interchange with Capital Metropolitan Transportation Authority late last year, allowing BNSF to improve its interchange with the Austin Area Terminal Railroad. See BNSF-PR-20, pp. 94-95.

8. Service Issues in Texas

BNSF reiterates several complaints about operations in Texas that it raised in its April 2001 quarterly report. As BNSF acknowledges, UP already responded to those complaints. Most arose from UP maintenance or track improvements. BNSF's complaints about discrimination are inaccurate or one-sided.

*Kerr-Sealy, TX.* BNSF once again complains that slow orders caused delays on its Kerr-Sealy trackage rights. BNSF acknowledges, however, that the delays resulted from maintenance-of-way work that UP completed by June 30, 2001. See BNSF-PR-20, pp. 95-96; UP/SP-385, p. 4.

*Temple-Eagle Pass, TX.* BNSF complains about train performance on its Temple-Eagle Pass route. See BNSF-PR-20, p. 96. UP previously explained that track work delayed both BNSF and UP trains. UP replaced rail and ties on the SP mainline through San Antonio, raising the speed limit from 20 up to 60 m.p.h. for both railroads. See UP/SP-385, p. 3.

BNSF also complains that UP discriminated against BNSF trains. BNSF complains that UP refused to allow its trains to set out cars for customers at San Antonio a year ago. See BNSF-PR-20, p. 96. As UP explained long ago, UP and BNSF trains received equal treatment: UP restricted operations to one track while a crossing gang worked on the other track. In order to avoid severe congestion, UP barred all trains, including UP trains, from setting out or picking up cars during this project, and it notified BNSF of the work in advance. See UP/SP-

385, p. 3. BNSF complains about a similar incident on June 21, 2001, when UP refused to allow BNSF train M-TPLEAP1-19 to set out cars at San Antonio. See BNSF-PR-20, pp. 96-97. UP has no record of this specific incident. If BNSF believes that it has been treated unfairly, there are well-established procedures in place for BNSF to raise such issues first at the UP-BNSF Spring Dispatching Center meeting conducted weekly, and then, if the issues remain unresolved or require further discussion, at UP-BNSF monthly service meetings involving the Spring Dispatching center and local operations personnel.

BNSF also revisits its complaint that in March 2001 UP imposed "arbitrary" restrictions on BNSF's interchange with FXE at Eagle Pass. See BNSF-PR-20, p. 97. As UP has already explained, however, a local UP operating official temporarily restricted BNSF's movements after BNSF had caused a derailment by engaging in unsafe operating practices. See UP/SP-385, pp. 2-3.

*Paired track between Ajax and San Antonio, TX.* BNSF complains that UP has refused to allow BNSF to use a second main track on UP's Austin Subdivision between Ajax and San Antonio. See BNSF-PR-20, pp. 31-32. UP restored this former MKT track to service at a cost of many millions of dollars. See Finance Docket No. 33611, Union Pacific R.R. – Petition for Declaratory Order – Rehabilitation of Missouri-Kansas-Texas R.R. Between Jude & Odgen Jct., Tx., Decision served Aug. 21, 1998. UP and BNSF discussed this issue as long ago as the Joint Service Committee meeting of June 15, 2000. UP offered to grant BNSF access to the restored line if BNSF pays its fair share for rehabilitation of that line or invests a comparable sum to expand capacity on BNSF's lines where UP trains suffer delays.

BNSF refuses to pay its fair share of the costs. BNSF is not entitled to use this track without contributing to joint operations in Texas. None of the Board's decisions require

UP to grant free access to all of the facilities that it improves forever into the future. UP's restoration of the former MKT line has not impaired BNSF's competitive presence in this area. Rather, it helped alleviate the congestion that BNSF had complained about. Granting BNSF access to the restored line is thus not necessary to preserve the competitive presence the Board expected BNSF to provide when it adopted the conditions. See Houston/Gulf Oversight Decision No. 10, served Dec. 18, 1998, p. 29.

*Houston-Brownsville, TX.* BNSF complains about slow orders on the UP trackage rights lines south of Algoa, Texas. As BNSF notes, the slow orders were caused by record heat more than a year ago, both UP and BNSF trains were affected, and the slow orders were later removed. See BNSF-PR-20, pp. 97-98.

9. Joint Intermodal Terminal ("JIT") at Oakland, CA

UP and BNSF have agreed on an operating plan that will allow BNSF to serve the JIT. See BNSF-PR-20, pp. 98-99. UP and BNSF are discussing BNSF's contribution to the costs of providing access to this facility, but this issue will not affect BNSF's access to the facility when it opens.

10. McClellan Industrial Park at Sacramento, CA

UP cooperated in arranging BNSF service to McClellan Park, a former Air Force base northeast of Sacramento, California. BNSF complains that the arrangements took too long, but UP and BNSF had to develop an operating plan that would allow BNSF to serve McClellan Park without interfering with UP's busy main line operations or with the commuter and AMTRAK trains, which use that mainline. BNSF's original operating plan was not realistic. To

help BNSF begin service, UP voluntarily provided reciprocal switching, allowing BNSF to serve McClellan Park until the track work necessary to implement the plan is complete.[1]

11. UP Demurrage Charges Levied Against BNSF Customer in Nevada

BNSF does not identify the Nevada customer allegedly involved in a demurrage dispute with UP, so it is impossible to address this issue directly. BNSF-PR-20, p. 106. UP is aware of one Nevada customer that claimed it was using private track and should not be subject to demurrage, but that customer's situation has no bearing on the BNSF Settlement Agreement. UP's investigation showed that the customer had a track lease agreement at one location, but the demurrage was actually accruing at another location where the track lease agreement was under another party's name. UP explained that the customer could sign a joint use agreement with the party at the second location to avoid future demurrage charges.

12. Reciprocal Switching in Southern California

BNSF says that it has received "anecdotal information" that its Southern California volumes have suffered as a consequence of poor UP reciprocal switching service and asks the Board to require UP "to indefinitely provide performance reports to BNSF no less than quarterly from which service can be benchmarked and switching for BNSF movements can be compared with switching for UP's own account." BNSF-PR-20, pp. 55-56. UP and BNSF are

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[1] BNSF complains that on two occasions in April 2001, UP's local operating officials refused to allow BNSF to serve McClellan Park, but as BNSF's own pleading indicates, these were attempts to serve McClellan Park before the UP and BNSF had agreed upon how BNSF would provide service. BNSF also complains that its first shipment into McClellan Park under the haulage arrangement took longer than it should have, but this appears to be an occurrence associated with the start-up of a new operation. These types of occasional incidents cannot be avoided. For example, on at least one occasion, BNSF presented cars to UP at the wrong interchange location, resulting in delays. UP has a well-established system in place for resolving these types of individual car issues. See, e.g., UP/SP-384, Compliance App. at 2 (describing UP's problem log database).

discussing new measurement tools to quantify switching performance. As the Board recognized in another setting, there is no need for Board intervention into switching disputes. See, e.g., Houston/Gulf Oversight Decision No. 10, pp. 30-31 ("We should note, however, that switching differences are inevitable for carriers that work together. Railroads regularly work out arrangements with each other without requiring government intervention, and we see no reason why BNSF and UP should not be able to work out the matter here as well."). The Board should not impose a new, indefinite reporting requirement when the parties can better develop their own.

13. Local Switching Service at Lake Charles, LA

BNSF complains about delays to its traffic originating in Lake Charles when KCS switches the customer. See BNSF-PR-20, pp. 68-69. UP and BNSF cars destined to and from plants served by KCS receive comparable service. BNSF's complaint may refer to recent plant shut downs and changes in production levels that resulted in increased car inventory when customers could not accept all of their cars returning to the Lake Charles area. When the inventory level exceeded the fluid operating capacity of the Lake Charles yard, classification and processing slowed for all cars processed. With respect to coordination between UP and KCS, the two railroads continue to work to ensure smooth operations and address any occasional communication failures, such as cars reported interchanged to UP but not physically present on the interchange track. Moreover, as noted above, UP has a well-established system in place for resolving individual car issues. See, e.g., UP/SP-384, Compliance App. at 2 (describing UP's problem log database).

14. Weight Limits on Angleton and Brownsville Subdivisions

BNSF proposed that UP improve several bridges in order to increase weight limits between Angleton and Odem, Texas. See BNSF-PR-20, p. 80. UP does not need to improve the bridges to satisfy its own customers but offered to perform the work if BNSF bears the expense. The BNSF Settlement Agreement requires UP to maintain the trackage rights lines at the standards designated in the timetable in effect on the date of the merger. It does not require UP to bear the cost of improving those lines to a higher standard.

# Union Pacific Corporation

DICK DAVIDSON
CHAIRMAN

August 21, 2001

The Honorable Michael O. Leavitt
Governor, State of Utah
210 State Capitol
Salt Lake City, UT 84114

Dear Governor Leavitt:

I am writing in response to your letter of August 15, 2001, to the Surface Transportation Board concerning Union Pacific's merger with the Southern Pacific Railroad. I want to reassure you that we are fully committed to all the conditions as spelled out in my letter of June 27, 1996. In that letter, UP agreed to an audit to assure that Utah rail shippers would not be disadvantaged (compared to similarly situated shippers in other states) as a result of rate increases.

The staff of UP's legal and government affairs department has been working with Dave Winder, Utah's Executive Director-Community and Economic Development, to implement our agreement. It is my understanding that a meeting is scheduled for September 5, and I am confident that our representatives will quickly come to agreement on an efficient and cost-effective audit process.

If the audit shows any need for restitution, we will move forward on a shipper-by-shipper basis to provide such a remedy. By virtue of my June 27 letter, Utah shippers are the real beneficiaries of our agreement and would have the right to enforce Union Pacific's commitment in the courts. However, we are prepared to agree to arbitration (under the rules of the American Arbitration Association) to resolve any disagreement between Union Pacific and any Utah shipper as a result of the audit. We believe that this is far more effective "recourse" for Utah shippers than STB oversight. It is also consistent with the Board's policy favoring private party solutions.

With respect to your concerns about the effectiveness of BNSF as a competitor in the Central Corridor, this topic has been the subject of detailed submissions by Union Pacific and BNSF over the past five years. BNSF is providing the vigorous competition that the STB expected it would when the Board approved the merger and imposed the conditions that granted BNSF extensive rights across our network. Further oversight on that issue after five years of examination of the facts related to BNSF competition would be of no value.

We will continue to argue before the STB that any continuation of the five-year oversight of our merger with SP is unwarranted. Over the past five years we have submitted clear evidence of the benefits associated with the UP/SP merger and proof that the conditions imposed by the Board have worked. The process of developing and submitting this documentation is time consuming and expensive, and given the evidence of record, we believe it is time for the oversight process to end. However, even without the formal oversight process, the State of Utah can petition the Board on issues regarding our merger should it feel a need to do so.

Union Pacific will file this letter with the STB, and there is no question as to our intent to fulfill the agreement made with you in 1996. We value our good relationship and historic partnership with the State of Utah. Please be assured that I will personally monitor our commitment to you and the State.

Sincerely,

Dick Davidson

1416 DODGE STREET, ROOM 1230, OMAHA, NE 68179 • 402 271-5966

203479

U.S. Department of Transportation

General Counsel

400 Seventh St., S.W.
Washington, D.C. 20590



September 19, 2001



Vernon A. Williams, Secretary
Surface Transportation Board
Suite 700
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Fin. Dkt. 32760 (Sub-No. 21)

Dear Secretary Williams:

Enclosed herewith are an original and ten copies of the Reply Comments of the United States Department of Transportation (DOT-7) in the above-referenced proceeding. I have also enclosed a computer diskette containing these comments in a format readable by WordPerfect 7.0. Included as well is an additional copy that I request be date-stamped and returned to the messenger delivering these documents.

Respectfully submitted,

Paul Samuel Smith

Paul Samuel Smith
Senior Trial Attorney

Enclosures

ORIGINAL

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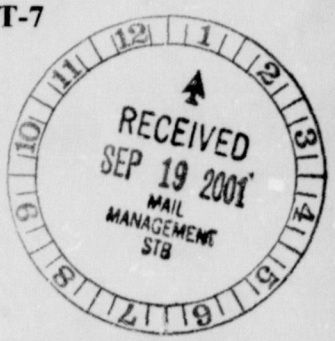


**BEFORE THE**
**SURFACE TRANSPORTATION BOARD**
**WASHINGTON, D.C.**

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|---|---|---|
| Union Pacific Corp., Union Pacific Railroad Co. and Missouri Pacific Railroad Co. - - Control and Merger - - Southern Pacific Railroad Corp., Southern Pacific Transportation Co., St. Louis Southwestern Railway Co., SPCSL Corp., and the Denver & Rio Grande Western Railroad Company (OVERSIGHT) | ) | F.D. No. 32760 (Sub-No. 21) |

**REPLY COMMENTS OF THE**
**UNITED STATES DEPARTMENT OF TRANSPORTATION**

## I. INTRODUCTION

The central purpose of this oversight proceeding has always been to monitor the effectiveness of the conditions imposed by the Surface Transportation Board ("Board" or "STB") to mitigate competitive losses caused by the merger of the Union Pacific ("UP") and Southern Pacific ("SP") railroads. Finance Docket No. 32760 (Sub-No. 21), "General Oversight" Decision No. 1 (served May 7, 1997). These conditions essentially consist of trackage rights designed to enable the only other major railroad in the West, the Burlington Northern and Santa Fe ("BNSF"), both to replicate the direct and indirect competition provided pre-merger by SP, and to gain access to sufficient traffic density to support effective use of the trackage rights. Finance Docket No. 32760, Union Pacific/Southern Pacific Merger, 1 S.T.B. 233, 419-21 (1996). In every one of its oversight decisions since the merger was approved, the Board has determined that the merger has not been shown to have caused significant competitive harm. It is now the fifth and final scheduled year of this proceeding. The STB must again consider the continuing efficacy of its conditions, and, for the first time, whether to extend its oversight of the effects of this transaction.

The United States Department of Transportation ("DOT" or "Department") believes that the record demonstrates that rail competition in the affected regions is vigorous, and that this is a testament to the efficacy of the conditions imposed by the Board. The record compiled over the years on the ability of BNSF to provide effective competition makes a strong case that the extensive reporting burden on UP and BNSF is no longer necessary.

However, this year's oversight proceeding does raise several relatively narrow but important issues. They center on the proper interpretation and application of the STB's conditions. In our view they should be resolved as such controversies always have -- by referring back to the purposes of these conditions. [1] Nevertheless, the existence of these disputes and the likelihood that they will continue to arise among affected parties call for continued oversight in some fashion to ensure that the conditions work as effectively as possible.

## II. THE STATE OF COMPETITION GENERALLY

The Board in the past has concluded that competition has been preserved in the West and that its conditions have been effective despite allegations that the conditions were not working to some greater or lesser extent. In this, the last year of scheduled oversight, the record contains the largely positive progress reports from UP and BNSF that have become the norm. UP/SP-384; BNSF-PR-20. Unlike past years, however, multiple parties have not asserted claims of broad competitive failures or inadequacies in the Board's conditions. *See, e.g.*, discussions in Finance Docket No. 32760 (Sub-No. 21), "General Oversight" Decision Nos. 10 (served October 27, 1997); 13 (served December 21, 1998); 15 (served November 30, 1999). What controversies there are certainly warrant attention, but they are relatively few in number and for the most part

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[1]/ We recognize that UP and BNSF had asked that parties address the issues surrounding their "Restated and Amended" settlement agreement at the time of initial comments. The STB to our knowledge never incorporated this into its procedural schedule, however, and compliance would have required DOT to vary from its traditional course of reviewing comments of the parties prior to offering its own substantive views. For these reasons we have deferred expressing our position on the merits until now.

focus on the proper understanding and application of specific conditions. UP/SP-387; BNSF-93.

The record currently reflects continued robust competition as a general matter. Virtually all of UP's progress report and the vast majority of BNSF's provide details of how those railroads compete for shippers' business on rates and services, their substantial capital investments, and the success of their endeavors against the other. UP/SP-384 and BNSF-PR-20, both *passim*. The absence of contrary evidence and argument, particularly when compared with the volume of adversarial contentions made in years past, is telling. DOT believes that this is a record that again supports a conclusion that the Board's conditions have served their intended purposes, and that as a result competition between UP and BNSF remains vigorous.

## III. THE RESTATED AND AMENDED SETTLEMENT AGREEMENT

The record is not a paean of support for every aspect of the status quo, however. Significant differences continue to arise between UP and BNSF over the proper interpretation and application of the Board's conditions. Resolution of these disputes requires reference to the Board's purposes in adopting the conditions it imposed.

### A. Evolution of the Conditions

The substantive controversies at this point center on the "Restated and Amended Settlement Agreement" submitted by UP and BNSF. UP/SP-385/BNSF-92. This agreement is intended to encompass all relevant conditions applicable to the UP/SP merger. Id. The starting point of the agreement and the conditions is the original BNSF Settlement Agreement entered into even before UP and SP submitted their application. UP/SP-22 at 318-47; *see* 1 S.T.B. at 243. In that agreement UP granted to BNSF trackage rights and line sales totaling more than 4,000 miles. Both carriers maintained that the agreement mitigated the competitive losses caused by the merger and asked the STB to impose the provisions of the agreement as a condition of approval. 1 S.T.B. at 252-53. This agreement itself, however, was supplemented and amended by UP, SP, and BNSF on several occasions. Id. at 243, 419 and note 177.

Notwithstanding their previously expressed views on the adequacy of the original settlement agreement with BNSF, in the course of the merger proceeding UP and SP reached another major settlement with the Chemical Manufacturers Association ("CMA"). Id. at 243, 419. [2] The CMA Agreement significantly strengthened the rights accorded BNSF and enhanced the competitive protections contained in the BNSF settlement agreement. To the trackage rights already afforded by the BNSF agreement, the CMA Agreement added BNSF storage facilities, shipper contract re-openings, participation in directional operations, a neutral dispatching protocol, and limited build-in and build-out opportunities. Id. at 419-20.

Despite these additions and amendments, DOT expressed the view that the unprecedented extent of the trackage rights made such a remedy inadequate in the circumstances of this merger. Brief of DOT (DOT-4), filed June 3, 1996, at 29-38. Instead, we generally supported divestiture as more likely to provide the necessary competition. In the Central Corridor, where divestiture was, in our view, not a viable remedy, the Department contended that trackage rights were acceptable only if they were tailored so as to "place BNSF in a competitive position approximating the Applicants." Id. at 42. In other words, we argued that significant modifications beyond those already agreed to by various parties in the case would be necessary to enable BNSF to fully replace the competition provided by the independent SP. The Department suggested substituting a different trackage rights compensation structure, preservation of the build-in/build-out and transloading options on all trackage rights lines and without time limits, expanded contract re-opening, together with formal oversight procedures to review annually the effectiveness of these conditions. Id. at 41.

The Board rejected divestiture as overly intrusive, but it, too, found that the BNSF and CMA agreements were inadequate. Instead, it adopted the two settlement agreements, all of DOT's trackage rights-related recommendations (except for that

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[2]/ CMA has changed its name to the American Chemistry Council ("ACC"), and continues to participate in this proceeding.

related to compensation), and more. 1 S.T.B. at 371-73, 403-06, 419-20. [3] The STB justified its general conditions by noting that they were necessary to replicate all the direct and indirect competition that an independent SP had provided to UP, and to ensure that BNSF had access to a sufficient traffic base to enable it to function as a viable competitor. Id. at 372-73, 419 ("[W]e are imposing a number of broad-based conditions that augment the BNSF agreement to help ensure that the BNSF trackage rights will allow BNSF to replicate the competition that would otherwise be lost when the SP is absorbed into UP."); 420 (opening contracts more extensively than provided for in the CMA agreement "will help ensure that BNSF has immediate access to a traffic base sufficient to support effective traffic rights operations"). Finally, recognizing the absolute necessity of maintaining effective competition in the western U.S., and the uncertain prospects of the unprecedented conditions it was imposing, the STB established a five year formal oversight period, and it expressly reserved the authority to impose new or additional conditions should its initial efforts prove ineffectual. Id. ("We retain jurisdiction to impose additional remedial conditions if, and to the extent, we determine that the conditions already imposed have not effectively addressed the competitive harms caused by the merger.").

B. Prior Board Clarifications and Interpretations

The Board on numerous occasions has clarified and interpreted its broad-based conditions by referring back to their original purposes. Fin. Dkt. No. 32760, Decision No. 61 (served November 20, 1996) at 7-12 (BNSF may access literally "any" new facility or transloading facility on any trackage rights line in order to preserve previous indirect competition between UP and SP and to allow for sufficient traffic density); [4] Decision No. 68 (served March 5, 1997) at 5 (new facilities and transload conditions benefit even "1 to 1" shippers by preserving source and geographic competition that SP

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[3]/ *See* Id. at 351, note 86 and at 487 ("With respect to the Central Corridor, we are conditioning the merger by strengthening the BNSF trackage rights much in the fashion that DOT has suggested.")

[4]/ The STB prescribed certain requisites for "legitimate" transloading facilities to avoid distortions to the principles that undergird its conditions. Id. at 12; *also* Decision No. 86 (served July 11, 1999) at 5.

represented); Decision No. 75 (served October 24, 1997) at 2-4 (transload condition allows BNSF the same access to a particular shipper that SP would have had); Decision no. 86 (served July 11, 1999) at 4-5 (clarification about scope of new facilities conditions based upon its original purposes); Decision No. 89 (served June 6, 2000) at 9-10 (contract reopening condition applied only to contracts of "2 to 1" shippers agreed upon prior to UP/SP merger and not substantially changed).

Thus, it should be clear that to warrant approval the relevant terms of the Restated and Amended agreement must be consistent with the Board's intentions. They must, at a minimum, enable BNSF to continue to replicate the direct and indirect competition that SP provided, and/or to access sufficient traffic to make the augmented trackage rights effective. Private settlement agreements may go beyond this if the parties wish, but the public interest requires that they do no less. *Compare* 1 S.T.B. at 419-20 (inadequate BNSF and CMA agreements needed to be supplemented to strengthen BNSF's competitive presence) with Fin. Dkt. No. 32549, Burlington Northern et al., -- Merger -- Santa Fe Pacific et al., 10 I.C.C.2d 661, 762 (trackage rights granted in settlement agreement go "far beyond" that necessary to address competitive losses, but imposed at the request of the parties). Ensuring that conditions previously imposed perform as intended may or may not entail the application of new or additional conditions, but it does not exceed the Board's authority -- particularly where, as here, it has specifically reserved this right. 1 S.T.B. at 420.

We now address the disputes presented by UP and BNSF.

C. Current Disputes

As noted, the "Restated and Amended" settlement agreement is supposed to contain, *inter alia*, all of the conditions ultimately imposed by the Board. UP and BNSF concur on the vast majority of provisions to be included. They disagree about the provisions concerning "2 to 1" points, "new" and "existing" transload facilities, team tracks, and specific trackage rights restrictions. BNSF-93; UP/SP-385; UP/SP-387. These issues have attracted most of what comment there is in this year's oversight record.

*See* comments submitted by the National Industrial Transportation League (NITL-27); American Chemistry Council (ACC-1), and Entergy Services, Inc. (ESI-34). [5]

(1) Definition of "2 to 1" points

The BNSF trackage rights under the original settlement agreement extended, *inter alia*, to all shipper facilities served prior to the merger by UP and SP and by no other carrier. Thus, the identification of "2 to 1" points in large measure defines the extent of the conditions ultimately imposed in this case. BNSF contends that a geographic definition grounded in six-digit Standard Point Location Codes ("SPLC") preserves the pre-merger competition that existed at such locations, that the STB should hold UP to a commitment made during the merger proceeding to preserve this type of competition, and that the Board's prior "rejection" of a four-digit SPLC definition did in fact maintain this type of competition. BNSF-93 at 3-8. UP counters that all "2 to 1" shippers have been identified, that the modification now sought by BNSF would expand that carrier's rights without justification, and that in fact the Board has already rejected this type of amendment. UP-387 at 6, 10-12. NITL and the ACC both support BNSF.

The Department supports the UP's position. The broad conditions imposed by the STB are designed, in the aggregate, to permit BNSF to replicate the universe of competition provided by the SP. This particular condition is addressed to that subset of competition directed at shippers that existed at specific sites prior to the merger that received service from UP and SP and no other carrier. 1 S.T.B. at 252, 368, 372, 390-93. UP's interpretation is faithful to this purpose. BNSF's view, on the other hand, more properly concerns the competition represented by the proximity of SP to other UP-served shippers (whether in the same SPLC-6 or other geographic area), and that competition is addressed by other conditions. The discussion below shows that it is these, such as the build-in/build-out and transloading conditions, that preserve the competition alluded to here by BNSF. Id.

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[5]/ We do not take a position on the comments submitted by the Cowboy Railroad Development Co. and the State of Utah. The City Public Service Board of San Antonio, Texas, reports that UP and BNSF failed to correctly memorialize a prior agreement, and that the two carriers have agreed to remedy this drafting error. CPSB-15.

(2) "New" and "existing" transload facilities

The original BNSF settlement agreement granted BNSF access to new and existing transload facilities at "2 to 1" points on SP trackage rights lines. The Board expanded this right to allow BNSF access to all new facilities, including transload facilities, on all trackage rights lines. 1 S.T.B. at 420. BNSF seeks to add definitions of both new and existing transload facilities to the "Restated and Amended" agreement. BNSF-93 at 9-12. UP claims that a definition of "new" transload facilities is unnecessary, and that the definition of "existing" transload facilities tendered by BNSF would grant it access to all exclusively-served UP shippers on the trackage rights lines, a right that has already been rejected by the STB. UP/SP-387 at 20-22. BNSF responds that the STB has already emphasized the broad nature of these rights and has already prescribed requirements for "legitimate" transloading facilities that protect against unwarranted access by BNSF. BNSF-93 at 9-12. NITL and the ACC again support BNSF.

The Board has already addressed this question on several occasions. The STB's order approving the merger required that BNSF be granted the right to serve new facilities, including transload facilities, on both UP and SP trackage rights lines. 1 S.T.B. at 420. The Board then clarified that this condition should be read literally (subject to specific "legitimacy" requirements) because that reading both replicates the competition provided pre-merger by the SP and helps BNSF to achieve sufficient traffic density on these lines. Fin.Dkt. No. 32760, Decision No. 61, *supra*, at 7, 9-12. [6] Finally, the point was reiterated when the STB applied this condition with respect to a specific facility. Fin. Dkt. No. 32760, Decision No. 75 (served October 27, 1997).

These decisions in large measure might appear to provide consistent support for BNSF's position. However, the Board also noted that it was "not unsympathetic" to UP's concern that a literal reading of the transload condition could effectively enable BNSF to directly reach exclusively-served shippers on the trackage rights lines, and made clear

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[6]/ *See* Id. at 10 note 32, quoting the merger approval decision ("But today UP or SP may locate transloading facilities anywhere on their lines to reach shippers on the other carrier.") *Also*, Fin. Dkt. No 32760, Decision No. 68 (served March 5, 1997) at 5 note 7 (this condition preserves pre-merger source and geographic competition, which provided "substantial competitive leverage" to exclusively served shippers).

that this was not the intent of the condition it imposed. Decision No. 61, *supra*, at 12. UP has raised the issue here again, and DOT believes its concern continues to have merit.

The issue overall encompasses several aspects of transloading: the "legitimate" siting of a transload facility vis-a-vis the location of an exclusively-served shipper, the ownership of that facility, and the extent to which it must be open to shippers. The Board has not to date provided definitive guidance on these points, but simply offered an example of an "illegitimate" exercise of this condition (*i.e.*, a new transload facility within 100 feet of an exclusively-served shipper). Id. The question is complex and circumstances are likely to vary depending on the situation. DOT considers it unlikely that a firm rule on the proximity of a "legitimate" transload facility to an exclusively-served shipper or the other issues could be established at this point that is fair to both carriers and shippers. We therefore recommend that the Board reaffirm its commitment to resolve such matters on a case-by-case basis until sufficient precedent is established. Fin. Dkt. No. 32760, Decision No. 74, *supra*, at 4.

(3) Team tracks

Team tracks are tracks on which rail cars are placed for the public's use in loading or unloading freight using trucks. UP/SP-387 at 6 note 3. BNSF concedes that neither the settlement agreements nor additional conditions added by the STB addressed team tracks, but maintains that UP and SP competed via team tracks and therefore it should be able to do so as well on trackage rights lines. BNSF-93 at 18-19. BNSF contends that UP's involvement makes it impractical to construct its own team tracks on these lines, and it therefore asks that UP be required to sell team tracks that it no longer uses at "2 to 1" points. UP avers that such tracks were intentionally omitted from the settlement agreements and conditions, that BNSF agreed to build its own team tracks, that the transitory nature of these tracks makes it difficult to identify any that UP would not use, and that granting BNSF's request would interfere with UP operations. UP/SP387 at 12-14. The ACC submits that BNSF should construct its own team tracks, but urges the Board to clarify that UP must cooperate with BNSF in this process.

The Department agrees with the ACC. It seems likely that UP and SP, like other carriers, did compete in part via team tracks. However, the fact that such tracks function

in this capacity only temporarily would seem to make it exceedingly difficult to identify team tracks that are no longer in use as such, for they could revert to that use at any given time. The parties have both agreed that BNSF has the right to construct its own team tracks; if and when it decides to do so, UP should be directed to extend all reasonable cooperation.

(4) Operating restrictions

Another contested issue concerns BNSF points of entry and exit from the trackage rights lines that allow it to serve "2 to 1" shippers. Of these, the most significant dispute involves BNSF's operation over the former SP line in the corridor from Houston, Texas to Valley Junction, Illinois. The rights granted in this corridor went beyond those generally granted BNSF on trackage rights lines because the "directional running" envisioned by UP in this corridor, post merger, would have hampered BNSF operations, rendering it less than an effective competitor. *See* CMA Agreement (UP/SP-219) and Decision No. 61, *supra*, at 5, 11. Consequently, BNSF trackage rights were extended to permit operations over sections of UP's parallel line to remedy the operational problem and permit BNSF to preserve two-railroad competition at certain points in the corridor. Id.

BNSF contends that UP's interpretation of the CMA Agreement and proposed changes in the Restated and Amended agreement impose operating restrictions in this corridor that deny BNSF the ability to efficiently enter its trackage rights lines at Jonesboro, Arkansas (a former SP-BNSF interchange), and exit back to its own system via the UP's line at Hoxie, Arkansas (a UP-BNSF interchange). BNSF-93 at 16-18. UP maintains that under the terms of the Agreement, BNSF may only enter and exit the trackage rights lines at Memphis. UP/SP-387. BNSF charges that this restriction would require a substantially more circuitous and inefficient routing for it to serve the 2 to 1 shippers in question. BNSF-93 at 17. [7]

The Board's intent here is to ensure that BNSF can replicate the competition provided pre-merger by SP. Presumably, prior to the merger an independent SP would

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[7] This issue has come to the fore because Entergy, a coal-fired utility plant operator, will be able to receive service from BNSF through a build-out to a former SP line. *See* ESI-34.

have routed the traffic in question via the more efficient interchange at Jonesboro, and a remedy to preserve the pre-merger competition would call for a routing that would allow BNSF to provide service at least as efficiently as SP.

The Department notes that there may be inconsistent provisions in the "Restated and Amended" agreement that make it unclear whether, under the terms of this document, BNSF could use the Jonesboro interchange point to access its trackage rights line. UP/SP-386/BNSF-92, "Red-Lined Version of Restated and Amended Agreement," *cf.* § 6(a)-(d) *and* § 9(m). Regardless of the proper interpretation of these sections as a matter of contract law, we emphasize that private agreements in this proceeding have given way, as they must, to overriding public interest considerations. DOT therefore again urges the Board to hew to a fundamental purpose of its general conditions and permit BNSF the measure of flexibility that SP enjoyed, thereby replicating pre-merger competitive conditions to the extent possible.

A similar dispute exists with respect to the Elvas-Stockton corridor in California. BNSF has overhead rights on this line, and claims that it can also serve new facilities and transloading facilities on the line as well. BNSF-93 at 12-15. UP denies that BNSF's overhead rights allow this in the affected area. UP/SP-387 at 18-20. The Board granted BNSF the right to serve new facilities and transload facilities on the lines north of Memphis, on which the railroad originally had only overhead trackage rights. Fin. Dkt. No. 32760, Decision No, 61, *supra,* at 11-12. This decision suggests that BNSF should be able to serve these kinds of facilities in the Elvas-Stockton corridor as well.

## IV. TRACKAGE RIGHTS FEE ADJUSTMENTS

There is another dispute between BNSF and UP that does not directly concern the "Restated and Amended" settlement agreement. It relates to the compensation BNSF must pay UP for use of the trackage rights that maintain competition in the West.

The BNSF settlement agreement, as supplemented by the CMA Agreement, stipulated that the trackage rights fees that BNSF pays UP for use of the lines would be based upon an agreed-upon gross ton mile ("GTM") mill rate, which rate would be adjusted annually to reflect changes in UP's maintenance and operating costs covered by

the trackage rights fees. *See* UP/SP-219, Sec. 7; 1 S.T.B. at 413-14 and note 169. As BNSF states, "it is critical to BNSF's ability to provide competitive service over the trackage rights lines that the GTM mill rate be properly adjusted to reflect changes in UP's cost." BNSF-PR-20 at 118. If costs fall, such decreases should be properly reflected in the rate through the adjustment process; otherwise UP will have an advantage over BNSF in providing competitive service.

Although the Department is not in a position to determine if the pertinent UP costs are indeed lower, the charges made by BNSF need review, perhaps on an ongoing basis. Any increases or decreases in UP's costs should be properly reflected in the agreed-upon adjustments to the trackage rights fees. To ensure these changes, it is important for the Board to enforce this provision.

## IV. CONTINUED OVERSIGHT

The record accumulated in this proceeding establishes both the general efficacy of the Board's conditions and that the two carriers charged with carrying out those conditions continue to have disagreements about them. DOT in these circumstances believes that a simple extension of the existing formal oversight structure is no longer appropriate, but that some continued monitoring by the STB is necessary.

The requirements for quarterly and annual progress reports, together with scheduled initial and reply comments, have served their critical purpose of assessing the effectiveness of the Board's conditions. These conditions are no longer untested; the past five years has shown that they have worked to maintain competition overall in the West. This experience supports a lessening of the burdens that this condition imposes.

On the other hand, there is no basis to discontinue oversight altogether. There are still only two major rail systems in the western United States; vigorous competition between them must continue indefinitely. Those two carriers continue to disagree about

the terms of the conditions that ensure their competition. [8] Shippers may well have other issues in the future. No one but the Board will be able to ensure that those disputes are resolved in the public interest.

The Department accordingly recommends that the Board consider a less burdensome, more passive oversight mechanism. We suggest that the quarterly reports from UP and BNSF be eliminated, and that their annual reports be made less detailed. Interested parties should continue to be able to draw the Board's attention to alleged instances of anticompetitive conduct or dysfunctional conditions.

## V. CONCLUSION

The record compiled over the years since the UP/SP merger demonstrates that the conditions imposed by the Board have fostered and maintained competition in the western United States. Insofar as most of the disputes this year concern the correct understanding or application of these conditions, the STB should resolve those disputes consistent with the central purposes of the conditions: to replicate the competition provided by SP, and to ensure BNSF access to a sufficient traffic base. The Department also encourages the Board to continue its oversight of the effects of this merger, but in a reduced fashion that is consistent with the confidence engendered by a favorable post-merger experience.

Respectfully submitted,

Rosalind A. Knapp
ACTING GENERAL COUNSEL

September 14, 2001

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[8]/ DOT has also noted that traffic levels have declined significantly in the Southern California corridor over which BNSF received trackage rights. BNSF-PR-20, Attachment 11. On the basis of anecdotal information from shippers, BNSF suggests that poor and inconsistent reciprocal switching provided by UP is responsible, and indicates that it has received similar complaints regarding other areas in which UP provides reciprocal switching. Id. at 55. BNSF will attempt to measure UP's reciprocal switching service performance. Id. We hope that this will resolve any problems of this sort.

**CERTIFICATE OF SERVICE**

I hereby certify that on this date I caused a copy of the Reply Comments of the United States Department of Transportation in STB Finance Docket No. 32760 (Sub-No. 21) to be served upon all Parties of Record by first class mail, postage prepaid.

Paul Samuel Smith

September 19, 2001

BEFORE THE
SURFACE TRANSPORTATION BOARD

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203440

Finance Docket No. 32760

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

— CONTROL AND MERGER —

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

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203441

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)

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UTAH CENTRAL RAILWAY COMPANY COMMENTS ON ISSUES RELATING TO BNSF SERVICE TO TRANSLOAD OPERATION AT OGDEN, UTAH

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Utah Central Railway Company ("UCRC") submits the following comments to assist the Board in understanding the facts surrounding the relocation of the transload at Ogden, UT. Burlington Northern and Santa Fe Railway Company ("BNSF") appears to misunderstand these facts and the dealings between UCRC and Transwood, Inc.

Transwood, Inc. presently operates a transload in Ogden on property leased from Union Pacific ("UP"). BNSF uses the transload to compete for soda ash produced in southwestern Wyoming at points served exclusively by UP. BNSF complains that UP's cancellation of Transwood's lease without offering to pay to relocate the facility threatens this competition. (BNSF-PR-20, PP.91-92)

If BNSF's transload options diminish, it will be BNSF's fault, not the result of any anticompetitive conduct by UP. UCRC and Transwood have been discussing Transwood's relocation to UCRC property since early 1999 – well before UP indicated any intent to cancel Transwood's lease – and they reached a tentative agreement to relocate the facility prior to UP's notice that it intended to terminate Transwood's track and property leases. Under the agreement, UCRC is providing the real estate and improvements Transwood

needs, and Transwood is providing the equipment to take full advantage of its new location.

Transwood's relocation to UCRC property should benefit all of the parties involved. Transwoods current location is too small to allow it to do much more than transload soda ash for BNSF. Transwood's new location is larger, and planned upgrades of plant and equipment will allow Transwood to handle a greater volume and a wider variety of commodities for a larger number of customers, all of whom will have the option of routing via either BNSF or UP. The new transload facility would maintain existing competition, expand market opportunities, and open new avenues for BNSF and UP compete with each other and for traffic that is currently moving by truck.

UP recognized the benefits associated with Transwood's relocation, and it has been extremely cooperative. UP allowed Transwood to remain at its existing site while UCRC acquired real estate and completed the necessary site engineering and construction. In order to accommodate UP's need to put Transwood's current site to a different use, UCRC and Transwood have entered into an agreement whereby UCRC will provide

Transwood with a temporary site to allow its current operations to continue until the larger, permanent facility is completed. UCRC's engineering of both the sites has been completed, and Transwood is scheduled to relocated in September.

In sum, the relocation plan was the product of a voluntary agreement between Transwood and UCRC. The entire cost to relocate, engineer and construct the new facility will be borne by Transwood and UCRC, as the parties agreed. UP's decision to cancel Transwood's existing lease thus in no way jeopardizes existing transload competition.

If anything affects Transwood's operations, it will be BNSF's apparent attempt to turn UP's cancellation of Transwood's lease into an advanctage in either the merger proceedings or its business dealings with UCRC and Transwood.

In May 2001, UCRC met with BNSF officials to discuss Transwood's relocation and UCRC's proposed switching charges. At that meeting, BNSF informed UCRC that any increase in cost to existing traffic from Transwood could jeopardize the continued movement. In an effort to maintain the existing business, UCRC

responded by proposing to reduce its switching charges for the traffic. BNSF never responded to UCRC's proposal.

In August, however, Transwood officials notified UCRC of their intent to place the relocation on hold. BNSF had apparently told Transwood that it would raise rates on transload traffic if Transwood relocated to UCRC, even though a rate increase would likely result in a loss of the business.

UCRC does not expect BNSF to handle traffic at a loss, but in light of BNSF's communications with UCRC, Transwood, and in its filing with the STB, it appears that this is not BNSF's true concern. BNSF appears to be trying to play UP, UCRC, and Transwood against one another in the hope of obtaining either an advantage in commercial negotiations with UCRC and Transwood or in the UP/SP oversight proceedings. In its filing with the Board, BNSF argues that UP should pay for Transwood's relocation – it does not argue that it will be unable to compete because of the costs of serving Transwood's new location. In its discussions with UCRC and Transwood, however, BNSF focuses on its cost of service – it has not expressed concern for Transwood's relocation costs.

UCRC believes that transload facilities like Transwood's play an important role in providing competition and thus serve the public interest. It is important to keep in mind, however, that it is not only rail competition between UP and BNSF that serves the public interest -- competition between rail and trucks also benefits the public. Transwood's relocation to an improved facility will increase both intramodal and intermodal competition. Transwood's relocation would preserve BNSF's existing transload option and expand both BNSF and UP access to transloaded products, all to the benefit of the public.

Despite BNSF's claim that it will lose its existing business, UCRC and Transwood intend to proceed with Transwood's relocation. We anticipate that Transwood's new operations will commence on September 30th or sometime shortly thereafter. Even if the economics of transporting soda ash have suddenly changed to make transloading uneconomical, the Transwood facility will be available to both BNSF and UP for use with respect to a wide variety of other products.

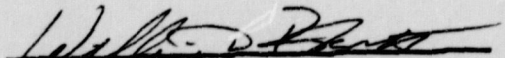
UCRC finds it difficult to believe that BNSF will truly be unable to economically serve the current users of Transwood's service once

their business is relocated to the new UCRC site. UCRC finds it difficult to understand how an 80,000 annual ton movement of soda ash would suddenly become economically unfeasible. Although it is only speculation, it seems more likely that BNSF is either trying to pressure UCRC and Transwood into giving BNSF a better deal, or it is attempting to stymie Transwood's relocation efforts – either to prevent UP from enjoying the benefits that Transwood's relocation would provide or for some other reason. Whatever BNSF's logic, the Board should not allow BNSF to use these proceedings to further its goals.

The Board need not worry about the issues BNSF raised regarding UP's cancellation of Transwood's lease and Transwood's relocation costs. As Transwood and UCRC have been engaged in plans to relocate their facility to UCRC lines for some time, UP's termination of the current Transwood lease had no impact. Both BNSF and UP, as well as Transwood and UCRC, stand to benefit from Transwood's new, expanded facility. The public interest will also be better served. Should the existing business that BNSF handles be lost, it will be due to market factors, not anticompetitive conduct by UP.

UCRC believes that the BNSF business will not be lost – that BNSF is simply engaged in gamesmanship. UCRC also believes that this situation will be resolved much more quickly if the Board makes clear that BNSF's tactics will not provide an advantage in the oversight proceeding.

Respectfully Submitted



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203403

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September 12, 2001


VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

ENTERED
Office of the Secretary

SEP 12 2001

Part of
Public Record

Re: Finance Docket No. 32760 (Sub-No. 21), Union Pacific Corporation, et al. -- Control and Merger -- Southern Pacific Rail Corporation, et al. (Oversight)

Dear Secretary Williams:

Union Pacific Railroad Company and The Burlington Northern and Santa Fe Railway Company respectfully request a five-day extension of time to and until Wednesday, September 19, 2001, to file their replies in the above-referenced proceeding. Yesterday's events disrupted the schedules of company personnel and counsel involved in the proceeding, and a reasonable extension will allow the parties to ensure that their filings are complete and accurate.

If you have any questions regarding this request, please contact Adrian L. Steel, Jr. at (202) 263-3237 or the undersigned at (202) 662-5448. Thank you for your assistance.

Sincerely,

Michael L. Rosenthal

Michael L. Rosenthal

cc: David M. Konschnik, Esq.
Adrian L. Steel, Jr., Esq.
All Parties of Record

203276

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ENTERED
Office of the Secretary

AUG 28 2001

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Public Record


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August 28, 2001

VIA HAND DELIVERY

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

Re: Finance Docket No. 32760 (Sub-No. 21), Union Pacific Corporation, et al. -- Control and Merger -- Southern Pacific Rail Corporation, et al. (Oversight)

Dear Secretary Williams:

Union Pacific Railroad Company ("UP") and The Burlington Northern and Santa Fe Railway Company ("BNSF") respectfully request that they be granted a ten (10) day extension of time to and until Friday, September 14, 2001, to file their replies in the above-referenced oversight proceeding. UP and BNSF are discussing a number of the unresolved issues relating to the BNSF Settlement Agreement, and they are hopeful that the requested extension of time may assist them in being able to reach a successful resolution of one or more of those issues.

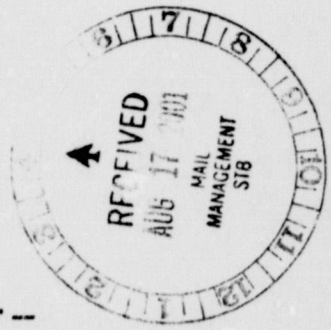
If you have any questions regarding this request, please contact Michael Hemmer at (202) 662-5578 or the undersigned at (202) 263-3237. Thank you for your assistance.

Sincerely yours,

Adrian L. Steel, Jr.

cc: Joseph H. Dettmar, Esq.
J. Michael Hemmer, Esq.
All Parties of Record

NITL-27




**BEFORE THE**
**SURFACE TRANSPORTATION BOARD**

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Finance Docket No. 32760 — 203172

***Union Pacific Corporation, et al -- Control and Merger -- Southern Pacific Rail Corporation, et al***

Finance Docket No. 32760 (Sub-No. 21) — 203173

***Union Pacific Corporation, et al -- Control and Merger -- Southern Pacific Rail Corporation, et al (Oversight)***

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# REPLY COMMENTS ON UNRESOLVED ISSUES RELATING TO THE RESTATED AND AMENDED BNSF SETTLEMENT AGREEMENT

submitted by

## THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

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THE NATIONAL INDUSTRIAL
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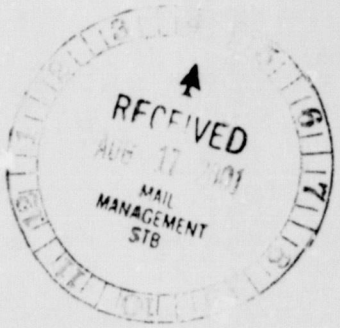
Dated: August 17, 2001

NITL-27




**BEFORE THE**
**SURFACE TRANSPORTATION BOARD**

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Finance Docket No. 32760

***Union Pacific Corporation, et al -- Control and Merger -- Southern Pacific Rail Corporation, et al***

Finance Docket No. 32760 (Sub-No. 21)

***Union Pacific Corporation, et al -- Control and Merger -- Southern Pacific Rail Corporation, et al (Oversight)***



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**REPLY COMMENTS ON UNRESOLVED ISSUES RELATING TO THE RESTATED AND AMENDED BNSF SETTLEMENT AGREEMENT**

submitted by

**THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

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On July 25, 2001, the Union Pacific Corporation, Union Pacific Railroad Company, and the Southern Pacific Rail Corporation (collectively, "UP") and The Burlington Northern and Santa Fe Railway Company ("BNSF") jointly submitted to the Board a "Proposed Restated and Amended BNSF Settlement Agreement" ("July 25 Joint Submission"). In that filing, UP and BNSF indicated that they have engaged in negotiations over the past several months to update the Settlement Agreement that they had entered on September 25, 1995 ("Original Settlement Agreement") to incorporate the conditions imposed by the Board in Decision No. 44 and in

subsequent Board decisions. They also indicated that, although they reached agreement on a majority of the changes to be made, there remained several unresolved issues. The carriers' July 25 Joint Submission contained the proposed changes on which UP and BNSF have agreed, and also contained UP's and BNSF's separate proposals on the issues on which the two carriers had been unable to reach final agreement. The July 25 Joint Submission proposed that interested parties file comments on the Proposed Restated and Amended BNSF Settlement Agreement o: August 17, 2001. Finally, also on July 25, 2001, UP filed its "Opposition to Substantive Changes to the BNSF Settlement Agreement" ("UP Opposition"); and BNSF filed its "Comments on Unresolved Issues Relating to the Restated and Amended BNSF Settlement Agreement" ("BNSF Comments")

The National Industrial Transportation League ("League"), having reviewed the Amended and Restated Settlement Agreement contained in the July 25 Joint Submission as well as the BNSF Comments and UP Opposition, desires to submit these Reply Comments in support of the position of BNSF on three of the issues presented, namely, the issue of the proper definition of "2-to-1" points; the definition of "new" and "existing" transload facilities; and the proper scope of BNSF's trackage rights in two important rail corridors.

## I. INTRODUCTION

The League is an organization of shippers that conduct industrial and/or commercial enterprises throughout the United States and internationally. The League is the oldest and largest nationwide organization representing shippers of all sizes and all commodities. The League has approximately 600 separate company members, ranging from smaller shippers to some of the largest shippers in the country. League members ship substantial volumes of commodities via rail, including rail transportation over the lines of BNSF and UP. The League has been an active

participant both in the merger proceedings involving the UP and the Southern Pacific Transportation Company ("SP"), and in the oversight of the implementation of the merger between the Union Pacific Railroad and SP. League members have an active interest in seeing that competition by the BNSF, that was intended to replace the competition that was formerly provided by the SP, is fully preserved.

## II. THE BOARD SHOULD ACT TO CLARIFY THE SETTLEMENT AGREEMENT IN LIGHT OF ITS POLICIES AND ORDERS IN THE UP/SP MERGER PROCEEDING

In its Opposition, UP argues that the Board does not need to, should not, and cannot as a matter of law, "expand" BNSF's rights under the agreement in order to provide effective competition against UP. UP argues that BNSF's proposals would impose "unlawful retroactive conditions" on the UP/SP merger; and would contravene the Board's policy favoring settlements. UP Opposition, pp. 3-12. The League, however, believes that UP seriously mischaracterizes what is being sought by BNSF in this matter. The League also believes that the effective operation of the conditions that the Board imposed in Decision No. 44, slip op. served August 12, 1996, 1 S.T.B. 233 (1996), requires clarification by the Board of the issues presented by BNSF and UP.

### A. These Three Issues Clearly Involve A Need to Clarify the Terms of the Original Settlement Agreement in Light of the Board's Subsequent Orders

Three of the issues presented by BNSF -- the definition of "2-to-1" points, the definition of "transload facility"; and the restrictions on trackage rights -- involve a clear need to clarify the Original Settlement Agreement. The need to clarify the meaning of the Original Settlement Agreement arises because the substance of the agreement that the parties negotiated; the terms that they used to express their agreement; and the wording of Decision No. 44, did not completely anticipate -- and realistically could not have completely anticipated -- the wide

variety of factual situations to which the Agreement and the conditions imposed by the agency would apply.

The League is aware, for example, that the issue of the definition of "2-to-1" points has been a matter for detailed discussion and disagreements between UP and BNSF right from the beginning, indeed soon after the BNSF trackage rights became effective after the merger of UP and SP was approved. Quarterly Reports for several years have set out a variety of disagreements on this matter. BNSF Quarterly Report, July 1, 1997, p. 12; BSNF Quarterly Report, January 2, 1998, p. 16; BNSF Quarterly Report, July 1, 1998, pp. 59-60; BNSF Quarterly Report, April 3, 2000, pp. 8-10. In fact, the Board's decision in its very first annual oversight proceeding extensively discussed the disagreements that had arisen on this issue. General Oversight Decision No. 10, 2 S.T.B. 703, 710-712 (1997). While the carriers have been able to resolve some of these disagreements, and while others have melted away because of the very uncertainty of the definition that BNSF now seeks to resolve, it is very clear that this issue is not the result of some late-blooming desire by BNSF to "expand" its rights, but is rather the result of uncertainties either in the Original Settlement Agreement and/or in the meaning of the Board's decision in Decision No. 44, and the complex situations to which these texts are applied.

Similarly, the issue of the meaning of "transload facilities" involves a long-standing disagreement.[1] In its decision in the very first oversight proceeding, the Board noted that the parties "seem to be unable to agree on what constitutes a 'new facility' or a 'new transloading facility.'" 2 S.T.B. at 715. Indeed, the Board has already acted several times to resolve disputes regarding the meaning of this condition. See, Decision No. 61, served November 20, 1996; Decision No. 75, 2 S.T.B. 697 (1997); and General Oversight Decision No. 10, 2 S.T.B. 703

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[1] See, *e.g.*, BNSF Quarterly Report, October 1, 1997, pp. 7-8.

(1997). More importantly, in both Decision No. 61 and in Decision No. 75, the Board rejected UP's interpretation of the transload condition, a fact that clearly indicates that the Board not only recognized the need for clarification, but also believed that the agency's action was not an unlawful "retroactive condition" or that the Board's policy favoring voluntary settlements was adversely implicated in any way.

Finally, the issue of the scope of the trackage rights in the Original Settlement Agreement clearly involves a clarification of the meaning of the terms of that document and the effect of Decision No. 44. In the Elvas to Stockton situation, UP itself admits that it granted BNSF local access to two shippers on that line. UP's alternative wording in the July 25 Joint Submission containing the Proposed Restated and Amended Settlement Agreement would confirm that access permanently. Indeed, UP's grant of permanent access is at odds with UP's current explanation that it granted access to those two shippers only because of the 1997-98 service crisis, which UP from the start had proclaimed to be only temporary. See page 8 of Proposed Amended and Restated BNSF Settlement Agreement contained in July 25 Joint Submission. UP's concession with respect to the two shippers, by itself, raises a question as to whether UP originally believed that the trackage rights that it granted to BNSF in that corridor were restricted to overhead rights only. In light of its own action, it is disingenuous for UP to argue now that BNSF is seeking some new right, or is acting inconsistently with its promises.

Similarly, in the Memphis to Valley Junction situation, UP is seeking to eliminate wording in the Original Settlement Agreement that would conflict with its current position -- a clear sign that UP itself recognizes that the Original Settlement Agreement was at minimum internally inconsistent. (See UP's proposed elimination of the first phrase ["Except as provided in Section 91 of this Agreement"] in UP Alternative of Section 6(d) of the Restated and

Amended Settlement Agreement [page 27 of Proposed Restated and Amended BNSF Settlement Agreement contained in July 25 Joint Submission]).

Thus, there is clearly a need to clarify the meaning of the Agreement.

B. Effective Competition Requires That the Board Resolve These Uncertainties

Both UP and BNSF have, in the July 25 Joint Submission and in their separate filings on July 25, asked the Board to resolve these areas of disagreements. The Board should do so. The League strongly believes that the interest of shippers in effective competition between UP and BNSF requires the Board to resolve these uncertainties.

Indeed, as a practical matter, the current uncertainty regarding several of these issues practicably resolves the issue in favor of no competition. Take, for example, the case of a shipper that is contemplating locating a facility at what is arguably a "2-to-1" point. Under Decision No. 44, if the location is in fact a "2-to-1" point, that shipper would have access to competitive rail service by both BNSF and UP. Decision No. 44, slip op. at 124, 1 S.T.B. at 393. However, if UP disagrees that the location is indeed a "2-to-1" point, then the shipper is faced with a dilemma. If the shipper locates the facility at the disputed point, and it is later determined that it does not qualify as a "2-to-1" point, the shipper would then be captive to the UP. Given the uncertainty and risks that such a course imposes, a rational shipper will simply choose not to build the facility at all, or build the facility elsewhere. In either case, the uncertainty over what qualifies as a "2-to-1" point is still unresolved, thus posing the same dilemma for the next shipper in the same position -- and so the problem continues.

The same is true for the issue of the definition of "new transload facilities." As the BNSF Comments and the UP Opposition both state, the issue is whether the operator of a new

transload facility may have any ownership of the product being transloaded. But the very disagreement between the carriers on this point decisively chills attempts to resolve the matter: why should a shipper expend the money to assemble land and construct a transload facility that may not be able to take advantage of BNSF access? Indeed, simply the time it would take for the Board to resolve a specific case is a serious negative factor, as markets and business conditions continually change.

Thus, the League strongly believes that the Board should act to resolve the questions presented by the carriers and, as noted further below, should act to resolve the issues in favor of effective competition between BNSF and UP.

C. UP Is Clearly Incorrect That BNSF's Proposals Would Impose Unlawful Retroactive Conditions on the UP/SP Merger, or Would Contravene the Board's Policy Favoring Settlements

In Decision No. 44, the agency imposed a broad oversight condition, in which it required initiation of yearly proceedings to determine "the effects of the merger and the implementation of the conditions." Decision No. 44, slip op. at 147, 1 S.T.B. at 421. Clearly, part of the issue of the "implementation of the conditions" involves the meaning of the conditions imposed, including the meaning of the Original Settlement Agreement that was itself imposed, with modifications discussed in Decision No. 44, as a condition of the UP/SP merger. See Decision No. 44, slip op. at 145-146, 1 S.T.B. at 419-420.

Thus, the UP's argument, that the Board has the power to "modify" a condition it imposed in Decision No. 44 *only* if the condition "failed to preserve competition," is incorrect. In the case of the issue of the definition of "2-to-1" points, "new" and "existing" transload facilities, and the scope of BSNF's trackage rights, the Board is not being asked to "modify" a

condition: it is being asked to determine the meaning of a condition that it has already imposed. The Board clearly has the power to do so.

Additionally, there is no real question that BNSF's request to the Board to clarify the meaning of the Original Settlement Agreement would contravene the Board's policy favoring settlements and BNSF's promises in the settlement agreement. These issues simply involve a good-faith dispute between BNSF and UP as to what the parties in fact agreed to in 1995 and the meaning of the words that they used to express their agreement, when both parties, and indeed the Board itself, could not foresee all the complex factual situations to which that agreement and the Board's conditions would apply. To accuse one party of bad faith is, the League believes, simply not helpful.

II. DEFINITION OF "2-to-1" POINTS

As pointed out by BNSF, the correct identification of "2-to-1" points is critical to the determination of the rights that BNSF received pursuant to the merger. BNSF notes that it received the right to serve "2-to-1" shippers, existing transloads, and new shipper facilities at "2-to-1" points. BNSF Comments, p. 3. Thus, notes BNSF, a clear definition of the term is vital to ensuring that shippers will receive the benefit of the Board's conditions. *Id.* UP apparently agrees that there *should* be a definition of "2-to-1" points in the Amended and Restated Settlement Agreement, since UP has itself proposed wording to define the concept. See page 3 of Proposed Amended and Restated BNSF Settlement Agreement contained in July 25 Joint Submission.

However, BNSF and UP disagree on the substance of the definition. Under BNSF's definition, a "2-to-1" point is "all geographic locations" (defined by 6-digit SPLC codes) "that

were commonly served by both UP and SP" when the Original Agreement was executed, regardless of how long before that date shippers at those locations may have shipped, or whether shippers at those locations were open to or served by both UP and SP.

UP, on the other hand, would define "2-to-1" points as "all geographic locations at which at least one '2-to-1' Shipper Facility is located." In turn, "2-to-1 Shipper Facilities," under UP's proposed definition, are defined as Shipper Facilities "that were open to both UP and SP . . . when the 1995 Agreement was executed. . . ." Thus, the UP definition would require the existence of a "2-to-1" shipper in 1995, and not just that the rail station was listed for service by both UP and SP in 1995.

The League respectfully submits that UP's proposed definition is inconsistent with the terms and policies of Decision No. 44.

It is extremely important to note that, at this point in time (*i.e.*, 2001 and forward for the life of the Settlement Agreement), the primary purpose for defining "2-to-1" points is to determine points at which new shipper facilities that may locate at such locations can receive competitive rail service from both BNSF and UP. Presumably, five years after the merger, BNSF and UP have already identified virtually all shipper facilities that were actually open to UP and SP in 1995, as well as all then-existing transload facilities.[2] Thus, the current dispute involves a narrow issue, and one that is primarily forward-looking: whether new shipper facilities planned today and for the future will be able to obtain competition from both BNSF and UP. Though the issue is narrow, it is very important: the Board noted in Decision No. 44 that "location of new facilities provides competitive pressure," and the Board took great care to

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[2] The League is aware that there are two existing disputes, regarding Tracy, CA and Woodland, CA, that are historical in nature.

maintain the availability of such competitive pressure for the indefinite future. Decision No. 44, slip op. at 124, 1 S.T.B. at 393.[3]

But a shipper considering locating today at a rail station listed for service in 1995 by both UP and SP would, but for the merger of the UP and SP, have that "competitive pressure" available to obtain a rate and service package from the two railroads, regardless of whether there was another *shipper* at that location open to both UP and SP in 1995. Thus, it is necessary at this point in time to define "2-to-1" points as geographic locations that were open to service by both UP and SP in 1995 (regardless of the existence of a shipper open to both UP and SP in 1995), in order to replicate, through competition provided by BNSF today, the "competitive pressure" that would have existed today but for the changes wrought by the merger of the UP and SP.

Moreover, the use of 6-digit SPLCs to define such geographic locations is particularly appropriate, because 6-digit SPLCs comprise an extremely narrow geographic area -- a single rail station -- within which it is logical to believe that a shipper now or in the future choosing to locate would have ready access to both UP and SP, but for the merger of the two carriers. Indeed, such a geographic definition is particularly appropriate because in 1995, both UP and SP held out to the shipping public, in their tariffs, that they each in fact served that geographic location.

In its Opposition, UP argues that the Board "already rejected" BNSF's current proposal "when NITL advanced it in the merger proceeding," citing 1 S.T.B. at 392 n. 133. UP is wrong.

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[3] Indeed, the Board was so careful to preserve this source of competitive pressure that it specifically broadened both the Original Settlement Agreement between BNSF and UP, and even broadened that Agreement as modified by the subsequent CMA settlement. *Id.*

First, the context of the League's evidence, as well as the Board's discussion cited by UP, did not involve the proper definition of "2-to-1" points in the Original Settlement Agreement. Rather, the evidence submitted by the League was directed to the extent of the overall reduction in competition to be caused by the UP/SP merger, in support of the League's proposed remedy, namely, divestiture of various SP lines to other carriers. See, Comments, Evidence and Requests for Conditions Submitted on behalf of The National Industrial Transportation League, March 29, 1996, pp. 23-24. As the agency noted, the protestants

> aggregate traffic that will experience various types of competitive problems that we think are readily susceptible to different types of remedies. Although divestiture of parallel lines could address harms discussed here, there are less intrusive ways and more focused ways of achieving that result, which are adopted here.

Decision No. 44, slip op. at 123, 1 S.T.B. at 392-393.

Second, UP implies in its Opposition that the agency rejected the League's approach in favor of UP's own approach. The actual situation is precisely the opposite. In its decision, the Board noted that, "[t]o identify points to be covered by corrective trackage rights, applicants have identified 2-to-1 points as those that can be served directly, or through reciprocal switching by UP and SP but by no other Class I railroad." In a footnote accompanying that quote, the agency specifically noted that the Applicants had "carefully checked actual accessibility" in defining "2-to-1" points. Decision No. 44, slip op. at 121-122, 1 S.T.B. at 391 [emphasis added]. After discussing the protestants' contentions that the applicants had not correctly measured the anticompetitive effects of the transaction, the Board noted that "[w]e agree with protestants that applicants have not gone far enough in addressing certain adverse competitive effects." Decision No. 44, slip op. at 123, 1 S.T.B. at 393. Thus, it is very clear UP's position, which then (as now) focused on "actual accessibility" to prescribe the limits of curative access by BNSF, was rejected

by the Board, although the Board also rejected the protestants' contention that divestiture was the proper remedy.

Indeed, the liberties that UP has taken with the Board's discussion in Decision No. 44 on this point are graphically illustrated in UP's "block quote" on page 12 of its Opposition, which conveniently omits the crucial words specifying the "arbitrary proximity" that the Board was discussing: "a BEA or 4-digit SPLC." [Emphasis added] BNSF in its Comments is not proposing a 4-digit SPLC, but the far narrower 6-digit SPLC, which defines an individual rail station. See 1 S.T.B. at 372, and compare to the passage quoted at UP's Opposition, p. 12.

The fact of the matter is that nowhere in Decision No. 44 is there any indication that the Board was requiring the existence of at least one-dual served shipper before the Board's remedies should apply, particularly in the narrow case now presented dealing with the location of future shipper facilities. In fact, the words and policies of Decision No. 44 argue strongly for BNSF's proposed definition of the term.

## III. DEFINITION OF "EXISTING" AND "NEW TRANSLOAD FACILITIES"

As noted by BNSF, the Original Settlement Agreement granted BNSF the right to serve existing and new transload facilities at "2-to-1" points, and in Decision No. 44, the Board expanded the "new facilities" condition to also grant BNSF access to new transload facilities on trackage rights lines. The dispute on this issue between the parties involves a single area of disagreement, namely, whether a qualifying transload facility may have an ownership interest in the product being transloaded.

In its Opposition, UP argues that the Board should now make a distinction between "public" and "private" transload facilities. UP seems to argue that the lack of a "non-ownership"

requirement would make it "easy" for every shipper to build its own transload facility, and argues that BNSF's proposed definition would somehow convert the transload condition into an "open access" provision.

But the Board has already decided these questions both in Decision No. 61 and in Decision No. 75, where it said that BNSF should have access to any "legitimate transload operation." See, Decision No. 61, slip op. at 12; Decision No. 75, 2 S.T.B. at 702. In those decisions, the Board made no distinction between a "public" and a "private" transload. The Board ruled that the question of whether a transload operation was "legitimate" would involve only two inquiries: namely, would it "entail *both* the construction of a rail transload facility as that term is used in the industry *and* operating costs above and beyond the costs that would be incurred in providing direct rail service." Decision No. 61, slip op. at 12; Decision No. 75, 2 S.T.B. at 699-701 [emphasis in original]. UP would now have the Board engraft a *new* requirement, namely, that "the operator of [the transload facility] has no ownership of the property being transloaded." See page 7 of Proposed Restated and Amended BNSF Settlement Agreement contained in July 25 Joint Submission.

UP's position would simply erect an additional barrier for a shipper's use of the transload condition. Not only would the shipper need to construct or have constructed a new transload facility and pay costs over and above the costs that would be incurred in providing direct rail service, but it would also have to find an independent operator of the facility and overcome whatever operational problems might arise as a result of the facility's separate ownership and direction. Nothing in the Board's several decisions on the transload requirement suggests that such an additional barrier is appropriate, and UP introduces no evidence or even makes no

assertion that there has been any attempted misuse of the transload condition by BNSF or any shipper.

The UP's proposed new requirement is thus inconsistent with the precedent already established by the Board, and should be rejected.

## IV. RESTRICTIONS ON BNSF'S TRACKAGE RIGHTS

Also at issue before the Board are certain alleged restrictions on BNSF's trackage rights, in two locations, Elvas (near Sacramento) to Stockton, CA; and in the Houston-Memphis-St. Louis Corridor.

While the League is not in a position to comment in detail on the substance of the parties' negotiations that led to the text of the Original Settlement Agreement, it does wish to briefly discuss two matters that bear directly on the issue now presented to the Board.

First, the League believes that UP is not correct in arguing that the scope of BNSF's rights in the two corridors at issue is only a matter of the private agreement of the parties. See, UP Opposition, pp. 15-16, 18. While the Original Settlement Agreement was negotiated and signed by the two parties, that agreement was subject to and radically affected by the orders and policies in Decision No. 44. In other words, the Original Settlement Agreement must be read in light of the subsequent decisions of the agency, which converted that agreement from a private settlement to an integral part of the mechanism by which the Board implemented its own statutory responsibility to protect the public interest. Thus, in resolving the current dispute, the Board must examine not only what the parties negotiated, but much more importantly, the words and policies of Decision No. 44 and the Board's subsequent rulings in the UP/SP merger proceeding.

Second, the League would urge the Board, in interpreting its orders in Decision No. 44 and subsequently, to avoid where possible imposing unnecessary operational restrictions on BNSF's trackage rights. The rail industry is long past the time that it can afford to tolerate inefficiencies, and it defies credulity that the Board's orders should be interpreted to mandate such inefficiencies, particularly when the Board intended in Decision No. 44 to make BNSF an effective competitor over the trackage rights lines.

These two points are particularly important in the case of the Houston-Memphis-St.Louis corridor. That corridor was one of the two key traffic lanes at issue in the UP/SP merger case for a variety of rail-dependent commodities, particularly chemicals, plastics, and forest products, and was the subject of numerous discussions and conditions throughout Decision No. 44. See Decision No. 44, slip op. at 122, 125-126, 132-137, 1 S.T.B. at 391, 394-395,408-409. In approving BNSF's trackage rights in this corridor, the agency was aware of the need for BNSF to provide efficient and effective service over the trackage rights lines. For example, in discussing the concerns of International Paper Company regarding service in the Houston to Memphis/St. Louis corridor, the agency assured the shipping public in Decision No. 44 that "[t]he trackage rights and routes opened to BNSF will permit that carrier to provide quality service competition in these markets," and that the trackage rights granted would permit "efficient movement of northbound BNSF traffic from these points . . ." Decision No. 44, slip op. at 136, 1 S.T.B. at 409.

UP's position, that BSNF trains in the Houston-Memphis-St.Louis corridor should not be able to enter or leave these trackage rights at intermediate points north of Bald Knob and Fair Oaks, AK, is just such an operational restriction that the Board should not permit. Prior to the merger of the UP and SP, BNSF could, for example, have interchanged traffic running

southbound on its Kansas City to Memphis line with either SP or UP at Hoxie or Jonesboro, AK, depending upon the carrier with which it desired to interchange the traffic to destination. Under the restriction advocated by UP, BNSF traffic would need to continue past those points to Memphis, TN, and then come back to the lines of the merged UP at Bald Knob or Fair Oaks (or Brinkley, AK), depending upon the destination. But such a restriction would be inconsistent with the intent of the trackage rights condition imposed by the Board in this corridor, to replace the competitive rail service provided pre-merger.

Moreover, as discussed above, the text of the Original Settlement Agreement made an explicit provision in Section 6(d), dealing with UP or SP lines between Memphis and Valley Junction IL, that BNSF would "have the right to connect, for movement in all directions, with its present lines (including existing trackage rights) at points where its present lines . . . intersect with Trackage Rights Lines." See page 27 and page 43 of Proposed Amended and Restated BNSF Settlement Agreement contained in July 25 Joint Submission. BNSF's own lines clearly intersect with the Trackage Rights Lines north of Bald Knob and Fair Oaks, and thus by the text of the Original Settlement Agreement itself, BNSF should have the right to connect to it own lines north of Bald Knob and Fair Oaks.

## VI. CONCLUSION

The Board is respectfully requested to clarify and interpret the Original Settlement Agreement and its prior decisions to approve the text proposed by BNSF to the Amended and Restated BNSF Settlement Agreement contained in the July 25 Joint Submission to the Board, as discussed in these Reply Comments.

Respectfully submitted,

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Dated: August 17, 2001

Certificate of Service

I hereby certify that I have on this 17th day of August 2001 served a copy of the foregoing Reply Comments on all parties of record, in accordance with the Board's Rules of Practice, and have hand-served a copy of the foregoing on counsel for BNSF and Applicants.