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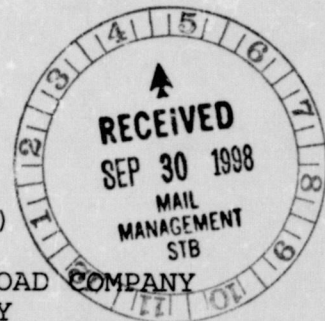
Finance Docket No. 32760 (Sub-No. 21)

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

191476  
UP/SP-361



APPLICANTS' REPLY TO COMMENTS

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APPLICANTS' REPLY TO COMMENTS

Applicants hereby reply to the following submissions  
in this proceeding:

- American Forest & Paper Association ("AF&PA"):  
August 14 comments.
- BNSF: July 1 report (BNSF-PR-8) and August 14  
comments (BNSF-7).<sup>1/</sup>
- Cemex USA Management, Inc.: August 14 comments.
- City Sanitation Districts of Los Angeles County:  
August 7 letter.
- Colorado, Kansas & Pacific Railway Company  
("CK&P"): August 14 comments.

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<sup>1/</sup> Our reply covers BNSF's July 1 and August 14 filings to the extent that they address issues other than the Houston/Gulf service issues to which we have already responded in our September 18 filing in the special Houston/Gulf oversight proceeding. We also have responded separately to BNSF's petition for access to South Texas Liquid Terminal in San Antonio (August 14 comments, pp. 7-8). See UP/SP-351; UP/SP-354.

- DOT: August 14 comments (DOT-3).
- Public Service Company of Colorado ("PSC"):

August 14 comments.

We also respond to two submissions that were recently filed in the Houston/Gulf oversight proceeding by related entities, and that address issues properly in the scope of the present proceeding rather than that one:

- Champion International Corporation: September 15 verified statement (CIC-2).

- Angelina & Neches River Railroad Company ("A&NR"), a shortline 50% owned by Champion: September 17 statement of David M. Perkins (A&NR-2).<sup>2/</sup>

I. THE RECORD SHOWS UNDIMINISHED -- AND INDEED  
INTENSIFIED -- COMPETITION FOLLOWING THE MERGER

By far the most significant fact about these various comments is what they do not say.

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<sup>2/</sup> We have previously replied to the Arkansas, Louisiana and Mississippi Railroad's petition seeking direct access to BNSF. See UP/SP-343; UP/SP-347. Since AL&M filed its petition, UP's service has improved markedly and cycle times are returning to normal. The average cycle time for moves that UP interchanges with AL&M and that terminate at UP-served destinations has dropped from a February 1998 high of 26 days to 17 days in August, a level that is approaching normal. For movements to non-UP-served destinations, cycle times dropped from a February peak of 14 days to 7 days in August, at or close to normal. We do not address comments (DOT-3, p. 7; CIC-2, p. 9; A&NR-2, pp. 7-8) supporting a request by the NIT League that increased reporting obligations be imposed on UP. That request was denied in a Decision served Sept. 22, 1998 in Ex Parte No. 573.



The Board commenced this second annual general oversight proceeding to determine whether the UP/SP merger had reduced competition, and whether the competition-preserving conditions that were imposed on the merger have continued to work. UP served its July 1 annual oversight report, exhaustively addressing those issues, on numerous parties on the service list for this proceeding, including many shippers who, during the course of the merger case, had opposed the merger outright or sought onerous conditions that the Board declined to impose. The text of the report has been on public file, and has also been available on UP's website on the Internet.

If any party -- or anyone in the world -- had any evidence that the merger has caused harmful reductions in competition, or that the BNSF and Tex Mex rights have not worked to provide powerful competition to the merged system, they had ample opportunity to present it. No one did.

Tellingly, none of the commentators has a word to say about UP's July 1 report. That report showed that BNSF has continued, for a second year, to mount fully competitive train service in every major trackage rights corridor -- a fact that BNSF itself confirms (BNSF-PR-8, p. 55). It showed that BNSF has continued to handle large and continually-increasing volumes of business using its merger rights -- indeed, volumes twice those in the preceding year -- and that

its trackage rights and haulage traffic is approaching half of the total universe of traffic that BNSF itself estimated it could contend for. See UP/SP-344, p. 80. It demonstrated that BNSF's volumes far exceed what the merger's opponents claimed BNSF could ever handle. Everyone had this information and an ample opportunity to respond. No one did.

The Confidential Appendices to the July 1 report (UP/SP-345) contained hundreds of concrete examples of BNSF's success in gaining "2-to-1" traffic using its rights, with attendant rate and service benefits to shippers, and of the rate and service improvements that UP has had to provide to shippers to retain a share of the "2-to-1" traffic in the face of BNSF's intense competition. Those Appendices also documented the benefits received by "3-to-2" shippers from a stronger competitive environment following the merger. They documented the reductions since the merger in UP's rates for "2-to-1" traffic, "3-to-2" traffic, Eastern Mexico gateway traffic, coal traffic, chemical traffic, plastics traffic, and grain traffic since the merger. Numerous private parties whose outside counsel and consultants had access to these Appendices, including BNSF, KCS/Tex Mex, SPI, CMA, the NIT League, and many affected shippers, as well as government parties such as DOJ and DOT, could have contested this



information if they had any fault to find with it or any error to point out. No one did.<sup>3/</sup>

Indeed, DOJ, perhaps the most vehement party in the merger case in theorizing that the merger, even as conditioned, would harm competition and drive rates sharply upward, has not seen fit to comment in either of the two annual oversight proceedings. The undisputed -- and indisputable -- facts contradict the theories that it presented to the Board.

The only comment that even alludes to the rich mass of information in UP's July 1 report and Confidential Appendices is a suggestion by DOT that, while the data do demonstrate vigorous and effective competition by the condition recipients, the service crisis prevents any firm conclusions from being drawn as to competitive impact of the merger or the effectiveness of the merger conditions. DOT Comments, pp. 5-6. With all respect, this suggestion cannot be squared with the facts.

Before the service problems arose, BNSF volumes (and Tex Mex volumes as well) had grown sharply, and had reached a level that supported fully competitive train services.

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<sup>3/</sup> BNSF vaguely asserts that "most" of its recent traffic growth has come from overhead traffic, "2-to-1" shortlines, or direct switching (Comments, p. 4), but this is belied by scores of concrete cases in the 1998 Confidential Appendices. BNSF offers no data to support its assertion or to contradict the facts in the Confidential Appendices.



Hundreds of shippers were benefitting from this strong competition before the congestion crisis struck. The Board relied on these facts in finding, in last year's annual oversight proceeding, that no competitive problems had been identified. Decision served Oct. 27, 1997, p. 2. Since then, despite the service problems, and despite BNSF and Tex Mex claims that they have been impeded by those problems, BNSF's and Tex Mex's trackage rights traffic volumes have grown further -- and it is clear that this growth cannot be explained by the congestion problems, which affected BNSF and Tex Mex as well as UP.<sup>4/</sup> Scores of additional concrete examples of shipper benefits have been added to the already long list that was available last year. Rates have continued to fall.

It is thus simply not true that it is too early to conclude with confidence that the merger conditions are working, and that the merger has caused no competitive harm. The very comprehensive record before the Board permits no other conclusion than that the conditions have been highly effective and the merger has not caused any reduction in competition. Indeed, it is clear that in many ways -- ranging from sharply lower reciprocal switch fees throughout the West, to the creation of two entirely new single-line routes in the

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<sup>4/</sup> See Finance Docket No. 32760 (Sub-No. 26), UP's Opposition to Condition Applications, Vol. 2 (UP/SP-357), Verified Statement of Richard J. Barber, pp. 47-53.

I-5 Corridor, to the creation of a cornucopia of equipment utilization benefits, to the injection of new competition for "1-to-2" shippers in Louisiana -- the merger has been pro-competitive.

## II. RESPONSES TO SPECIFIC COMMENTS

### A. AF&PA

AF&PA is the only commentator that contests applicants' showing that the merger has already produced real benefits. AF&PA asserts, without citing any specifics, that the merger has failed to "produce the public benefits relied upon by the Board" (p. 3), and suggests that UP may not have sufficient incentives "to improve and maintain service levels, an adequate supply of equipment, or to capitalize on expected merger economies of scale to attract incremental business off the nation's highways" (pp. 3-4).

It is hard to understand how AF&PA can seriously advance these claims. The fact is that the merger has already generated a particularly wide array of benefits for forest products and paper shipments. Despite service problems, lumber carloadings have increased as a result of the merged system's improved car supply, lower rates, and improved coverage of lumber producers' end markets. Paper shippers are taking advantage of the new shorter and single-line routes that the merger created. These were the very merger benefits



that the applicants predicted, and the Board found, would occur.

Equipment Supply. A primary merger benefit for AF&PA members has been UP's greatly expanded fleet of centerbeam flatcars. As AF&PA notes (p. 2), the forest products and paper industry is responsible for 95% of all centerbeam traffic. Centerbeams are the preferred equipment type of Pacific Northwest and California lumber shippers. Since the merger, UP has purchased or leased 875 additional 73-foot centerbeam flats, and it is now in the process of acquiring 300 more. SP lacked the financial resources to acquire such cars. The merged system has also worked with shippers and shortlines to support the expansion of their centerbeam fleets. In all, UP's centerbeam fleet, including 73-foot and 60-foot cars, will grow from 3,221 cars before the merger to 4,396 in the first quarter of 1999. Today, UP is completely current in meeting centerbeam demand.

UP has also acquired 800 more bulkhead flatcars for lumber traffic since the merger, and has plans to acquire another 125 such cars, which will bring its fleet of bulkheads to almost 4,000. UP has been so successful in meeting bulkhead flat demand that it has bulkheads in storage.

Furthermore, the merged system has acquired or reconditioned hundreds of boxcars to move forest and paper products. Since the merger, UP has purchased or repaired 763

50-foot boxcars and 308 60-foot boxcars, which has brought UP's fleet of boxcars used in the lumber and paper business to almost 19,000 cars.

Forest products and paper shippers have benefitted not only from access to a larger fleet, but also from the merged system's ability to use the combined UP/SP fleet more efficiently. The merged system can better meet customer requirements with its expanded combined fleet. It is able to provide higher capacity cars, and thus reduce overall costs, for customers who would prefer such cars. Moreover, the merger has created many opportunities to reposition and reload empty equipment to increase equipment availability for shippers. And it has made UP equipment available to SP shippers for loading, and vice versa. For example:

- SP empty centerbeams and boxcars are being reloaded at UP points in Texas, Louisiana and Arkansas for backhauls to SP points in Arizona and California.

- SP boxcars are being used for paper loading in Arkansas, which is allowing UP to reduce the use of foreign cars.

- UP is providing from 30 to 125 high-cube 50-foot boxcars per month to SP-served shippers for paper moves from Oregon to Southern California.



- UP is providing as many as 125 60-foot boxcars per month to SP-served shippers for lumber loading in the Pacific Northwest.

- UP is providing up to 40 60-foot boxcars per month to SP-served Arkansas plywood shippers.

Simplified and Reduced Rates. In addition, forest products shippers have greatly benefitted from the merged system's complete redesign and simplification of SP's lumber tariffs. UP replaced a three-foot stack of SP tariffs and circulars with a simple-to-read matrix. This streamlined format improves the shippers' ability to do business by making rates understandable and accessible to the personnel who are responsible for buying and selling lumber, in contrast to the superseded tariffs, which required interpretation by rate specialists.

UP's rate simplification also dramatically reduced the level of SP's lumber rates. Rates for traffic moving from SP shippers to Midwest points and gateways were lowered sharply. For example, for lumber shipments moving from SP points in Oregon to Chicago, St. Louis and Memphis, rates were reduced on average by more than \$1,200 per car. These reduced rates, combined with improved equipment supply, expanded SP lumber shippers' access to critical domestic markets at a time when export markets were drying up.

Forest products shippers located on UP lines have also enjoyed rate reductions because of the merger. UP rates have been reduced in order to make UP-served shippers in the Pacific Northwest more competitive to SP-served destinations in California and Arizona. For example, rates from Spokane to Northern California have been reduced by 14%, rates from Spokane to Los Angeles have been reduced by 11%, and rates from Seattle and Tacoma to Phoenix have been reduced by 14%.

Increased Business and New Markets. In significant part because of these merger benefits, shipments of forest products have significantly increased. SP-served shippers in Oregon, who suffered from SP's poor service and inadequate equipment supply before the merger, have particularly benefitted. Between 1996 and 1997, the total number of carloads of lumber shipped by UP/SP from Oregon increased substantially. Bulkhead flatcar shipments increased by 28%, and centerbeam carloadings by 25%. UP/SP's Oregon shipments increased by 19% to the Upper Midwest, by 39% to the Northeast, by 13% to the Southeast, by 30% to the Midwest, by 19% to Texas, and by 14% to Arizona and New Mexico.

In the first seven months of 1998, carloads were up compared with 1997 levels. Shipments from Oregon to the Upper Midwest were 12% higher in the first seven months of 1998 than in the first seven months in 1997. There were also dramatic increases in shipments from the Pacific Northwest to the



Northeast (up 17%), the Southeast (up 24%), the Midwest (up 12%), and Texas (up 46%).

These increases in traffic are the result of SP shippers' taking advantage of lower rates, improved equipment supply and improved routes to reach new markets and expand existing business. The traffic increases are also the result of UP shippers' taking advantage of new single-line service, reduced rates, and access to SP destinations to reach new customers in California, Arizona and Texas.

Paper producers have also been taking advantage of improved routings and the ability to reach new markets as a result of the merger. For example, in the Pacific Northwest, UP-served paper shippers in Washington are using the new single-line routes available in the I-5 corridor to replace joint-line routings to receivers in Southern California. UP-served shippers in Washington are exploiting new access to SP-served receivers in Arizona. SP-served shippers in Oregon are supplying UP-served receivers in the Los Angeles Basin. And SP-served shippers are utilizing UP's more direct route to reach new receivers in Denver, with scrap paper moving in the opposite direction.

In the Southeast, UP-served paper shippers in Arkansas, Texas and Louisiana are taking advantage of new, shorter routes to UP- and SP-served destinations in Southern California. Large mileage savings are realized for this

traffic by use of the SP Sunset route instead of UP's less direct Central Corridor route. SP-served shippers in Arkansas are using shorter routes to reach receivers in the Pacific Northwest. And paper shippers that before the merger used BNSF intermodal service rather than SP to move traffic between New Orleans and Southern California are now shipping via UP, while other paper shippers are taking advantage of BNSF's new rights to offer service over New Orleans.

One segment of UP's paper business that has been increasing recently is scrap paper traffic. Single-line service in the I-5 Corridor, the ability of SP-served mills in the Pacific Northwest to access UP-served supplies of scrap paper in California, and the ability of UP-served mills to access SP-served scrap paper supplies have resulted in a 30% increase in northbound scrap paper shipments in the I-5 Corridor. Moreover, BNSF has made new inroads into this market as a result of the new single-line routings it obtained in the I-5 Corridor.

Shortline Railroad Concerns. AF&PA also complains about so-called "paper barriers" in shortline sale agreements, and about railroad pricing policies that allegedly affect the competitiveness of shortline railroads. Comments, pp. 4-5; see also CIC-2, pp. 8-9; A&NR-2, p. 7.

These issues have no connection to the UP/SP merger, which did not render any shortline "captive" or create any



"paper barrier." Moreover, they have recently been addressed in the very positive and constructive agreement entered into on September 10 between the Association of American Railroads and the American Short Line and Regional Railroad Association. See Docket No. S5R 100, Association of American R.Rs. & American Short Line & Regional R.R. Ass'n -- Agreement -- Application Under 49 U.S.C. 10706, Decision served Sept. 22, 1998.

It should nonetheless be noted that UP is in the process of instituting new, competitive through rates that will allow exclusively-served shortlines to ship products to BNSF local points. UP has already put such rates in place for one shortline, Central Oregon and Pacific, and is in the process of negotiating similar through rates with respect to three other Pacific Northwest shortlines. These new, competitive rates will give Pacific Northwest producers expanded access to markets served by BNSF.

B. BNSF

In the following discussion of BNSF's July 1 report and August 14 comments, we first respond to BNSF's various specific complaints, and show that they are ill-founded or grossly exaggerated, have in large part been resolved, and often have nothing to do with the merger. We then address BNSF's irresponsible charges that UP is guilty of a "lack of cooperation and neglect" and "outright discrimination and

manipulation of existing agreements." August 14 Comments, pp. 3-4. We show that these are outrageous falsehoods, and that the truth is the diametric opposite -- UP has bent over backwards to provide BNSF one unilateral concession after another, far beyond anything required by the settlement agreement or the conditions imposed by the Board, to ensure that BNSF will be quickly and fully competitive using the rights it received in connection with the merger. Finally, to place BNSF's never-ending litany of complaints against UP in proper perspective, we review a few of the serious complaints that UP could have advanced against BNSF in this forum but has not -- and explain why such matters can and should be worked out between railroads on an arm's-length basis in the private sector, and are brought to this agency only as part of a cynical campaign to secure regulatory largesse.

1. BNSF Complaints

- a. Central Corridor

In its July 1 report, BNSF advances a number of complaints regarding operations in the Central Corridor. BNSF repeats several of these complaints in its August 14 comments. BNSF's complaints continue a pattern of asserting vague, unsubstantiated, and often misleading or outright false charges, and of raising before the Board issues that UP and BNSF have already resolved or are working together to resolve. BNSF's efforts to tar UP in the hope of receiving additional



rights from the Board in this or related proceedings have led it to advance complaints that not only are invalid, but in many cases have nothing to do with the merger. Many of BNSF's complaints reflect its desire to use UP's capacity and shift other costs to UP without paying its fair share. When BNSF does focus on merger-related events, its complaints in fact demonstrate UP's extensive efforts to ensure that the conditions imposed by the Board are effective.

Congestion. BNSF says in its July 1 report (p. 21) and August 14 comments (p. 11) that congestion along UP lines between Denver and Stockton has adversely impacted its service.<sup>5/</sup> UP indeed experienced congestion in the Central Corridor, especially after the July 1 cutover to TCS in California and Nevada. However, operations are now much more fluid throughout the corridor, although between Denver and Bond, Colorado, capacity constraints continue to affect both UP and BNSF operations.

The temporary congestion that BNSF complains about resulted from steps that will improve service for all concerned. Vital maintenance on UP's Central Corridor lines,

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<sup>5/</sup> BNSF asserts in its August 14 Comments (p. 11) that the level of service BNSF has been able to provide over trackage rights lines "does not allow BNSF to meet its commitments to customers." But the appropriate test should be whether BNSF is able to offer competitive service, not whether BNSF is meeting unilaterally-established commitments. Under BNSF's vague standard, it would be far too easy for BNSF to promise the customer the world and then blame UP when its unrealistic commitments cannot be met.

the TCS cutover in the Far West, and the rebuilding of the Roseville yard have all contributed to Central Corridor congestion. Much of the mainline maintenance and upgrading work is now complete, though work will continue through the fall and winter. The TCS cutover is now behind us. Work at Roseville is progressing, but will continue into next year. All these steps were and are essential, and all will benefit BNSF as well as UP. Even in the short term, they did not place BNSF at any competitive disadvantage.

BNSF complains in its July 1 report (p. 21) that UP has been increasing its coal business in the Grand Junction, Colorado, area and building up traffic on the former SP line between Denver and Grand Junction without consulting BNSF. It is true that UP has been increasing its Colorado coal business. UP is working hard to meet the demand for coal by utilities. UP is not required to seek BNSF's permission to increase its business. Moreover, BNSF can hardly claim to be surprised by increases in Colorado coal traffic. The merger application and other filings by Applicants in the merger case stressed that the merged system would promote continued growth of Utah and Colorado coal traffic.

The primary issue on the Denver-Grand Junction line is one of capacity between Denver and Bond. BNSF cannot ignore the fact that it is responsible for a large share of the increase in traffic along this line. BNSF has the right



under the settlement agreement to request that UP add capacity to the line, but if it wants this extra capacity, it is required under the agreement to pay for its share of the improvements.

In its August 14 comments, BNSF suggests (p. 11) that coordinated dispatching control of this line would improve BNSF's ability to compete. BNSF never explains why this would be so. BNSF does not contend that UP has "discriminated" against it in dispatching this line, and UP has not. BNSF recently placed one of its Denver trainmasters in the Harriman Dispatch Center for two weeks to observe dispatching decisions on the line, and his conclusion, which was reported at the June 12 Joint Service Committee by BNSF's David Dealy, was that UP was following the parties' Dispatching Protocol and that there had been no "discrimination."

Coordinated dispatching control of lines in the Houston area has been beneficial because UP and BNSF trackage and operations are highly intertwined in and around perhaps the most complex and difficult rail terminal in the nation. For example, every UP and BNSF train operating into Houston from UP's Brownsville Subdivision must operate on tracks controlled by UP dispatchers, then on tracks controlled by BNSF dispatchers, and then back onto tracks controlled by UP dispatchers which pass by BNSF's freight yard, all in a few

dozen miles. Coordination is essential. On mainlines in open country, there is no need for such intricate coordination, although there is certainly a need for communication.

Trackage rights agreements across the country, including many where UP is on BNSF lines, allocate dispatching control to the landlord.

Any adoption of joint or coordinated dispatching should be negotiated by the affected carriers in ways that are sensitive to specific conditions. UP is willing to discuss such arrangements with BNSF -- and the parties have had such discussions -- but we would expect BNSF to be equally receptive to coordinated dispatching of BNSF lines used by UP, such as Portland-Tacoma, Chicago-Kansas City, Daggett-Riverside CA, and the Powder River Basin Joint Line. BNSF recently rejected a UP proposal for joint dispatching in the Powder River Basin.

If BNSF is looking for a short-term solution to the press of business on the Denver-Grand Junction line, short of adding capacity, it would do well to follow UP's lead and shorten its crew districts. When the merger was implemented, UP's crew district was initially from Denver to Grand Junction, the same as BNSF utilizes now. UP recognized, however, that this district was too long, and divided it into two separate districts, Denver-Bond and Bond-Grand Junction. As a result, UP's re-crew rate dropped from 50% to less than



15%. UP has told BNSF about its experience and suggested that BNSF modify its crew districts. BNSF has refused to do so.

BNSF also complains in its July 1 report (p. 21) about congestion on the joint line between Denver and Pueblo, and suggests that joint dispatching of this line would improve BNSF's ability to serve shippers. This is an odd issue to be raising in a proceeding related to conditions imposed in the UP/SP merger. The Denver-Pueblo line is subject to a longstanding joint facility agreement between BNSF and the former SP, and BNSF did not receive any new rights over the Denver-Pueblo line in the UP/SP merger.<sup>6/</sup> Although the possibility of creating a joint dispatching center that would include this line was mentioned at the most recent Joint Service Committee meeting as one of many possible joint dispatching options, BNSF never indicated that it considered dispatching on this line to be a problem. In fact, BNSF is responsible for dispatching much of this joint facility -- trackage between Denver and South Denver, the single-track segment between Palmer Lake and Crews, and the northbound lines between South Denver and Palmer Lake, and between Crews and Bragdon. It has total dispatching control of trains entering and departing Denver, where, as discussed below, UP experiences severe delays. In addition, to the extent that

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<sup>6/</sup> Perhaps in the realization that the Denver-Pueblo line was not affected by the UP/SP merger, BNSF does not repeat its complaints in its August 14 comments.

BNSF is suggesting that UP is solely responsible for the increase in traffic on the line, BNSF's complaint is highly misleading. While there has been an increase in traffic between Denver and Pueblo, most of the new traffic is the result of an increase in BNSF trains. BNSF runs approximately ten trains over this corridor for every one that UP operates.

Finally, BNSF says in its July 1 report (p. 21) that it remains "extremely concerned" about its operations between Denver and Stockton. However, BNSF clearly has no cause for concern about its ability to compete using this segment. BNSF's own data (BNSF-PR-8, Att. 9) show that its traffic in the Central Corridor has been increasing dramatically -- it has increased more than fivefold between January 1997 and August 1998. Moreover, as already discussed, Central Corridor congestion is substantially behind us, is transitory in nature, and has no competitive significance. At the same time, BNSF must realize that traffic between Keddie and Stockton has increased dramatically as a result of its own new I-5 business, and any capacity issues need to be addressed jointly, with each railroad paying its proper share.

Crew Shortages. BNSF complains in its July 1 report (p. 21) and again in its August 14 comments (pp. 6, 14-15) that UP has been unable to provide sufficient crews to allow BNSF to operate efficiently between Salt Lake City and Stockton. BNSF has no cause for complaint in this regard.



The settlement agreement gives BNSF the unilateral right to provide its own crews between Salt Lake City and Stockton. It can exercise this option whenever it wants. The settlement agreement also gives BNSF the right to request that UP add to its labor force to meet BNSF's needs. BNSF has never made such a request, perhaps because, under the agreement, it would then become responsible "for any labor protection, guarantees or reserve board payments for such incremental employees." See Settlement Agreement § 1(h). Again, BNSF's complaint reflects its desire to avoid costs for which it agreed it would be responsible, and force UP to shoulder them.

BNSF also asserts that when crew shortages exist, UP meets its needs before BNSF's. This complaint apparently stems from UP's operating practice of supplying crews to high-priority intermodal trains before UP or BNSF manifest trains.<sup>2/</sup> BNSF apparently would have UP reverse its priorities when BNSF manifest traffic is involved. As long as BNSF operates using UP crews, UP will continue to provide BNSF with crews in accordance with standard priorities, used on BNSF as well as UP.

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<sup>2/</sup> UP is aware of a single occasion in early June when it provided crews for UP trains ahead of BNSF trains when there were delays as a result of two consecutive derailments in the Feather River Canyon. UP acknowledged its error and more than made up for it by prioritizing certain BNSF trains until the effects of the error were corrected.

It appears, in any case, that this issue will soon be moot. On July 29, in response to a letter written by UP's Brad King requesting that BNSF notify UP in writing of BNSF's additional crew needs, BNSF's Matthew K. Rose responded that BNSF had determined that it would use its own crews for its Central Corridor operations. See Exhibit 1. The two railroads are now working through the necessary details, and this should put an end to BNSF's complaints.

BNSF says in its August 14 comments (p. 6 & n.4) that until it has implemented its plan to hire and train its own crews, it is rerouting certain Central Corridor trains over its own lines through Arizona and Southern California. However, BNSF's assertion that this demonstrates a reduction in service and a lessening of competitive options is not credible. BNSF indicated in its July 1 report (p. 47) that it had been "routing some merchandise flows from other corridors -- primarily the Southern Corridor -- over the Denver-Stockton route" in order to improve "BNSF's overall service" and ease "congestion on the Southern Corridor route." In other words, BNSF was taking advantage of UP's capacity and crews to decrease congestion on its own lines. Moreover, it appears that BNSF is once again routing this traffic over the Central Corridor now that the congestion has cleared.

BNSF also notes in its July 1 report (p. 22) that it has asked UP to allow BNSF to provide its own crews between



several California points. This issue was addressed at the June 12 Joint Service Committee meeting -- a fact that BNSF omits to mention -- and as a result BNSF is providing its own crews between Stockton and Roseville, and between Richmond and Roseville. BNSF recognizes this in its August 14 comments (p. 15). UP agreed that BNSF could use its own crews between Stockton and Portola, but BNSF then said that the issue required further study.

Salt Lake City Southern Interchange. BNSF complains (July 1 report, p. 22) that UP requires BNSF (through its agent, UTAH) to interchange with Salt Lake Southern Railway ("SLS") through UP at Midvale Yard. BNSF's interchange with SLS is functionally identical to the interchange that SP had before the UP/SP merger (though the SP interchange took place at SP's Roper Yard). Under the settlement agreement, BNSF is entitled to continue pre-existing competition at "2-to-1" points, not to provide new competition that did not exist prior to the merger.

There is a significant operational problem with allowing a direct BNSF-SLS interchange at UP's Midvale Yard: there is barely enough capacity at Midvale Yard to accomplish the interchange between UP and BNSF that presently occurs there. Allowing SLS to interchange with BNSF there as well would not eliminate the need for a UP interchange; it would simply add SLS to the mix and create congestion.

Switching at Salt Lake City. Although BNSF makes vague allegations in its July 1 report (p. 22) about a supposed UP "practice" of blocking switching leads that are used by UTAH in Salt Lake City, BNSF cites only one example, involving Amoco. That situation well illustrates how UP, BNSF and customers have worked together to overcome problems.

As a result of discussions involving the railroads and Amoco, UP and BNSF's agent, UTAH, agreed on July 16, 1998 on a specific window in which UTAH will perform its switching. UP's Senior Manager Terminal Operations issued instructions to his managers to "do whatever it takes" to keep the switch open for UTAH access. See Exhibit 2. When some problems persisted, UP arranged for a meeting between local managers for UP, UTAH and BNSF to focus on communications among the local operating personnel to ensure that everyone knew how to address any problems that might arise. We are aware of no problems that have arisen since.

The Amoco situation is not an example of a merger-related problem. It is instead an example of the type of operating issues that arise wherever railroads have joint facilities, and of the normal problem-solving that railroads engage in on a daily basis to deal with them, without STB intervention.

In its August 14 comments (pp. 11-12), BNSF did not mention UP's efforts to resolve the Amoco issue. Instead, it



tried to tie that complaint to a distinct issue it newly raised relating to access to four other Salt Lake City shippers. It is true that UTAH was impeded in serving the shippers in question because UP was forced to stage trains for Roper Yard. But it is not true, as BNSF seems to suggest, that UP maintained a clear route that allowed it to serve the shippers. UP serves those shippers using the same track that UTAH uses, and UP service was impaired too. Moreover, with respect to the incident in question, UTAH did not tell anyone at UP about the problem until long after the situation developed. UP has stressed to UTAH the importance of calling UP when such problems develop so they can be solved. And UP recently met with UTAH to ensure that UTAH knows whom to call if similar situations arise.

Facilities for Operations at "2-to-1" Points. BNSF complains in its July 1 report (pp. 24-26) that UP has refused to make available to BNSF certain unused or out-of-service UP facilities in Utah, Colorado and Nevada. But BNSF's own report demonstrates that these complaints are simply not true.

First, BNSF complains that UP did not make available two tracks at the former SP Ogden Yard. But in the next breath BNSF notes that as soon as UP took those tracks out of service, they were made available to BNSF (pp. 24-25). In addition, UP has recently provided BNSF with information about

UP property at Ogden, Utah, that is available to BNSF to build new facilities for its Central Corridor operations.

Second, BNSF states that UP has not provided BNSF with adequate track capacity in Grand Junction, Colorado. But it then acknowledges that UP has agreed to make two depot tracks available (p. 25).

BNSF also claims that certain tracks in the Grand Junction Yard are out of service, but neglects to tell the Board that UP and BNSF representatives had visited the Yard only days before BNSF filed its July 1 report, and that UP personnel explained that the tracks had been taken out of service only temporarily and were being returned to service. BNSF also neglects to tell the Board that, as a result of that visit, UP has been working to identify a site where BNSF can construct additional yard facilities. In fact, UP recently provided BNSF with information about UP property in Durham, Colorado, that is available for BNSF's use.

Third, BNSF complains that UP has refused to allow BNSF to operate over unused track at Winnemucca and Sparks, Nevada. But it later acknowledges that UP needed to use the Winnemucca track for planned track work, and that during the week of June 29 "a team of BNSF representatives toured [the Sparks] area to identify possible alternative facilities or property that BNSF could use without adversely impacting UP"



(p. 26). BNSF also admits that an alternative has been identified and is being studied (id.).

In its August 14 comments (p. 15), BNSF says it is awaiting a UP response to its proposals. In fact, in mid-August, UP agreed to lease BNSF two tracks at Sparks for car storage. UP also agreed to sell BNSF land to build its own facility at Fernley, Nevada, and to lease BNSF a track at Fernley until the new facility is completed, which will allow BNSF to improve its local operations at Winnemucca and Fernley. As a result, BNSF replaced its Winnemucca-Sparks local with a Sparks-Fernley turnaround local in early August, and no longer needs additional track at Sparks. Under a new agreement with UP, BNSF through freights now set out and pick up their Reno/Sparks cars at Fernley, and the new local handles this traffic and serves BNSF customers in Reno/Sparks.

Despite BNSF's opportunistic complaints, even BNSF seems to recognize that UP has done its best to cooperate in providing BNSF unused or vacant facilities. Indeed, BNSF has sometimes taken improper advantage of UP's cooperative attitude. For example, UP agreed to allow BNSF to use two tracks at UP's Midvale Yard and to cooperate with BNSF's efforts to construct additional track. But on many occasions, including one witnessed by representatives of both companies during a recent joint tour of the region, BNSF used more than the two tracks assigned to it without seeking UP's permission.

(This underscores the fact that, as noted above, Midvale Yard is simply too crowded to add an SLS interchange there.)

BNSF also complains in its July 1 report (p. 26) that UP has been reluctant to allow new BNSF facilities to be tied directly to a mainline. BNSF provides no specific example of UP's refusing such tie-ins, and UP in fact recently allowed BNSF to build a new siding north of Eagle Pass, Texas, at Ryan's Run that ties in to UP's mainline at both ends. Moreover, UP allowed BNSF to tie directly into UP's mainline at Longview, Texas, to allow BNSF trains to enter UP's directionally-operated line.

BNSF's complaint may be directed at UP's objection to a BNSF plan for additional tracks at Midvale Yard that proposed the addition of a second switch in a siding on UP's mainline. UP's objection to that plan was straightforward -- UP did not want BNSF to build a new facility that would significantly interfere with UP's operations. BNSF's plans would have resulted in BNSF's use, as part of its switching operations at Midvale, of a controlled CTC siding that UP uses to meet and pass trains (including BNSF and UTAH trains). Where BNSF has proposed construction that will not interfere with mainline operations, such as at Ryan's Run and Longview, UP has agreed to permit BNSF to tie in to a mainline.

Nevada. BNSF continues its litany of complaints in its July 1 report by claiming service problems with movements



of sulfuric acid from Magna, Utah, to Jayhawk, Nevada, and traffic for Anshutz Marketing at Carlin, Nevada (p. 26). As BNSF appears to recognize, however, these problems were related to the maintenance of separate UP and SP data systems, and the July 1 TCS cutover resolved these issues as employees became acclimated to the new computer system. One non-TCS-related matter that is worth pointing out is BNSF's practice of providing the customer at Jayhawk with more acid cars than the customer can handle. The result is that UP ends up storing these cars, which it is not obligated to do. This occupies essential facilities on UP lines. UP has told BNSF that BNSF needs to build additional tracks because UP will not go on indefinitely giving it a free ride.

In its August 14 comments (pp. 12-13), BNSF describes four cars that were misdirected after the TCS cutover and one error with respect to pulling a BNSF-delivered load from a shipper. BNSF asserts that this shows a shift of problems from those caused by maintenance of separate data systems to problems caused by "systematic mishandlings" by UP of BNSF shipments. This assertion is completely unsubstantiated and false. The particular, isolated problems that BNSF lists simply illustrate that it takes time and training to adjust to a major computer system cutover -- a phenomenon that BNSF experienced during the transitions to new

transportation information systems associated with the Burlington Northern/Santa Fe merger.

b. California and the I-5 Corridor

BNSF also advances various complaints regarding the I-5 Corridor and California in both its July 1 report and its August 14 comments. Like its complaints regarding the Central Corridor, these complaints appear aimed more at trying to conjure up an appearance of UP misconduct than at identifying any genuine problems regarding the implementation of merger conditions.

Tehachapi Line. Santa Fe began operating via trackage rights over SP on the Tehachapi line in 1899. BNSF complains in its July 1 report (p. 27) and again in its August 14 comments (p. 17) about the service it has been receiving from UP over this line. As with a number of its other complaints, BNSF does not explain how this relates to the UP/SP merger -- and it plainly does not.

The congestion on the Tehachapi line was related to essential maintenance and important improvements that had been taking place on the line. UP significantly improved the line by installing tens of thousands of concrete ties on this curving, mountainous terrain, which adds stability to the track structure and reduces the risk of derailments. The work



was completed on Monday, August 17.<sup>8/</sup> As BNSF acknowledges (p. 14), UP worked with BNSF to detour BNSF trains over other UP routes to avoid this congestion.<sup>2/</sup>

What happened on the Tehachapi line this year is not unlike what happened last summer when a BNSF concrete tie gang was engaged in maintenance on Cajon Pass, a major mountain pass southeast of the Tehachapis where UP has trackage rights on BNSF. The main difference is that while UP frequently postponed the start of its curfews to allow BNSF to operate expedited intermodal traffic that were running late and would have missed the agreed operating window, BNSF made absolutely no exceptions for UP trains on Cajon. UP did not bring that problem to the Board.

BNSF contends that UP has engaged in "discriminatory" dispatching practices regarding the Tehachapi line, but as with so many of its allegations, it provides not one shred of supporting evidence. Data on actual train movements show that BNSF's average transit times over its

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<sup>8/</sup> BNSF is incorrect when it suggests in its August 14 comments (p. 17) that the maintenance had been completed before it filed those comments.

<sup>2/</sup> UP provided crews for BNSF detour trains despite UP's own crew shortages along the detour routes. BNSF, however, does not miss the opportunity to complain (p. 14) that the rerouting impacted BNSF's ability to serve customers on the line it avoided. UP rerouted these trains at BNSF's request, and the reroutes occurred only with BNSF's consent. BNSF could have insisted that its trains not be rerouted and accepted the delays involved in using only tracks on which it had trackage rights.



Tehachapi line trackage rights are faster than UP's times for both intermodal and manifest traffic, in both directions. Between September 1 and September 25, BNSF's average transit time for intermodal trains moving from Kern Jct. to Mojave was 3.8 hours, compared to 4.1 hours for UP. BNSF's average transit time for manifest trains was 4.1 hours, compared to 4.7 hours for UP. For intermodal trains moving from Mojave to Kern Jct., BNSF's average transit time was 3.5 hours, compared to 3.6 hours for UP. For manifest trains moving from Mojave to Kern Jct., BNSF's average transit time was 3.9 hours, compared to 4.3 hours for UP.

BNSF also suggests creating a joint dispatching facility for this line, but recent problems were caused by maintenance activities, not dispatching decisions. UP suspects that one of the reasons for BNSF's dissatisfaction was that, even though notice was provided, BNSF's senior management misunderstood when those maintenance activities were to be completed. UP is willing to discuss joint dispatching, but such a step will not solve the problems that remain. The problems that BNSF is facing as UP's tenant on the Tehachapi line are just like those UP is facing as BNSF's tenant on Cajon Pass -- the volume of traffic moving over both lines is too great for the railroads to expect to move their trains without occasional delays. Both railroads need to look

at capacity issues, and if they decide that improvements are necessary both railroads must pay their fair share.

Los Angeles Basin. In its August 14 comments (p. 18), BNSF expresses concern about UP congestion in the Los Angeles Basin. This congestion was caused by transitory problems principally related to UP's TCS cutover, and as UP's recent service reports indicate, it is substantially resolved. BNSF should recognize from its own experience that merger implementation can cause temporary problems.

Stockton Area. In its August 14 comments, BNSF says (p. 16) that UP and BNSF completed a major track realignment project designed to improve the movement of trains in the Stockton area. BNSF complains that the completion of this project has not yet improved BNSF operations "to the extent expected." In fact, what BNSF describes is the installation of a temporary connection that allows BNSF efficiently to move its trains from UP's Feather River Canyon line over a short segment of the former SP's line in Stockton and then on to BNSF's track at Stockton without making a backup movement or moving locomotives from the front to the back of its trains.

As BNSF notes, this connection was only recently put in place, and because the operation is new, communications problems must be worked out. However, BNSF is incorrect to place the blame for less-than-ideal operations on UP. Because the switches involved are hand thrown and not centrally



controlled, before a BNSF train can move from the UP line to the BNSF line, it must coordinate verbally with three dispatchers on two UP lines and the BNSF line. Once the permanent connection is put in place, BNSF trains will not have to contact a dispatcher. In fact, as familiarity with the operation of the new connection has increased, the situation has continued to improve, even in advance of the completion of the project.

BNSF also complains about congestion in UP's Stockton yards. As UP explained to the Board in its filings in Ex Parte No. 573, the learning curve associated with the TCS cutover caused many cars to move to the wrong yard in Stockton, resulting in unnecessary "crosshauls" and significant congestion. This congestion interfered with interchange at Stockton as well. These yards are now operating normally.

Delivery of Cars. BNSF complains in its July 1 report (p. 28) and again in its August 14 comments (pp. 16-17) that UP has been unable to meet its service plan for the delivery of cars in Sacramento, California, for BNSF customers. UP is aware that there have been haulage problems in Sacramento, which is served via an interchange in Stockton. During July and into August, UP had serious congestion problems in the Stockton area. At times, BNSF was also congested, which prevented it from both delivering and



receiving cars in interchange from UP for two or three days at a time.

UP has not ignored these problems. UP and BNSF have met three times in order to establish new and more reliable interchange arrangements, and the new plans appear to be working. For example, with respect to Farmers Rice, UP switches the facility on an "as needed" basis with a 7:00 a.m. switch crew. As long as Farmers Rice releases cars to UP before 5:00 a.m. on Day 1, the traffic will be moved by UP to Stockton the next day and made available for a scheduled BNSF interchange between midnight and 4:00 a.m. on Day 3. These new arrangements will improve service.

In addition, UP has offered to allow BNSF to operate its own local to handle this traffic. When considering BNSF's complaints, it is important to remember that BNSF retains the right to serve these shippers directly, but has chosen not to. Indeed, when BNSF indicated at the Joint Service Committee meeting that it would serve these customers directly if UP did not improve its service, UP said that would be fine.

The Board must take BNSF's complaints about haulage with a large grain of salt. The provision of haulage at such points as Sacramento is a unilateral concession on UP's part that goes beyond what is needed to preserve pre-merger competition, or what is required under the settlement agreement. UP did not have the right to SP haulage services

at "2-to-1" points before the merger, or vice versa. The settlement agreement gives BNSF three choices, not including haulage, for serving "2-to-1" customers: direct service, reciprocal switching, and (with UP's concurrence) service through a third-party agent. Although BNSF complains about UP's haulage service, it also persistently takes advantage of UP haulage, and requests new haulage.

c. Dispatching Protocol

In its August 14 comments (p. 10), BNSF takes issue with UP's statement that the Dispatching Protocol has "worked well." BNSF says that there are "far too many occasions" when UP has dispatched a train over trackage rights lines when the crew did not have sufficient time under the hours of service law to complete the movement, resulting in a blockage of the line until a replacement crew could be called in. Again BNSF is long on rhetoric and short on facts. Although UP had such problems during the service crisis in Texas, that crisis has passed. More recently, it has been BNSF that is running crews over UP's lines when those crews do not have sufficient time to complete movements.

For example, on the night of August 14, the same day that BNSF filed the comments making this allegation, BNSF's Temple-Corpus Christi train MTPLCPS312 moved onto UP's line at Caldwell at 10:00 p.m. for a six-hour run to Victoria although the crew only had until 3:30 a.m. to work. That same night,



BNSF's Eagle Pass train MTULEAP112 moved onto UP's line at Caldwell at 8:30 p.m. for a six-hour run although the crew only had until 12:50 a.m. to work. These trains had to be laid down on UP tracks. BNSF thus kept its lines clear while using UP's lines as a parking lot. This is an example of a pattern in which other railroads block UP's tracks and sidings and then blame UP for "congestion."

BNSF also claims (pp. 10-11) that UP reports for the month of July from the "joint service monitoring system" show that BNSF trains are handled more slowly than UP counterparts in a number of trackage rights lanes. BNSF is referring to a set of reports that UP prepared pursuant to the parties' agreement to develop a system to record and compare each railroad's performance where it operates over trackage rights lines of the other. Both UP and BNSF committed to developing a measurement system for their lines, and UP has begun providing BNSF with the data automatically generated from the UP AEI readers.

BNSF blatantly misrepresents the data it discusses in its August comments. The full data then available to BNSF show that in the periods covered -- the last 16 days in July and the first 6 days in August -- BNSF Central Corridor trains regularly outperformed UP trains in every corridor in which measurements were taken. In the eight Central Corridor lanes for which performance of comparable trains was measured, BNSF



trains outperformed UP trains, usually by large margins, in 10 of 16 measurement periods. BNSF is able to allege "discrimination" only by selectively referring to data from one of the measured periods, and citing out of context data for selected line segments.

UP presented even more recent data in its September 18 filing in the Houston/Gulf oversight proceeding. The data show that BNSF transit times were equal to or faster than UP transit times in 22 out of 26 comparisons involving Arkansas-Texas-Louisiana-area trackage rights segments in a 31-day period ending September 10, 1998. See UP/SP-358, Wilmoth V.S., p. 5. As Mr. Wilmoth explained, he did not even present Central Corridor data, because BNSF's transit times were much faster than UP transit times as a result of UP's congestion problems related to its TCS cutover.

In light of BNSF's claims of discrimination in this proceeding, however, we present the most recent Central Corridor data here. The following table sets forth the data that were gathered between September 1 and September 25 for trackage rights segments where UP and BNSF moved comparable types of traffic:<sup>10/</sup>

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<sup>10/</sup> In other words, if UP moved intermodal traffic over a particular segment in the measurement period but BNSF did not, we have not included data on the UP movement because no comparison is possible.

Segment	Train Type	BNSF Transit Time (in hours)	UP Transit Time (in hours)
Denver (CS Jct.) to Roper	Manifest	30.5	62.0
Roper to Denver (CS Jct.)	Manifest	27.4	78.8
Roper to Winnemucca	Manifest	15.3	28.2
Winnemucca to Roper	Manifest	17.0	20.0
Keddie to Winnemucca	Manifest	8.4	10.0
Winnemucca to Keddie	Manifest	21.0	29.3
El Pinal to Keddie	Manifest	9.7	12.1
	Premium		
	Manifest Unit	10.3 9.4	14.5 12.0
Keddie to El Pinal	Intermodal	8.8	7.9
	Premium		
	Manifest	11.9	22.5
	Manifest Unit	9.4 8.1	20.2 20.4
El Pinal to Winnemucca	Manifest	21.9	22.4
Winnemucca to El Pinal	Manifest	21.2	53.5

The data show that for all comparisons except one, BNSF trains outperformed comparable UP trains. In the normal course of events, with no "discrimination," one would expect to see each railroad outperform the other half the time. If anything, UP has bent over backwards to make sure that BNSF has no cause to complain.



The real question for BNSF is: Where is the comparable BNSF data on performance of UP trains over trackage rights on BNSF? Both railroads agreed to put measurement systems in place to monitor trackage rights performance, but only UP has done so. BNSF would certainly complain to the Board and question what UP had to hide if UP had not carried through on its commitment to provide service performance data. BNSF is in default on its own obligation.

d. Information Exchange

BNSF complains in its July 1 report (p. 64) about problems with electronic data exchange that it says are impeding service along the Baytown Branch. Only a few customers on the Baytown Branch gained access to BNSF through the merger and BNSF settlement agreement. Most gained access more recently through the February 1998 agreement under which BNSF joined in the Spring Center.

UP has exerted a great deal of effort to improve the data exchange process relating to movements to these customers. The problems with data exchange stemmed from two sources. The principal one involved the computer programs that perform the data exchange. UP has consistently been working to improve these programs, and a significant flaw in them was identified and corrected in late July. Although there are still a few remaining programming issues to be resolved, the reporting process has been vastly improved



through these corrections. A secondary source of problems related to entering the necessary information into UP's TCS system. UP has provided its employees with extensive instruction to ensure they are properly trained to record BNSF movement events in UP's TCS program. UP continues to work to overcome remaining problems, which affect UP and BNSF alike.

BNSF also says in its August 14 comments (p. 10) that the UP employee assigned to work on these issues has been reassigned. Although that employee has changed positions, he has continued to work with BNSF in resolving information exchange issues. As BNSF knows, he continues to participate actively in the weekly conference calls held to resolve these issues, and BNSF has never been without a UP contact person for any of these issues.

e. Problem Logs

In its August 14 comments (pp. 8-10), BNSF takes issue with UP's assertion that the problem resolution process that the two railroads developed to resolve haulage problems has been successful. In UP's view, the problem log system has been tremendously successful in resolving these problems. As BNSF notes, there are two problem log systems, one for information systems issues and one for haulage problems. The haulage problem log has been running since the end of May 1997. There have been 2,563 entries, including 412 this month. As of September 28, only 82 entries remained open.

Although BNSF claims (p. 8) that UP "arbitrarily" decides which problems to focus on, the logs indicate the priority level to be assigned to each problem, and BNSF knows perfectly well that if it has a special problem or a critical situation, it can so indicate, and UP will focus attention on that problem.<sup>11/</sup>

BNSF also complains about the information systems problem log. It says (p. 9) that it has not received a meaningful response to a letter it wrote outlining concerns regarding resolutions to information systems issues. UP has responded to that letter, and as the response indicates, these issues are ongoing concerns of a general nature that UP and BNSF have been working to resolve, not examples of UP's ignoring problems. See Exhibit 3. Moreover, UP and BNSF hold a conference call every Monday to discuss information systems issues.

2. UP Has Been Extremely Helpful to BNSF

BNSF says in its August 14 comments (pp. 3-4) -- raising to a new level the rhetoric it has used throughout these oversight proceedings -- that its ability to compete has

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<sup>11/</sup> BNSF points to two problem logs it says were closed "arbitrarily." These logs were closed because a UP employee mistakenly believed they referred to trackage rights traffic. That employee has received additional instruction on the operation of the problem log database. This occurred because BNSF persists in using the haulage problem log to raise trackage rights issues despite repeated reminders that UP personnel at the National Customer Service Center are simply not in a position to resolve trackage rights problems.



been hampered by UP's "lack of cooperation and neglect" and "outright discrimination and manipulation of existing agreements." These are outrageous falsehoods for which both UP and the Board deserve an apology.

These assertions ignore UP's massive implementation effort, and the many, many steps that UP has taken to ensure that BNSF has been able to provide fully competitive service. These steps have gone far beyond the requirements of the settlement agreement and the further conditions the Board imposed on the merger. UP has again and again waived the terms of the settlement agreement and the Board's conditions to allow BNSF additional flexibility in developing its service offerings. And UP has again and again unilaterally granted BNSF still more rights to facilitate BNSF's use of the rights it gained under the settlement agreement and the Board's conditions.

Quite simply, UP has bent over backwards to ensure that BNSF is receiving fair treatment when using its rights, even though BNSF has not reciprocated. Indeed, the many steps that UP has taken to assist BNSF have allowed BNSF to commence and carry out competitive operations at a much lower cost than simple adherence to the letter of the settlement agreement and the Board's orders would have entailed.



a. Initial Implementation Efforts and  
Continuing Day-to-Day Problem Solving

The intensive efforts that UP undertook to allow for the immediate commencement of BNSF service upon consummation of the UP/SP merger have been previously described in UP's reports on merger implementation. UP/SP-303, pp. 79-82. Still, in light of BNSF's outrageous claims that UP has been uncooperative and obstructionist, some of the basic facts bear repeating.

Hundreds of UP personnel worked thousands upon thousands of hours to assist with the institution of BNSF's haulage and trackage rights operations. Operating and data systems were put in place for immediate commencement of BNSF service upon consummation of the merger. UP devoted intense effort to address very complex implementation issues, including the development of necessary computer systems and the qualification of crews.

In fact, planning for implementation of the BNSF rights began at UP a full eight months before the merger was approved. Following the effective date of the merger decision, dozens of UP employees were assigned full-time to the implementation of BNSF's rights. Daily UP-BNSF conference calls, generally lasting at least two hours, were conducted seven days a week for many months. UP and BNSF continue to this day to engage in constant communications to resolve merger-related issues.

UP engaged in extensive and costly programming work to develop the computer technology needed to support BNSF's rights prior to consummating the merger. The development of systems to allow the railroads to communicate with each other was a complex task, and bugs inevitably had to be worked out. In March 1997, UP and BNSF developed a formal process to record, monitor and resolve problems relating to UP and BNSF information systems. Of the close to 1,000 problems documented in this database in the 18 months it has been in existence, only 15 remain open.

UP has also worked with BNSF to improve the data-exchange process between the two railroads. In April of this year, UP implemented its portion of a project designed to transmit information about each railroad's trackage rights trains so that it automatically creates train sheets in the other railroad's system. These train sheets are then updated by computer as the train moves along its route. As a result of UP's work, BNSF is able to receive more accurate and up-to-date information on BNSF trackage rights trains. BNSF has still not carried out its portion of this project, which would give UP better information regarding UP trackage rights trains moving on BNSF lines -- but UP has not come to the Board charging "lack of cooperation and neglect" and "manipulation of existing agreements" by BNSF.



b. Voluntary Agreements To Aid Start-Up

In addition to pouring resources into systems development, UP granted BNSF additional substantive rights to assist its operations. From the very moment that UP consummated the merger, it went beyond the requirements of the settlement agreement to ensure that BNSF would quickly be able to provide vigorous competition for all "2-to-1" traffic.

Interim Haulage. The settlement agreement contemplated that BNSF would serve all but a few "2-to-1" shippers using trackage rights. But even though all of the BNSF trackage rights agreements became effective immediately upon UP's consummation of control on September 11, 1996, UP agreed to allow BNSF to serve shippers for an initial six-month period pursuant to a blanket interim haulage agreement. This allowed BNSF to establish competitive service far more rapidly and at a much lower cost than it could have under the clear terms of the settlement agreement. Interim across-the-board haulage rights permitted BNSF to offer competitive service to all "2-to-1" shippers using UP locomotives, crews and facilities. BNSF avoided all the costs typically associated with commencing operations to new customers. It did not have to dedicate locomotives, hire new crews, construct track for set-out and pick-up of cars or interchange, establish new crew change points, or construct



new connections. It was able to "piggyback" on UP investment and capacity.

BNSF was thus able to get a "jump" in the competitive race. It was able to offer new services to "2-to-1" shippers long before UP/SP could complete the computer system cutovers and other steps required for operation as a merged system. Thanks to UP's voluntary and unilateral assistance, BNSF proceeded to take traffic from UP under the merger conditions before UP could exploit the merger efficiencies to itself become more competitive.

Additional Haulage Agreements. The interim haulage agreement contemplated that BNSF would commence trackage rights operations after the initial six-month haulage period expired. Nonetheless, at BNSF's request, UP also entered into still further agreements with BNSF, granting haulage rights in numerous locations for periods of up to five years.<sup>12/</sup> BNSF has never once acknowledged before this Board this extraordinary UP assistance. These agreements cover:

- Dayton SIT Yard - Baytown TX
- Elko NV - Winnemucca NV
- Lake Charles LA - Harbor, Westlake, Rose Bluff and West Lake Charles LA
- Pine Bluff AR - Camden AR
- Shreveport LA - Tenaha TX

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<sup>12/</sup> UP has also agreed to extend a number of these agreements beyond their initial expiration dates.

- Stockton CA - Turlock CA
- Valla CA - Patata and Southgate CA
- Beaumont TX - Orange TX
- Pine Bluff AR - Dexter and Paragould AR
- Pine Bluff AR - Forest City AR

UP has also voluntarily been providing, for almost two years, haulage service for BNSF between Warm Springs and San Jose, California, and between Warm Springs and Fremont, without formal haulage agreements.

Like the interim haulage agreement, these numerous additional unilateral haulage grants were not required by the settlement agreement or any condition imposed by the Board. And like the interim agreement, they provided, and continue to provide, BNSF with valuable benefits. In every case, it would have been far more costly for BNSF to institute and maintain trackage rights operations and BNSF has received a cost advantage in serving "2-to-1" shippers above what the settlement agreement contemplated. Moreover, it would have taken BNSF longer to develop the infrastructure to support trackage rights operations and commence service at these locations. As a result of these haulage grants, BNSF has been able to commence competitive operations but defer making the investments it was supposed to make under the settlement agreement.

In addition, because BNSF has had the right to institute trackage rights operations at its election at any time at any of these locations, the haulage arrangements have allowed it to employ trackage rights at the precise time when it was optimal to do so from an economic standpoint. BNSF has been able to choose on a case-by-case basis whether and when it was more efficient for it to use UP trains, crews and facilities or to mount its own trackage rights operations. This is an option that neither UP nor SP had before the merger, and that BNSF had no right to under the settlement agreement or the Board's conditions.

BNSF complains incessantly about the haulage service that UP has provided, but the Board should never forget that UP is providing almost all of this haulage as a result of purely voluntary agreements.

Allowing BNSF to Adjust Its Rights. UP has also allowed BNSF to depart in other ways from the letter of its agreements -- always to BNSF's advantage and UP's disadvantage. For example, under the settlement agreement, BNSF obtained trackage rights to serve certain "2-to-1" customers on the SP Baytown Branch. As noted, UP also voluntarily granted BNSF haulage rights to serve those same customers. The Baytown haulage agreement provides that "BNSF shall not use its companion trackage rights until such time as it no longer uses the Haulage Services provided under this



Haulage Agreement." See UP/SP-266, Ex. C (Haulage Agreement Between Dayton SIT Yard and West Baytown, Texas and Baer Switch, Texas § 16). Nonetheless, UP has been permitting BNSF to use its trackage rights to serve certain Baytown shippers directly while continuing to use UP haulage to serve others. This type of "skimming" arrangement has provided BNSF with yet a further cost advantage over UP than was not contemplated in the settlement agreement. BNSF has been able to use haulage or trackage rights depending on the economies associated with particular movements.<sup>13/</sup>

UP has also demonstrated extraordinary flexibility in allowing BNSF to switch between trackage rights and haulage rights without providing the notice expressly required under the parties' agreements. For example, under the settlement agreement, BNSF obtained both haulage rights and trackage rights between North Little Rock and Pine Bluff. The haulage agreement provided that BNSF could terminate the agreement upon 90 days' written notice to UP and commence trackage

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<sup>13/</sup> BNSF says it is faced with a "dilemma" because mounting trackage rights operations to serve a shipper is expensive and some shippers prefer to be switched by only one railroad. BNSF-7, p. 5. But this is not a "dilemma" that the merger created. Before the merger, neither UP nor SP had any magic solution to these problems, and neither was under any obligation to provide support to the other so that it could serve shippers using any one of a variety of service options. The vast majority of "2-to-1" shippers were directly served by either UP or SP and open to the other via reciprocal switching. The settlement agreement gave BNSF more options than this, and UP's unilateral post-merger concessions have given BNSF still more options.

rights operations. UP/SP-266, Ex. C (Haulage Agreement Between North Little Rock and Pine Bluff, Arkansas § 16). On several occasions, BNSF announced to UP that it was going to switch from haulage to trackage rights, and then reversed itself. Finally, BNSF did switch to trackage rights, without providing UP with 90 days' written notice. Changes without sufficient notice make it much more difficult for UP to plan and schedule its trains and deploy locomotives -- it cannot be sure whether it will need to move BNSF's haulage traffic or whether it will need to account for a new BNSF train on the line. Nonetheless, UP has allowed BNSF to make such changes.

Flexibility in How BNSF Serves Shippers. UP's extraordinary cooperativeness can also be seen in the flexibility that UP has maintained when dealing with BNSF's election of methods for serving "2-to-1" shippers. Under the settlement agreement, BNSF is allowed to serve customers (a) directly, (b) through reciprocal switching, or (c) with UP's concurrence, through a third party agent. BNSF is expressly required to provide UP with written notice of its election 45 days before initiating service to a customer. See, e.g., Settlement Agreement § 1(d). BNSF is only permitted to change its election once every five years. Id. UP has allowed BNSF to disregard every one of these restrictions.

One significant way in which UP has allowed BNSF to exercise rights beyond those granted by the settlement



agreement is by allowing BNSF to use UTAH as its agent in the Utah Valley. The settlement agreement allows BNSF to use a third-party agent to perform customer switching if UP consents, but BNSF has gone far beyond this, with UP's voluntary agreement. UP has allowed UTAH to act as BNSF's agent not merely as an industrial switcher moving cars from customer facilities to set-out points along BNSF trackage rights, but as a local train operator, moving local trains over UP mainlines and blocking cars and assembling BNSF trains in UTAH yards.

UP's willingness to cooperate can also be seen in how it dealt with BNSF's changing desires regarding the switching of traffic for two customers in the Salt Lake City area -- Inland (Crysen) Refining and L.S.I. Although BNSF had advised that it would directly serve all open customers between Ogden and Salt Lake City directly, using UTAH as its agent, it subsequently asked, and UP agreed, to access these two customers through reciprocal switching by UP.

UP has also not held BNSF to the requirement that it notify UP 45 days before commencing service to a customer whether its service will be direct or through reciprocal switching. BNSF rarely informs UP at all that it is commencing service to a new customer. UP does not find out until the train is on the way. UP has not held BNSF to the notice requirement because it has not wanted to interfere with



shipments that are moving to customers, but this lack of notice has posed problems relating to scheduling, capacity and development of information systems for reporting purposes. If service problems result from its own failure to provide the required notice, BNSF is sure to complain about them.

Additional Operational Rights. UP has also eased BNSF's implementation of its rights under the settlement agreement through a variety of short-term operational agreements that were not called for by the settlement agreement. For example, UP agreed to allow BNSF to use an existing UP connection at Sealy, Texas, to implement its trackage rights until BNSF placed its own connection in service. And UP agreed to lift temporarily a restriction in the settlement agreement that placed limits on BNSF traffic moving to and from Sacramento via UP's Sacramento-Elvas line and to provide a connection with the Elvas-Stockton line until UP installed a new connection at El Pinal.

c. Further Voluntary Actions That Improved  
BNSF's Operations Or Reduced BNSF's Costs

In addition to providing BNSF with rights beyond those provided by the settlement agreement that have helped BNSF quickly implement new services at reduced costs, UP has also worked with BNSF voluntarily to ensure that BNSF has been able to use its rights in an efficient manner and, in some cases, to improve permanently the rights BNSF received.

Directional Running. One important, long-term cooperative step that UP took which will improve BNSF's rights and was not required by the settlement agreement was to grant BNSF additional trackage rights when UP instituted directional running between Houston and Beaumont. UP had built into its merger operating plan the use of directional running between Houston and Memphis, and it amended the settlement agreement to allow BNSF to operate directionally over UP's lines. After the merger was consummated, UP recognized the potential benefits associated with operating directionally over its lines between Houston and Beaumont. UP then granted BNSF the additional rights necessary so that it too could operate directionally over those lines.

Assignment of Rights Over Huey P. Long Bridge. UP also has gone out of its way to provide BNSF with lower-cost access to New Orleans than it was required under the settlement agreement. Under the settlement agreement, BNSF was granted access to Eastern carriers and the New Orleans Public Belt Railroad ("NOPB"). However, BNSF was required to reach an agreement with the NOPB to govern its use of the Huey P. Long Bridge between Avondale and New Orleans. When BNSF was unable to arrive at a satisfactory agreement with NOPB, UP assigned to BNSF its access rights under an agreement involving the former MP.



Expedited Approval for Eagle Pass Construction.

Another example of UP's cooperative stance is its recent expedited approval of BNSF's request for permission to construct new storage tracks at Eagle Pass, Texas. UP expedited the design, leasing and permitting process, and diverted material from other UP projects so that it could install the switches that were required for this project. By contrast, UP asked BNSF to install a switch at Colton at the same time BNSF made its Eagle Pass request, and BNSF still has not done so. UP is also awaiting BNSF's completion of a similar project at Sealy, Texas.

Temporarily Lifting Restriction on BNSF Memphis-Valley Junction Rights. Another example of UP's cooperative attitude toward BNSF is reflected in UP's recent agreement to lift temporarily a restriction on traffic moving over BNSF's Memphis-Valley Junction trackage rights. The settlement agreement provides that traffic to be handled over UP and SP lines between Memphis and Valley Junction, Illinois, over which BNSF has trackage rights is limited to traffic that moves through, originates in, or terminates in Texas or Louisiana or originates or terminates at certain "2-to-1" locations in Arkansas. Settlement Agreement § 6(c). Nonetheless, UP recently suspended this restriction to allow BNSF to move trains from the West on these trackage rights in order to create a window for maintenance on other BNSF lines.



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Finally, it should also be noted that, separately from the myriad steps UP has taken to facilitate BNSF's exercise of the competitive conditions granted by the Board, UP has also been cooperative in working with BNSF to address the recent congestion problems. To cite just a few examples, UP granted to BNSF, as temporary measures to alleviate congestion, rights on UP's Caldwell-Flatonia-San Antonio lines, directional rights on UP's Caldwell-Flatonia-Placedo lines, and haulage over the GH&H line between Congress Yard and Harrisburg Jct., and allowed BNSF traffic originating between Sinco Jct. and Bayport, which is usually handled through Englewood, to be handled through PTRS at Pasadena. UP also made major commercial concessions to induce BNSF to join in the Spring Dispatching Center.

### 3. UP Complaints Against BNSF

Throughout the UP/SP merger oversight proceedings, as well as the service proceedings, BNSF has registered complaints about UP's administration of facilities that BNSF uses. UP acknowledged that congestion on its lines during its service crisis adversely affected BNSF service over UP facilities, although UP service suffered even more. But BNSF claimed an entitlement to an absolute level of favorable service, not just fair and equal treatment, and it also asserted that UP engaged in misconduct and intentional

attempts to impair BNSF competition, apart from the effects of the service crisis.

UP has demonstrated in many contexts that BNSF's complaints are unjustified. As we explain above, for example, BNSF's allegations regarding UP misconduct in the West range from misunderstandings of circumstances of which BNSF was unaware to outright factual misstatements. In our Opposition to Condition Applications, filed on September 18, we showed that BNSF's unsubstantiated, but constant, allegations that UP treats its own trains with improper "favoritism" in dispatching, and "discriminates" against BNSF trains, are contradicted by automated measurements of UP and BNSF transit times on dozens of track segments, and that overall, BNSF trains actually achieve faster transit times than UP trains of the same type and class. Further proof is set forth above.

In contrast to BNSF, UP has refrained from raising complaints about BNSF actions that adversely affect UP service. UP believes that the concerns of railroads using joint facilities should, and almost always can, be addressed by private industry through negotiation and private dispute-resolution mechanisms, not through governmental intervention.

Following the merger, BNSF and UP established, pursuant to the Dispatching Protocol, a Joint Service Committee ("JSC"), backed by arbitration procedures, to



resolve joint-facility issues.<sup>14/</sup> The JSC has already resolved some of the issues that BNSF has presented to the Board, and others are presently before the JSC. On the other hand, many of BNSF's complaints have not been presented to the JSC. UP considers it especially objectionable for BNSF to raise issues before the Board, such as BNSF's recent request in the Houston/Gulf oversight proceeding for "neutral switching supervision" on the Baytown Branch near Houston, that BNSF has never presented to the JSC.

UP and BNSF have been conducting a series of "problem-solving" meetings around the West that are solving longstanding problems. UP and BNSF held such a meeting at Spring, Texas, on September 16 to discuss service on the Baytown Branch. In light of the fact that BNSF had filed a formal application with the Board for the imposition of a "neutral switching supervision" condition on the UP/SP merger, supposedly to address BNSF dissatisfaction with UP haulage service on this branch, UP asked BNSF to explain the nature of its concerns and define what it means by "neutral switching supervision." The BNSF representative, who had submitted the verified statement to the Board in the Houston/Gulf oversight proceeding that complained about UP's haulage service, stated

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<sup>14/</sup> UP and BNSF also agreed at the last JSC meeting that managers of the two railroads should meet even more frequently to address and resolve issues as they develop. To that end, they have established a series of weekly and monthly meetings that will be held in addition to the quarterly JSC meetings.



in the presence of several UP officials that BNSF has no problems with UP's haulage service. He refused to discuss "neutral switching supervision" because it is a matter before the Board. BNSF apparently believes that it can "spin" complaints before the Board, and seek governmentally-imposed conditions, while taking different positions in the real world.

If UP wished to bombard the Board with complaints against BNSF, it could. UP has its own ongoing menu of unhappinesses with BNSF actions that affect UP's ability to compete. BNSF has undermined UP service in Houston and the Gulf Coast area, causing shippers to believe that UP is providing inadequate service and causing congestion that other parties blame on UP. It has impaired UP service in West Texas, where UP (as successor to SP) was designated to supply the competition that BN and Santa Fe eliminated when they merged. It has at times impeded UP service in the Powder River Basin, where the ICC expected UP, as successor to CNW, to provide competition for BNSF.

In the following section, we review some of these issues. In doing so, we wish to stress that we are confident these matters can be resolved between the parties. Some of them already have been, just as many of BNSF's complaints against UP were being or had been resolved even as BNSF was submitting them to this Board. UP is not asking the Board to

solve UP's problems. We are not asking the Board to reopen the BNSF merger proceeding, though many of the matters we discuss have more nexus to that merger than the complaints BNSF is raising here have to the UP/SP merger. UP also acknowledges that there may be considerations or perspectives of which we are unaware that may help explain BNSF's conduct, just as BNSF has seemed unaware of factors relevant to the UP conduct about which it has complained.

We provide these examples of UP problems with BNSF's conduct so that the Board and affected parties will understand that BNSF's incessant complaints about UP administration of joint facilities are nothing more than one-sided and self-serving attempts to discredit UP in order to pursue regulatory objectives. Every railroad using a joint facility regularly has issues to raise with its joint-facility partners. That is hardly surprising where vigorous competitors<sup>15/</sup> also need to cooperate in operating facilities. But, absent regulatory proceedings that provide an occasion for opportunistic complaints to the government, railroads successfully work such matters out, day in and day out, year after year. BNSF and UP can and should resolve their operating disputes on their own. BNSF's misuse of this and other Board proceedings as

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<sup>15/</sup> BNSF's aggressive and highly successful competitive battles with UP since the UP/SP merger, and its multiple skirmishes with UP before this Board, should dispel the concerns about "collusion" raised by DOJ and others during the merger proceeding.



opportunities to air such issues in pursuit of other ends only serves to divert time and attention from the normal process of resolving them on a business basis.

a. Houston and the Gulf Coast

BNSF Trains Blocking HBT and UP Lines in Houston.

The Houston terminal complex has limited track capacity, with about 150 operations each day over 48 miles of mainline tracks. BNSF trains have regularly occupied scarce track capacity for long periods of time because the yards to which the BNSF trains are moving cannot accept them. PTRA holds both BNSF and UP trains out of its yards. BNSF brought this matter up at the last PTRA meeting, complaining that BNSF is holding PTRA trains as far away as Temple and Teague, Texas. PTRA encourages BNSF to bring the trains into the terminal but cannot take them when they arrive.

Because BNSF operates on so many UP-owned and UP-controlled tracks in the Houston area, its trains awaiting admission to the PTRA have a disproportionate impact on UP operations. BNSF also appears to have an inadequate local crew base, so these trains sometimes sit for long periods. Problems with gaining access to PTRA have diminished in recent weeks.

More serious is the inability of BNSF's New South Yard to accept BNSF trains on arrival. BNSF does not have adequate track space in the Houston area to stage trains for



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New South Yard when it is congested, which is much of the time. As a result, BNSF trains often block HBT, BNSF and UP tracks in the Houston area, causing congestion and delays. Since there is so little mainline track in the Houston terminal complex, a mile-long BNSF train blocking one of the tracks often causes serious delays. These situations sometimes are so severe and prolonged that UP uses its own train crews to move BNSF trains into UP yards. That occupies precious UP yard space, but it is better than losing mainline capacity in the busy terminal and on nearby lines. This persistent problem is one of many that arise out of BNSF's need to invest in greater capacity in the Houston area.

BNSF Operations Blocking the Baytown Branch. The former SP Baytown Branch, on which BNSF holds trackage rights, is one of the most overtaxed facilities on the UP system. UP's 1999 capital investment plan calls for the expenditure of millions of dollars to add double track to this line. In the meantime, BNSF and UP must use this track to its maximum capacity. On a regular basis, BNSF has blocked this track, preventing UP from moving trains off the track and into UP's yard. BNSF builds trains on the branch mainline, stages them until crews arrive, and switches cars on the mainline. Ironically, this delays BNSF shipments too, which are transported in haulage service on most UP trains traversing the branch.

For example, at 11:45 p.m. on August 30, 1998, UP attempted to operate a local from Dayton to Mont Belvieu to pick up more than 80 outbound shipments. The UP local, train LHX03, could not depart Dayton at the north end of the branch because the BNSF was holding a train on the mainline next to its yard at milepost 2 of the branch. Finally, UP gave up attempting to run its train and transported its crew by motor vehicle to Mont Belvieu at the south end of the branch. Using yard engines, the train crew picked up 84 cars and moved north the length of the branch back to Dayton. When it returned to Dayton at 3:20 a.m., the BNSF train was still blocking the main track. Finally, after blocking this track for over four hours, the BNSF train moved at 3:50 a.m.

On August 11, 1998, UP train LHX01 was attempting to bring cars up the Dayton Branch to Dayton. The UP train could not reach Dayton because BNSF had cars on the main track and was switching the BNSF yard. After learning of the situation at 10:00 a.m., UP's manager got into his car and drove to the BNSF yard to ask BNSF to clear the mainline. The BNSF engine did not finish switching until 11:15 a.m., causing a total delay to UP train LHX01 of three hours. UP's train LHX01 probably had BNSF haulage cars as well as UP cars, and all of them were delayed, no doubt giving apparent support to BNSF complaints about UP haulage service.



These problems will be solved if ENSF builds a switching lead at its small Dayton yard, just like the one at a privately-operated storage yard on the opposite side of the branch at the same location. UP has suggested this solution. BNSF has not responded. BNSF has contended that it should be allowed to occupy the branch to switch its yard, delaying all trains, because UP sets out and picks up cars with trains using the branch. But such set-outs and pick-ups, usually of blocks of cars, are different from yard switching. UP must set out cars in order to expedite the movement of BNSF cars into the BNSF yard and the movement of both UP and BNSF cars into the private storage yard. The alternative, in which BNSF's cars would go to UP's Dayton yard, be classified there and return to BNSF in interchange, would cause substantial delays to BNSF's haulage cars.

BNSF Causing Congestion South of Houston. All UP trains on UP's Brownsville Subdivision must operate over approximately 23 miles of BNSF trackage rights between Algoa, Texas, and T&NO Junction (Tower 81) on the south side of Houston. UP encounters numerous delays on this line. BNSF frequently parks a local train or grain trains on one of the main tracks at Alvin, near Algoa, causing congestion and delays. BNSF also frequently blocks the three sidings on this segment with trains unable to get into New South Yard. With restricted, or no, space to meet trains on this segment, UP is

forced to hold trains either in Houston on congested HBT tracks or on the UP Brownsville Subdivision south of Algoa. Trains must then move in fleets over this segment. This causes crews to run out of time under the Hours of Service Law.

BNSF causes even more delay on this segment by storing SIT cars in tracks along the mainline. Shippers want specific cars removed from SIT storage every day, causing BNSF to shut down the line for two or three hours at a time to switch SIT cars. UP has been complaining to BNSF about this problem for a year and a half or longer.

BNSF also causes congestion both on UP's Harrisburg Line across the south side of Houston and on the HBT in Houston by performing a very awkward and potentially dangerous movement with trains operating from the PTR A Pasadena Yard to BNSF's New South Yard. These 100-car trains use the Harrisburg Line from PTR A to T&NO Junction (Tower 81), then back slowly across busy city streets up the HBT East Belt into New South Yard. This causes congestion on both rail lines, as well as delays to motorists. BNSF should build a connection in the northeast quadrant of T&NO Junction to eliminate this operation.

BNSF Failure to Accept Interchange in Houston. By local agreement in Houston, BNSF is obligated to deliver interchange to UP at Englewood Yard and to pull interchange



from Englewood Yard back to BNSF's New South Yard every day. Until late August, BNSF often failed to perform this task. On some days, BNSF would provide no interchange service at all. On other days, BNSF would deliver cars to Englewood but refuse to pull any cars back to New South Yard because that yard was full or BNSF's crew was short on time. In either situation, cars to be interchanged to BNSF remained in Englewood, occupying track space and causing congestion. UP has been forced to hold 300 or more BNSF cars at a time in Englewood because BNSF has been unable to retrieve them. Most shippers are so accustomed to assuming that UP is responsible for all delays that they blame us for these delays.

On more than one occasion, UP has been forced to engage in self-help to deal with this problem. UP has delivered cars to BNSF, even though it was not UP's responsibility to perform the interchange. UP has even gone so far as to hold the BNSF interchange locomotive at Englewood until BNSF would agree to take cars back to New South Yard. In recent weeks, this problem appears to have receded.

BNSF Refusal to Honor Avondale Agreement. Steve Barkley, UP's Southern Region Vice President, agreed with his counterpart Rollin Bredenberg of BNSF that BNSF would be allowed to use the UP mainline through Avondale as an additional route into New Orleans in exchange for BNSF's allowing UP to use tracks 6 and 7 in BNSF's Avondale Yard. UP



has been allowing BNSF trains to use its mainline for months, but BNSF refuses to honor the agreement. Yard tracks 6 and 7 generally are not available to UP, leaving UP with congested yard space.

BNSF Interchange Deficiencies at Beaumont. By local agreement in Beaumont, Texas, BNSF is obligated to deliver and pull interchange traffic between BNSF and UP seven days per week. However, BNSF does this work only approximately three days per week, causing significant delays to UP traffic. BNSF sometimes tells customers that their shipments are in UP's possession even though BNSF has not yet interchanged them to UP.

b. North and West Texas

BNSF Blocks UP's Switching in Amarillo. In Amarillo, Texas, UP, succeeding to SP, is working to supply the competition that BN and Santa Fe used to provide but eliminated by merging. BNSF has been impeding UP's efforts to provide that competition.

UP operates a traveling switch engine south of Amarillo to serve an automobile unloading facility, ASARCO, and other shippers. BNSF has regularly delayed this engine, and on some nights has not allowed it to operate at all, refusing to give this engine and the few cars it is pulling permission to cross the BNSF mainline. This has caused

lengthy delays in UP service to these shippers and prevents UP from providing remedial competition.

UP, as SP's successor, competes with BNSF to provide service to a power plant at Amarillo. UP's train CAIAO operates on BNSF trackage rights from the UP connection at Dalhart, Texas, southeast to Amarillo. BNSF has appeared to follow a practice that gives an absolute preference to BNSF service. If a BNSF coal train for the Amarillo power plant has left Pueblo, Colorado -- almost 200 miles to the north -- BNSF has held the UP train at Dalhart until the BNSF train has reached the plant and unloaded. BNSF has not taken trains on a first-come, first-served basis.

As UP, in the wake of service recovery, moves to intensify its competition against BNSF in northwest Texas, filling the competitive role envisioned in the decision approving the BNSF merger, it will insist that these concerns be addressed and resolved.

BNSF Refusal to Accept Its Own Trains at Ft. Worth.

BNSF operates trains over UP's line between Ft. Worth and Sweetwater, Texas. When eastbound trains reach Ft. Worth, BNSF often will not accept them, particularly if the crew has less than 1½ hours left to work. BNSF does not want the trains to stop on its tracks, blocking them, while BNSF finds a replacement crew. So BNSF has refused to take the train



from UP and forces UP to hold the train on a UP track, blocking other UP trains.

c. Colorado Joint Line

One of the most persistent problems that UP has encountered in using BNSF facilities has been obtaining access at Denver to the BNSF-UP Joint Line between Denver and Pueblo, Colorado. UP's southbound trains, including coal trains to Coletto Creek and Amarillo, have regularly been delayed by several hours in Denver, where they have been held for BNSF coal trains. This situation has improved due to the recent problem-solving initiative between the two carriers, but BNSF still sends its coal trains out of Denver without helpers and holds them on the mainline at Littleton, Colorado, to wait for helpers that are coming back down the mountain from Palmer Lake. While those trains wait for helpers, UP trains that do not require helpers are stuck behind and unable to move south.<sup>16/</sup> We expect to continue to address these issues with BNSF until they are fully and satisfactorily resolved.

d. Powder River Basin Joint Line

UP competes head-to-head against BNSF in serving the mines of the southern Powder River Basin. Both railroads serve all the mines on this joint facility. Although this

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<sup>16/</sup> The Joint Line to Palmer Lake is double track signalled for one-way operation on each track, and trains cannot normally pass each other.



track is owned jointly, BNSF is the operating contractor, and it controls all train movements.

BNSF and UP employ a slotting system in which each empty coal train arriving in the Basin from the south is assigned to a time slot. Trains of both carriers are to move in slot order to the mines, unless a railroad "blanks" a slot because no empty train is available. At the mines, trains line up in order of arrival to be loaded for utilities across the country. In addition, BNSF has retained unrestricted access to the Joint Line from the north end.

BNSF has sometimes permitted BNSF trains destined to a specific mine to move ahead of UP trains destined to the same mine, even though the UP trains arrived in the Basin in earlier time slots. When a BNSF train is allowed to run ahead of a prior UP train it is called a "runaround." Each of these "runarounds" gives BNSF a competitive advantage in the head-to-head competition for transportation of Powder River Basin coal. It gives BNSF the opportunity to provide the more reliable service that utilities desire. It lengthens UP's cycle times, which are very important to UP and its customers, because cycle times drive equipment costs. And it often forces UP to replace a train crew, increasing UP's costs.

When UP is deprived of the opportunity to serve a mine on a first-come, first-served basis, it may never be able to recover from that delay. BNSF and UP now are operating as

many trains as the loading capability of the Powder River Basin mines can accommodate. Once UP loses a loading opportunity, that opportunity to maximize coal deliveries is lost forever.

BNSF trains have sometimes run around UP trains as often as several times per day. For example, UP noted seven such incidents on September 14, 1998:

- UP train CTVBT-08, an empty coal train from the Tennessee Valley Authority to the Jacobs Ranch mine, was slotted for UP's 0001 slot (12:01 a.m.) and was waiting at Shawnee Jct., the south end entry point to the Joint Line. BNSF ran three empty trains to the Jacobs Ranch mine ahead of the UP train: train E SLPJRM2 19, which had the BNSF 0030 slot at Shawnee Jct.; train E SLPJRM2 18, which had the BNSF 0040 slot; and train E KCWEBM3, which entered the Joint Line from the north end.
- UP train CPWNA-10 had the 0220 slot at Shawnee Jct., but was held while BNSF ran its 0430 and 0440 trains to the North Antelope mine ahead of the UP train. The BNSF trains were E ALNNAM0 05 and E THHNAM1 69.
- UP train CLLAT-09 was slotted to pass Shawnee Jct. in the 0420 slot. BNSF's train E PRRATM0 88 held the BNSF 0640 slot, but was allowed to leave Shawnee Jct. first and proceed to the Antelope mine ahead of the UP train.
- UP train CFGAT-09, in the UP 0800 slot, was held at Shawnee Jct. while BNSF train E WAGBAM0 68, in the BNSF 0820 slot, was allowed to proceed ahead of it to the mine.
- UP train 2CNWNA-08, in the UP 0610 slot, was diverted into the UP yard at Bill, Wyoming, while BNSF train E ARNNAM0 35, was allowed to proceed around it and into the North Antelope mine.



- Two UP trains serving Union Electric at West Labadie, Missouri, and Commonwealth Edison's Will County Power Plant, CWLJR 09 and CWIJR 10, which held UP's 1430 and 1500 slots, were run around by BNSF's train E SLPJRM2 21, operating in BNSF's 1530 slot. BNSF allowed its train to proceed to Jacob's Ranch mine ahead of the two UP trains.
- BNSF's train in the 1020 slot, E SLPJRM2 20, was allowed to proceed ahead of two UP Jacobs Ranch trains, CWIJR 09, with the 0220 slot, and CTUJR 10, with the 0810 slot. The two UP trains were held at Bill, Wyoming, while the BNSF train proceeded to the mine. UP contacted a BNSF employee named "Mark" to complain about this runaround, but he had no explanation.

Because this has been a persistent problem, UP has registered every such issue formally and in writing with BNSF's Rick Ellis, Assistant Vice President, Coal Operations, in Ft. Worth, Texas. In June, UP proposed to BNSF that the southern Powder River Basin Joint Line be placed under joint dispatching, just as is done at the Consolidated Dispatching Center in Spring, Texas, for the former-SP Houston-New Orleans line in which UP and BNSF agreed in February to exchange 50% ownership interests. However, though BNSF linked joint ownership with joint dispatching in agreeing to participate in the Spring Center,<sup>11/</sup> and though it is now advocating joint

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<sup>11/</sup> BNSF's "price" for joining in the Spring Center was a "swap" between UP and BNSF of 50% interests in the former-SP segments between Houston (Dawes) and Beaumont, and between Beaumont and New Orleans (Avondale), and access for BNSF to some 150 shippers on the Houston-Beaumont segment and all appurtenant branches, including the Baytown and Port Arthur Branches. The new industry access became effective immediately. The ownership exchange was contingent on a Board

(continued...)



dispatching even of lines wholly owned by UP, it refused to discuss the possibility of joint dispatching of this jointly-owned line.

The Powder River Basin is operating better at present, and we are hopeful that this problem is resolved. UP officers met with their BNSF counterparts last week to discuss the handling of UP trains, and BNSF pledged to address the runaround problem. It did so.

e. UP Access to Superior, Nebraska

As already noted in our September 18 submission in the Houston/Gulf oversight proceeding, UP is working with BNSF to try to resolve another problem relating to the BN/Santa Fe merger. In that merger, UP received trackage rights to preserve competition for traffic to and from Superior, Nebraska -- a "2-to-1" point. Since the merger, UP has been moving trains from Wichita to Abilene on a combination of its own line and trackage rights, and then between Abilene to Superior on trackage rights it obtained in its merger settlement agreement with BNSF. Recently, however, BNSF suddenly claimed that there was a small gap between UP's trackage rights to Abilene and the rights it gained in the BN/Santa Fe merger -- noted by no one when the settlement was

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<sup>17/</sup> (...continued)

exemption, which was granted yesterday. Finance Docket No. 33630, Burlington Northern & Santa Fe Ry. & Union Pacific R.R. -- Acquisition Exemption -- Lines Between Dawes, TX, & Avondale, LA, Decision served Sept. 29, 1998.

concluded and submitted to the ICC as a solution to the competitive issue at Superior -- and that UP would have to build an expensive new connection between the Abilene-Superior trackage rights line and UP's own line that passes through Abilene if it wanted to continue to serve Superior.

BNSF's position would clearly defeat the ICC's purpose in approving the settlement, would contradict BNSF's own representation to the ICC in its merger case about the effectiveness of this remedy for a "2-to-1" problem, and would eliminate UP's ability to provide Superior shippers with competitive service. UP is attempting to work through this issue with BNSF rather than troubling the Board with it.

\* \* \*

UP could list more examples of dissatisfactions with BNSF administration of joint facilities. We could discuss Cajon Pass in Southern California, where UP trains frequently are unable to reach destination within the Hours of Service Law; the Rock Creek Junction-Congo-Eton segment near Kansas City; Superior, Wisconsin; and other locations where BNSF operating personnel know full well of UP's concerns. BNSF may have additional concerns about UP -- though it is hard to believe it has not aired every possible one in this proceeding. While BNSF has chosen to try to turn such disputes to regulatory ends, UP has continued to act as railroads always have. It has cooperated with BNSF where



cooperation is reasonable -- such as by altering its maintenance windows during its Tehachapi line construction to accommodate BNSF's premium trains. It has worked with BNSF to resolve complaints -- such as about BNSF's unwillingness to provide a similar courtesy during its maintenance of the Cajon Pass. It has also tried to recognize that the tenant has responsibilities just as the landlord does; the tenant must monitor and manage its operations, and raise issues on a timely basis. In sum, the Board should not be misled into believing that only BNSF has complaints -- or into believing that there is a need to turn such complaints into federal cases.

C. Cemex

Cemex again requests BNSF access to its facility at Dittlinger, Texas. It now expands the request it made repeatedly in Ex Parte No. 573 and Service Order No. 1518 -- and that was most recently rejected by the Board in a Decision served in those proceedings on July 31 -- to include BNSF access to "all cement, stone and sand bulk facilities located along lines in Texas over which BNSF has been granted trackage rights." Comments, p. 6. None of the other potentially affected shippers joins in this request. Indeed, many Texas



aggregate and cement shippers have opposed the imposition of additional conditions on the merger.<sup>18/</sup>

Cemex -- which probably has made more submissions to the Board in the last year than any other party -- continues to assert that the "service situation remains grim." Id., p. 3.<sup>19/</sup> But while Cemex builds an ever-growing paper record of complaints about UP service, UP service gets better and better. Cemex's open access agenda is unaffected by the radical improvement in UP service to Cemex over the last several months.

We resubmit today a September 10 verified statement of Mark Costanzo, UP's Superintendent of its Central Texas service unit, who describes the substantial improvements UP has effected for Cemex. Last month, UP transported 1,773 cars of rock for Cemex, the largest number of rock cars UP has moved for Cemex during the 3½ years for which UP has records. Costanzo V.S., p. 4. UP's cycle times for rock cars have been plummeting. Id., p. 3. In fact, due to a recent weather-

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<sup>18/</sup> See, e.g., Finance Docket No. 32760 (Sub-No. 26), UP's Opposition to Condition Applications, Vol. 4 (UP/SP-359), statements of Capitol Cement, Georgetown Railroad, GTI Materials, Redland Stone Products, Transit Mix and Yarbrough's Material & Construction.

<sup>19/</sup> Cemex's free-wheeling assertions about UP service are not credible. For example, in order to fashion a link between the UP/SP merger and its complaints, Cemex argues: "Almost immediately after the STB approved the merger in 1996, service deteriorated steadily." Comments, p. 1. But Cemex's Exhibits 1, 2 and 3 show no such pattern.

related slowdown in Houston construction, Cemex is no longer able to fill the rock trains UP is prepared to operate. UP is waiting for Cemex, and not vice versa. UP also is carrying all the cement Cemex can tender (which does not inhibit Cemex from complaining that UP should have moved cement Cemex could not ship). Id., p. 2. Many of these gains have been achieved through UP-initiated productivity enhancements, such as using longer trains to transport Cemex's products and working with receivers to unload cars more quickly. Id.

UP could transport even more shipments for Cemex if Cemex would build additional trackage at its facility, so that Cemex's railroad subsidiary could tender 90-car trains to UP without forcing UP to build trains on the Austin Subdivision mainline from Cemex's short tracks. Cemex also needs more in-plant trackage. UP has offered engineering and other assistance to Cemex to advance this work. Id.

There is no basis for a permanent open access condition on UP's Austin Subdivision, and no plausible allegation of any defect in competition. Cemex was exclusively-served both before and after the UP/SP merger. Its complaints derive from UP's inability to carry all the rock that Cemex wanted to ship in a sizzling Texas construction market.<sup>20/</sup> This was a problem of rail capacity

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<sup>20/</sup> Consultants hired by RCT and KCS/Tex Mex have described alleged multi-billion dollar losses to the Texas economy as a  
(continued...)



in a Texas construction boom, not of inadequate competition. No matter how many railroads serve Cemex, there is not enough track capacity in that area to move more trains than UP is moving now. Adding another railroad would reduce the effective transportation capacity because of coordination problems among two railroads and a shipper.

UP conceded months ago that it could not satisfy the demand for rock transportation from numerous Central Texas producers during an extraordinary construction spree throughout Texas. Like the church that cannot be built for Easter Sunday, UP cannot size its physical plant for unusual construction spurts in Texas. UP has acknowledged that its Austin Subdivision, where Cemex and most other producers are located, is perhaps the most severely taxed line on the railroad, and UP is working hard to expand capacity by rehabilitating 17 miles of second main line in the New

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20 / (...continued)

result of UP service, but the Texas economy does not appear to know that it was injured. According to the Houston Chronicle, new home sales exploded by 36% in May compared to the same month the prior year, the second highest monthly sales total in the entire decade of the 1990s. Single-family construction starts jumped 28%. According to an analyst: "All of this prosperity creates a real construction boom." The paper reported that "Houston is one of the busiest cities for housing construction in the nation," ranking sixth in the nation in single-family permits and first in apartment construction permits. Houston Chronicle, June 17, 1998, Business Section, p. 1.



Braunfels area.<sup>21/</sup> This line passes adjacent to the Cemex plant, so UP soon will have more capacity in that area. Meanwhile, it is using its capacity to the maximum extent possible to serve all its customers, and it will continue to do that when the new track becomes available. Costanzo V.S., p. 5.

Cemex can help itself by building more track, but bringing BNSF onto the Austin Subdivision will not help Cemex or any other producer. On the contrary, it will hurt. Where BNSF serves shippers in common with UP in Central Texas, BNSF has already reduced UP's ability to serve customers and reduced the total effective capacity of the local track network. Id., pp. 5-6. For example, BNSF has trackage rights over UP to reach the Georgetown Railroad at Kerr, Texas, which originates large volumes of rock. BNSF trains sometimes block UP tracks when its train crews run out of time under the Hours of Service Law and BNSF does not have a replacement crew. Id. At Halstead, Texas, where both carriers serve the Lower Colorado River Authority power plant, BNSF trains without crews frequently block the plant trackage, preventing UP trains from reaching the plant. On a number of occasions, UP has been forced to use its own crews to pull BNSF trains out

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<sup>21/</sup> See Finance Docket No. 33611, Union Pacific R.R. -- Petition for Declaratory Order -- Rehabilitation of Missouri-Kansas-Texas R.R. Between Jude & Ogden Jct., TX, Decision served Aug. 21, 1998.

of the plant and store them on a UP track so that UP could serve LCRA. Id. These types of coordination problems on the severely-constrained segment of the Austin Subdivision would reduce the total amount of rock shipped, because UP's limited capacity would be used less effectively.

D. City Sanitation Districts of Los Angeles County

In a letter dated August 7, 1998, the City Sanitation Districts of Los Angeles County ("CSD") expressed concern about UP rail service in Southern California in light of delayed shipments of chlorine needed for water purification. These shipments move from a supplier in Henderson, Nevada, southeast of Las Vegas, to points in Southern California. They are routed via UP to Barstow, California, and BNSF beyond to destination.

UP agrees with CSD that chlorine shipments in July and August suffered delays, and one car was badly mishandled. As UP reported to the Board in July and August, its services throughout the Southern California region were adversely affected as SP personnel learned how to use UP's TCS system, and due to other factors. As we reported on August 31, UP's most persistent congestion was on its South Central District between Los Angeles and Las Vegas, which encompasses the entire route of these shipments on UP.<sup>22/</sup> Congestion-spawned shortages of locomotives and crews caused UP to "blank" (not

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<sup>22/</sup> Letter from J. Hemmer to M. Clemens, Aug. 31, 1998, p. 4.



operate) its Las Vegas-Yermo manifest train and its industry switchers that serve Henderson.

UP's congestion problems in the Southern California area are over, so these unusual delays should be behind us. To make sure, UP implemented new procedures in August to ensure that the chlorine shipments and other traffic from the Henderson area will be picked up by other trains if the Las Vegas-Yermo train does not operate. In addition, UP's Vice President-Western Region and other UP officials met on Monday with the shipper in Henderson to ensure that local service is consistent and to cooperate on safety issues. Also, UP is training thirteen additional switchmen for service in Las Vegas in order to ensure that it has adequate crews in this area. With these measures in place, UP service should be much more reliable.

E. PSC

Public Service Company of Colorado ("PSC") asks the Board to (1) retain the condition permitting UP to discontinue service on, but not permitting it to abandon, UP's Tennessee Pass route between Dotsero and Pueblo, Colorado; (2) order UP to continue to preserve the integrity and continuity of this through route; and (3) revisit the level of service UP provides over the Moffat Tunnel route in mid-1999. PSC-9. These conditions are not needed, because UP has decided on its own initiative to preserve the Tennessee Pass route and its



continuity as a through route. Opal V.S., p. 1. UP plans to resume service over this route if necessary to alleviate congestion on the Moffat Tunnel line.

UP agrees with PSC that traffic growth is pressing capacity on the Moffat Tunnel route, especially between Denver and Bond, Colorado, a distance of approximately 130 miles.

(Bond is the junction point at which UP's Craig Branch leaves the former DRGW mainline to serve coal fields in northwestern Colorado.) Traffic has grown on this segment because UP is successfully promoting expansion of Utah and Colorado coal business. In addition, BNSF greatly expanded its operations over the line and is again rerouting traffic from its southern transcontinental route to the DRGW line. UP notes that PSC's own demand for coal transportation is growing. According to its data, PSC scheduled more coal trains in March, May and June of 1998 than for any other month in the prior three years, with only one exception that followed a month of very low PSC consumption. PSC-9, Lawson V.S., Exhibit DNL-1.

The wisdom of the Board's condition requiring UP to preserve the Tennessee Pass route now seems evident. As traffic on the Denver-Bond segment continued to grow, UP earlier this year began to reconsider its plans to abandon the Tennessee Pass route. Well before PSC's filing, UP sent an engineering team to the line to study its condition for possible rehabilitation and operation. On August 21, UP

formally notified the Board that it was withdrawing the line from its System Map as a candidate for abandonment.

Meanwhile, UP has rerouted some coal trains between Utah and the Midwest to its Wyoming mainline to reduce traffic on the Moffat Tunnel route.

UP has not yet made a decision to resume operations over the Tennessee Pass route, but has publicly indicated that operations could resume within two years. UP will notify the Board if it decides to operate trains over this route.<sup>23/</sup>

F. Champion and A&NR

In similarly framed statements, Champion and its 50%-owned subsidiary, A&NR, complain that they are not

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<sup>23/</sup> An entity calling itself the Colorado, Kansas & Pacific Railway Co. ("CK&P") asks the Board to maintain its condition permitting UP to discontinue service over but not to abandon or break the continuity of UP's "Tennessee Pass Line" between Pueblo and Dotsero, Colorado. UP has decided do to exactly what CK&P asks, so there is no need for a condition.

In large measure, CK&P's comments are devoted to accusations that UP, acting as "the classic monopolist," dealt with CK&P in bad faith. Comments, pp. 2-4. UP offers the attached verified statement of Robert Opal, who served as UP's chief negotiator in its lengthy dealings with CK&P. As Mr. Opal explains, CK&P is actually a gathering of rail aficionados with dreams of operating excursion passenger trains throughout Colorado, including over the UP Moffat Tunnel line and the BNSF-UP Joint Line between Denver and Pueblo, and long-distance steam trains over the Tennessee Pass and Towner-NA Jct. lines. The State of Colorado, not UP, rejected CK&P's bid to purchase the latter two lines on the ground that it was not viable. UP then attempted to work separately with CK&P on a purchase of the Towner-NA Jct. line. This attempt failed when it became clear that CK&P had no financing to buy this railroad, and had misrepresented its financial resources both to UP and to Governor Romer. UP subsequently sold the Towner line to the State of Colorado.



receiving consistent local service on UP's directionally-operated Lufkin Subdivision between Houston and Shreveport. They seek a requirement of "specific daily local service to short lines" that interchange with UP on main lines out of Houston. A&NR seeks an additional condition allowing BNSF to interchange with it traffic to and from new facilities that might in the future locate on its line. Champion also would like for a shortline that it owns, the Moscow, Camden & San Augustine ("MC&SA"), to switch its plant at Corrigan, Texas. A&NR-2, pp. 7-8; CIC-2, pp. 8-9.

A&NR interchanges with UP at Lufkin, Texas, some 100 miles northeast of Houston. The MC&SA-UP interchange is at Moscow, Texas, about 31 miles south of Lufkin. Champion's Corrigan plant is several miles north of Moscow. UP serves the two interchanges and Corrigan using a local that operates three days per week in each direction between Houston and Lufkin, and it serves Lufkin with another local from the north.

UP agrees that its service for these customers has not met their expectations or UP's in two respects. First, UP has not provided consistent local service on the Lufkin Subdivision. Second, many of the shipments from these facilities are destined to California, where UP operations were congested in July and August, as we frequently reported to the Board.



UP is taking a number of steps to improve local service on this line, based on a detailed review by UP's new Superintendent Joe Whalen. Effective last week, UP doubled the frequency of local service between Shreveport and Lufkin provided by trains LEF60 and LEF61. This will improve movement of cars between the A&NR interchange and points north.

Effective September 28, UP relocated dispatching of the Lufkin Subdivision from Omaha to the Spring Dispatching Center. This is an important change because it will bring a higher level of both management and dispatcher focus on this segment and will place the dispatcher responsible for the Houston terminal and the Lufkin Subdivision in the same room to improve coordination. UP had found that Lufkin Subdivision locals were sometimes delayed for hours because a busy dispatcher in Omaha put them in sidings earlier than necessary in preference to through trains, preventing the local crews from completing their work.

UP also plans to assign locomotives to locals LEF52 and LEF53 between Houston and Lufkin so that they will not have to compete for power with other operations. Some of the delays to these locals had been caused by delayed or unavailable power. UP will also take steps to ensure that the trains are ready to go at Englewood Yard when the local crew comes on duty, eliminating situations where the crew consumes

part of its service time waiting for its train to be prepared. Mr. Whalen will continue to review this operation to ensure that the new arrangements work and to make any necessary adjustments.

Champion complains that UP is assigning heavy locomotives to serve its plant at Corrigan, causing derailments. UP reviewed its records and determined that this is inaccurate. UP uses 4-axle locomotives on these locals. Champion's trackage at Corrigan was so badly deteriorated that even these units were derailing. At one point, UP refused to switch the plant until Champion performed essential maintenance to make the track safe. After Champion performed the repairs, the derailments stopped.

Champion would like to use a MC&SA locomotive to switch its own plant. UP does not object to this arrangement. As UP understands it, the dispute is over economics, not operations. Champion wants an allowance for doing the work, but UP would not save any money by turning the switching over to Champion. This economic issue is not suitable for Board resolution.

Shipments to the West Coast from A&NR, MC&SA and Champion were delayed during UP's recent service problems in California, along with most other shipments to and from that area. That congestion has been eliminated, and transit times reflect the improvement. Some of these shipments had been



rerouted via North Platte during the worst of the California congestion, which resulted in longer transit times.

Service to other parts of the UP system is already improving, even though the steps described above are only now being implemented. For example, a recent Champion shipment to Wisconsin had a transit time on UP to interchange in Chicago of less than six days. A recent movement from Corrigan required six days to reach interchange at East St. Louis, another improvement over prior service.

UP acknowledges its service defects, but Champion may have overstated them. For example, it claims that "26 cars loaded with product for our customers sat for eight consecutive days at the Moscow, TX interchange yard." CIC-2, p. 5. UP was unable to find any such delay, and local operating officers say it could not have happened. When UP's Trainmaster contacted MC&SA at Moscow, MC&SA could not identify any specifics associated with the claimed delays. In any event, UP is taking the steps necessary to make sure that such delays do not occur.

Champion and A&NR argue for conditions requiring UP to provide "specific daily local service" to all shortlines in the east Texas area, and to give local crews "priority to travel over or across main lines to switch local industries and collect or deliver shipments and/or equipment to shortline railroads." CIC-2, p. 9; see also A&NR-2, p. 8. They offer



no evidence that such daily local service was guaranteed before the merger, or that local crews had the priority they demand before the merger. Nor do they present any evidence, or even try to argue, that any competitive impact of the merger -- as opposed to specific local-train service issues on one rail line -- has caused any reduction in UP's service to shortlines.

A condition requiring daily local train service to every shortline in east Texas -- or elsewhere -- could require UP to provide uneconomic service. Under the post-Staggers regulatory regime, railroads are expected to make rational decisions about service frequency. In some instances, traffic levels may not justify daily service. Requiring daily service in such circumstances will only drive up costs and force a constriction of service somewhere else. Service more frequent than is economically justified would add unnecessary train movements to lines that are already busy, creating unnecessary congestion and delays for all traffic.

Similarly, like other proposals for arbitrary operating priorities -- such as the request recently rejected by the Board for an absolute priority for cement and aggregates traffic in Texas (Ex Parte No. 573 & Service Order No. 1518, Decision served July 31, 1998) -- the Champion/A&NR crew priority proposal seeks to have the government override

sensible day-to-day operating decisions in order to favor a particular group over others. It is entirely unjustified.

A&NR also argues that the "new industries" condition should be extended to shortlines that connected to only one of the merging railroads before the merger. A&NR-2, pp. 5-6, 8. That condition, which was expanded by the Board beyond the scope agreed upon between the applicants and BNSF and CMA (Decision No. 44, served Aug. 12, 1996, pp. 106, 124, 146), allows BNSF to serve all new industries (including transloading facilities) locating on lines over which BNSF has trackage rights. Its purpose was to preserve pre-merger competition between UP and BNSF for the siting of new facilities, and also to ensure that BNSF would have access to enough traffic to be fully competitive. Id., p. 106; Decision No. 61, served Nov. 20, 1996, pp. 9-10.

Clearly, there is no basis for extending this already-broad condition still further to cover industries locating on shortlines which, prior to the merger, connected exclusively to UP or SP. BNSF is handling ample traffic volumes, and does not need more industry access to ensure its competitiveness. A&NR says that the condition puts the shortlines in question at a disadvantage because it makes other locations more attractive as new industry sites, but it



offers no specific to support this conclusory contention.

A&NR-2, pp. 5-6, 8.<sup>24/</sup>

Even if A&NR's contention as to relative disadvantage were true, this would be a circumstance that already existed prior to the merger. At that time, shippers could elect to locate new facilities at points served by both UP and SP, while exclusively-served shortlines could not offer a site open to rail competition. The condition imposed by the Board did expand to a certain degree the number of such competitive locations -- in UP's view, more than was justified by preserving pre-merger competition (see UP/SP-275; UP/SP-285) -- but that is no reason to inject still further competition that did not exist before the merger. By that logic, BNSF would have to be given access to every location on the merged system.

But there is also every reason to conclude that A&NR's contention is not true. Solely-served shortlines have been a central part of the shortline renaissance, and thousands of new industries have chosen to locate on them in recent years. Solely-served locations, and the shortlines that serve them, clearly can compete for new industries. They can negotiate long-term railroad service contracts with the connecting line-haul carrier, using as leverage the fact that

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<sup>24/</sup> Indeed, its suggestion that the Board seek comments from other shortlines (A&NR-2, p. 6) suggests it knows of no actual evidence in support of its contention.



if the connecting railroad does not cooperate to attract the industry to a well-suited site on the shortline, the industry will locate elsewhere and deprive both railroads of the revenue associated with the new industry's traffic. This is the same sort of leverage that exclusively-served industries use when they invoke source competition to secure rail rates competitive with the rates charged to jointly-served industries shipping or receiving the same product. A&NR offers no evidence that these well-recognized competitive forces are not at work in its situations; indeed, it offers no evidence at all of any industry location that was supposed frustrated by the Board's condition. Accordingly, its request for an even broader new-industry condition should be denied.

#### CONCLUSION

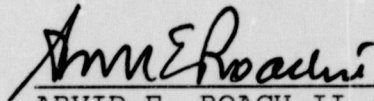
None of the comments on UP's July 1 oversight report takes issue with the facts that are of fundamental importance in this proceeding: those showing that competition remains intense following the merger, and that the BNSF and Tex Mex conditions have been highly effective in fulfilling their intended purpose. The complaints raised by BNSF have been or are being resolved, and do not show any failure of the merger conditions to preserve fully effective competition. Other comments focus on service problems which have been, or are in the process of being, rectified. The Board should close this proceeding, as it did last year's, with a finding that there

is no evidence of competitive harm calling for any further conditioning of the merger.

Respectfully submitted,

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September 30, 1998

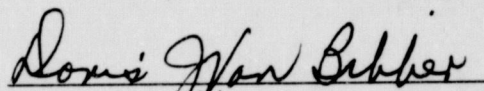
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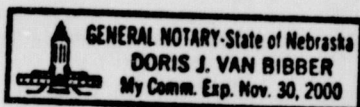
STATE OF NEBRASKA     )  
                              ) ss.  
COUNTY OF DOUGLAS    )

I, Brian G. McDonald, Assistant Vice President and Business Director-Lumber and Panel Products of Union Pacific Railroad Company, state that the information in Part II.A. of the Applicants' Reply to Comments (UP/SP-361) in STB Finance Docket No. 32760 (Sub-No. 21) was compiled by me or individuals under my supervision, and that I know its contents, and that to the best of my knowledge and belief those contents are true as stated.

  
BRIAN G. MCDONALD

Subscribed and sworn to before me by  
Brian G. McDonald this 28th day of  
September, 1998

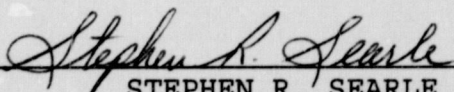
  
Notary Public





AFFIRMATION

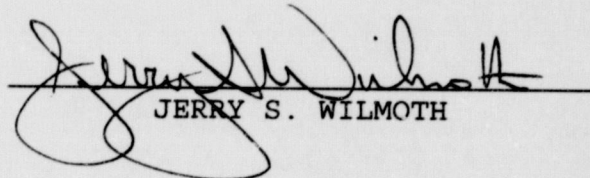
I, Stephen R. Searle, Superintendent of Trackage Rights of Union Pacific Railroad Company, state under penalty of perjury that the information in Part II.B.1 and II.B.3 of the Applicants' Reply to Comments (UP/SP-361) in STB Finance Docket No. 32760 (Sub-No. 21) was compiled by me or individuals under my supervision, and that I know its contents, and that to the best of my knowledge and belief those contents are true as stated. Executed on September 25, 1998.

  
STEPHEN R. SEARLE

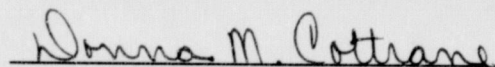
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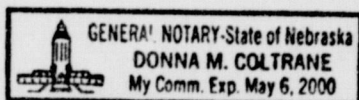
STATE OF NEBRASKA     )  
                              ) ss.  
COUNTY OF DOUGLAS    )

I, Jerry S. Wilmoth, Director-Joint Facilities of Union Pacific Railroad Company, state that the information in Part II.B.2. of the Applicants' Reply to Comments (UP/SP-361) in STB Finance Docket No. 32760 (Sub-No. 21) was compiled by me or individuals under my supervision, and that I know its contents, and that to the best of my knowledge and belief those contents are true as stated.

  
JERRY S. WILMOTH

Subscribed and sworn to before me by  
Jerry S. Wilmoth this 29th day of  
September, 1998

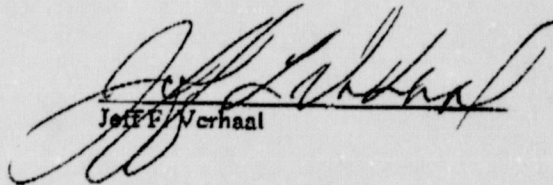
  
Notary Public



**AFFIRMATION**

I, Jeff L. Verhaal, declare under penalty of perjury, that the foregoing statements regarding UP service on chlorine shipments from Henderson, NV, to Southern California are true and correct. Further, I certify that I am qualified and authorized to make those statements.

Executed on September 30, 1998

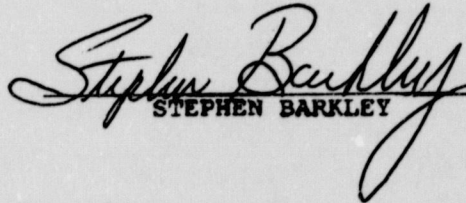
  
Jeff L. Verhaal



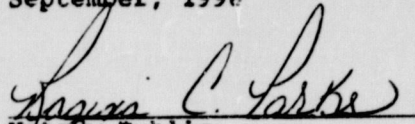
VERIFICATION

STATE OF ARKANSAS    )  
                          ) ss.  
COUNTY OF PULASKI    )

I, Stephen Barkley , Regional Vice President-  
Southern Region of Union Pacific Railroad Company, state that  
the information in Part II.F of the Applicants' Reply to  
Comments (UP/SP-361) in STB Finance Docket No. 32760 (Sub-No.  
21) was compiled by me or individuals under my supervision,  
and that I know its contents, and that to the best of my  
knowledge and belief those contents are true as stated.

  
STEPHEN BARKLEY

Subscribed and sworn to before me by  
Stephen Barkley this 29th day of  
September, 1998

  
Notary Public

**EXHIBIT 1**

**BNSF**

MATTHEW K. ROSE  
Senior Vice President  
and Chief Operations Officer

**Hurlington Northern Santa Fe  
Corporation**

PO Box 961034  
Fort Worth TX 76161-0034  
2600 Lou Menk Drive  
Fort Worth TX 76131-2830  
817-352-6100  
817-352-7430 fax

July 29, 1998

Mr. Brad King  
Executive Vice President - Operations  
Union Pacific Railroad Company  
1416 Dodge Street, Room 1206  
Omaha, Nebraska 68179

Dear Brad:

Thank you for your letter of July 17, 1998, concerning crewing issues on the Central Corridor.

As you know, we have worked with Mr. Steve Searle to initiate crewing trains with our people on the Richmond - Roseville, and Stockton - Roseville segments.

You have requested that BNSF notify UP in writing of our additional crew needs. We have determined that our long term requirements dictate that BNSF establish its own crew base for handling BNSF trains on the balance of the Central Corridor. It is our intent to establish a home terminal at Carlin, Nevada, so that our crews can operate between Carlin and Salt Lake City/Provo, Utah; Carlin and Sparks, Nevada; and Carlin and Keddie, California. In addition, our crews would operate between Stockton or Richmond and Sparks, as well as Stockton or Richmond and Keddie.

It will be necessary to work out related items such as locker facilities for crews and specific crew change arrangements. We will proceed on the basis that hiring and training will be accomplished in time to make January 1, 1999, the effective date for this overall change in crew handling.

Regards,

Matthew K. Rose



**EXHIBIT 2**

W. R. BLANK  
BUSINESS DIRECTOR  
CHEMICALS

UNION PACIFIC RAILROAD COMPANY



MARKETING AND SALES  
1200 Corporate Center Drive  
3rd Floor  
Monterey Park, CA 91754  
(213) 880-8801  
Fax (213) 880-8880

July 17, 1998

Mr. Bill Esslinger  
Mgr. Land Transportation Services  
Amoco Oil  
P.O. Box 87707  
Chicago, IL 60680-0707

Dear Bill:

This refers to your letter of July 10, addressed to Ed Sims, concerning rail access by the Union Pacific and BNSF to your Salt Lake City Refinery.

Ed has asked me to respond since I facilitated a meeting on this subject with several of your Salt Lake Refinery Managers and Union Pacific on July 16, 1998.

The results of this meeting were very positive according to your representatives; Mr. Adrian Davidson, Mr. Tim Harms, and Mrs. Arlene Cantrell. As we indicated at the meeting, it is not our intention to delay or restrict BNSF (Utah) access to your refinery.

We have asked the BNSF's Agent, the Utah Railroad, to now work directly with our Senior Manager Terminal Operations, Norris Wiseman, if they have any difficulties. The Utah Railroad has also committed to being available around 8PM for the switch so we can plan for the timing that will ensure the track is clear. Mr. Wiseman has issued instructions to his managers to "do whatever it takes" to keep the switch open for BNSF access. As a backup, your Rail Scheduler, Mrs. Cantrell has agreed to notify Mr. Wiseman if there is an issue over access. Our objective though, is to make the interaction between Union Pacific and BNSF transparent to Amoco.

I think you recognize that there may be "Force Majeure" type events, such as derailments, that might cause us to not make our commitments. However, our goal is making the commitment 100%.

Please let me know if you need any further clarification.

Regards.

Sincerely,

W. R. "Bill" Blank

cc. Ed Sims - UPRR, Omaha  
Terry Macy - Amoco  
Adrian Davidson - Amoco  
Tim Harms - Amoco  
Arlene Cantrell - Amoco  
Norris Wiseman - UPRR  
Rick Durrant - UPRR  
Ted Lewis - UPRR



**EXHIBIT 3**

**Union Pacific Railroad  
National Customer Service Center  
210 N. 13<sup>th</sup> St. - Room 500  
St. Louis, Mo. 63103**

September 8, 1998

Elias Lyman, Jr., VP  
Customer Service & Business Unit Support  
Burlington Northern & Santa Fe Railway  
2650 Lou Menk Drive, 3<sup>rd</sup> Floor  
Ft. Worth, Tx. 76131

Dear Tay:

Reference your letter addressed to Jim Damman dated July 10, 1998 concerning '*outstanding issues*' as it relates to BNSF Haulage/Trackage Arrangement.

As you are probably aware, Jim Damman has taken on a new assignment at our headquarters in Omaha, heading up our Harriman Dispatch Center. I have been assigned to the position of Vice President Customer Service Center, St. Louis, effective, August 16<sup>th</sup>.

I apologize for the delay in answering your letter. My response to the issues you have outlined in your letter is shown on the attached.

Just as matter of clarification, the Lotus Notes Database was originally designed to identify and address Information Systems Support Issues primarily dealing with Electronic Data Exchange problems in order to document, assign responsibility and provide status updates to resolution. Currently this procedure still exists and is reviewed weekly by Burlington Northern & Santa Fe and Union Pacific's IS & CSC personnel, which has proven to be most successful.

This same database was further enhanced to address customer service related incidents involving delays to traffic moving in haulage/trackage train corridors or discrepancies in the waybilling of such traffic.

I would like to arrange for a face-to-face meeting at your earliest convenience to discuss issues surrounding the use of the database and our joint efforts in meeting customer requirements. Please let me know your availability. (Proposed agenda attached)

Yours truly,

Rick Turner, VP  
National Customer Service Center

## **Attachment**

**Problem # 711** - Cars releasing loaded from customers on the Baytown Branch or at Dayton SIT for delivery to BNSF at Dayton. Discrepancies occurring in this movement were for the most part heavy congestion related; however, no-waybills and/or improper billing was also a contributing factor. Operating conditions have significantly improved. Manual procedures established between our two haulage teams have likewise improved this overall problem.

**Problem #10073** - Transmission of 417 Haulage Bills to BNSF. Understand there is a dispute as to how the routing segments are being sent, what is standard and who needs to program for change. I expect to have an update from our technical group and a decision forthcoming within the week.

**Problem #'s. 10222, 10264 & 10410** - 451 transaction sets (train movement events UP provides BNSF). Each of these issues is in a progression stage. Programming changes have been made and we continue to work with your IS group to improve the overall accuracy and timely reporting of these events.

**Problem # 10595** - Empty Reverse routing. A conference call was held August 27 and it was agreed by both UP and BNSF that UP would program for sending the empty reverse route haulage bill rather than rely on input from BNSF. Initial estimate for completion of this programming was 4 to 6 weeks. Status update is due this week. In the interim, UP is providing BNSF a daily report of cars actually placed at industry. BNSF then generates an empty reverse route haulage bill to UP for movement.

9/8/98



## **PROPOSED MEETING AGENDA**

### **Communications**

**Every other week conference calls Mangiaracino/Berz**

### **Billing**

**Receipt of Electronic Billing/Aging of No-Waybills**

### **Problem Resolution**

**Update - meeting UP/BNSF - Ft. Worth - September 3, 1998**

### **Lotus Notes Database**

**Problem Resolution  
Systems Problem Logs**

### **Measurements**

**UP  
BNSF**

### ***Other Issues***

VERIFIED STATEMENT

OF

MARK COSTANZO

I am Mark Costanzo. For several years I have been based at Spring, Texas, serving as Superintendent of the Central Texas Service Unit for Union Pacific Railroad Company. I have held various positions with UP since 1974, including Yardmaster, dispatcher, Superintendent for the Western Region, and Superintendent for the Livonia Service Unit. Just this week I was promoted to General Director of Premium Service. I am intimately familiar with the operations on the Austin Subdivision, where, as I have explained to Cemex numerous times, there is no room for train movements of another railroad.

I have read the Petition for Reconsideration Cemex filed with the Surface Transportation Board. Cemex is mistaken in claiming that the Board relied on incorrect information, supplied by UP, in deciding to deny BNSF access to Cemex's facility at Dittlinger, Texas. All of the facts UP provided to the Board were accurate, and the Board was correct that BNSF would not be able to provide additional service on the Austin Subdivision without jeopardizing other operations over the line, and that UP service for Cemex has improved significantly.

UP transports both cement and rock from Cemex's Balcones facility at Dittlinger, Texas. UP is currently

utilizing the Austin Subdivision as effectively as possible, and is operating as many trains over that line as its capacity allows. The Austin Subdivision cannot accommodate any more local train operations than UP is currently running. Cemex is asking the Board to allow BNSF to supplement UP service and carry Cemex products that UP is unable to move. Adding another railroad to the line, however, will not achieve that goal and would actually decrease shipment volumes by interfering with UP's extensive efforts to maximize train movements on the Austin Subdivision.

UP continues to solidify and improve both its cement and rock service to Cemex. As was true when the Board first denied Cemex's request for emergency relief, UP is moving every carload of cement tendered to it by Cemex. Cemex complains that UP has not yet transported 480 cars in a given month, as we agreed to do. This is due, however, to the fact that Cemex does not load enough cars to reach 480 loads per month. Cemex depletes its supply of cement. It also is working to increase its supply of cement cars. UP continues to have resources available to move more cement cars without delay.

We are also doing an excellent job of moving rock. Cemex loads over 100 gondola cars owned by its Western Railroad Company ("WRRRC") and 78 Union Pacific gondolas, as well as open-top hoppers, to ship its supply of aggregates. The following table demonstrates that car cycle times for the



UP-owned and WRRRC-owned gondolas alike have decreased substantially since March.

<u>Month</u>	<u>WRRC Gondola Cycle Times</u>	<u>UP Gondola Cycle Times</u>
March	36.21	41.27
April	25.59	23.06
May	16.10	15.68
June	16.32	16.48
July	16.28	15.95
August	10.51	10.45

Cycle times on all cars, including the open-top hoppers, have similarly fallen dramatically month over month since April.<sup>1/</sup>

<u>Month</u>	<u>Average Cycle Time</u>
April	18.7
May	11.1
June	10.7
July	10.3
August	8.2

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<sup>1/</sup> These times include time the cars spend loading and unloading at the facilities.

Cemex complains that UP has never achieved the agreed-upon three shipments per week to Turkey Bend Island ("TBI") in Houston. This is no longer true. During the week of August 24, for example, UP moved three trains to TBI that contributed to the total of 526 cars of stone shipped that week. In addition, the number of trains is unimportant given the fact that UP is achieving the same number of carloadings with fewer trains. Average cycle times to TBI have fallen each month since April 1998, from 14.5 days down to 5.3 days in August.

UP does not have sole control over the number of trains directed to TBI each week. At times, Cemex elects to ship first to a receiver other than its own TBI facility in Houston. Last week, for example, UP shipped two trains to TBI, but Cemex chose to send a third train to Beaumont instead.

With improved cycle times, UP has increased carloadings of aggregate month over month throughout 1998. The 1773 carloads of aggregate that UP loaded in August make last month the largest loading month for Cemex since the beginning of 1995, which is as far back as UP retains records. We do not anticipate any change in this trend, as indicated by the fact that UP handled 498 Cemex carloads during the first week in September.

UP devotes an immense amount of time and resources to resolving Cemex's operating concerns. For some time we

have conducted bi-weekly conference calls with Cemex to discuss service issues including billing, pickup and arrival notification. In addition, even with sustained service improvement, UP continues an intensive effort to maximize train operations on the Austin Subdivision. Within UP, we conduct internal conference calls every day to coordinate rock and cement movements along the line. These calls take place seven days a week and sometimes twice a day.

Allowing BNSF access at Dittlinger would undermine the kind of coordination and the service levels we achieve for Cemex. Our experience with BNSF service to shippers on our lines shows that operating and coordination problems with BNSF can reduce overall service levels. UP has, for example, had consistent problems with BNSF at the Lower Colorado River Authority coal facility in Halstead, Texas. BNSF unloads trains at that facility, but has too small a crew base to support the operation. As a result, empty trains often sit for extended periods of time without a crew available to run them. We use our own crews to move their trains into the yard at Smithville in order to create space to bring UP trains in for unloading.

We have similar problems with BNSF trains at Kerr, Texas, where BNSF interchanges with Georgetown Railroad. BNSF trains sometimes block us from serving Georgetown Railroad with our trains, or block our trackage, due to lack of crews.



If this happened further south on the Austin Subdivision, it would cripple our service to Cemex and other customers.

The way to increase the total amount of rock shipped over the Austin Subdivision is not to inject another railroad onto the existing line, with all the coordination problems that would cause, but to increase capacity both inside and outside shipper facilities. In October, UP will open 17 more miles of track through New Braunfels, which will increase capacity in the Cemex area and enable us to provide better service to all of our customers. This capacity should allow us to run a few additional trains, and we intend to use all of that capacity as soon as it becomes available.

For its part, Cemex needs to increase the capacity at its plant to ensure a smooth flow of traffic on our mainline and on its property. Currently, Cemex does not have adequate capacity to receive or build efficient 90-car trains on a single track. Cemex can build trains of only 40 to 50 cars without the need to double over on the busy mainline, disrupting operations. Transporting product in trains of this length also is inefficient and consumes scarce capacity. UP is working with Cemex to address this. UP has committed to furnish Cemex enough rail to lengthen their interchange tracks at Dittlinger to enable them to build up to 90-car trains without forcing UP to switch on the mainline.

Because of a shortage of storage track within Cemex's plant, Cemex has been using the former MKT line near

New Braunfels as an industrial track, holding large numbers of cars there. We are currently rehabilitating that track as a mainline, and it is no longer available to Cemex as a storage option. Cemex needs to build more track on its property, and UP is providing engineering assistance to help it.

In addition, UP's ability to transport cars is limited because destination facilities have limited unloading capacity. No Cemex customer is able to unload 90 cars in a single spot. We send 90-car trains to TBI and to Lufkin, Texas, but unloading requires a second spot. At TBI in Houston, this requires UP to use an extra switch engine job at our expense.

Union Pacific is unwilling to replace the manual switch at Dittlinger with an automated switch because the investment of \$250,000 is not cost effective. We do not have automated switches at any other rock facility on the Austin Subdivision, and we cannot reasonably spend the money to install them.

**VERIFICATION**

STATE OF TEXAS

)

) ss:

COUNTY OF HARRIS

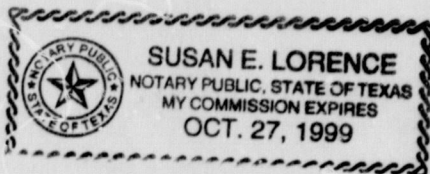
)

Mark Costanzo, being first duly sworn, deposes and states that he has read the foregoing Verified Statement, know the facts contained therein, and that the same are true as stated to the best of his knowledge, information and belief.

*Mark Costanzo*  
\_\_\_\_\_  
Mark Costanzo

Subscribed and sworn to before me this 16<sup>th</sup> day of September, 1998.

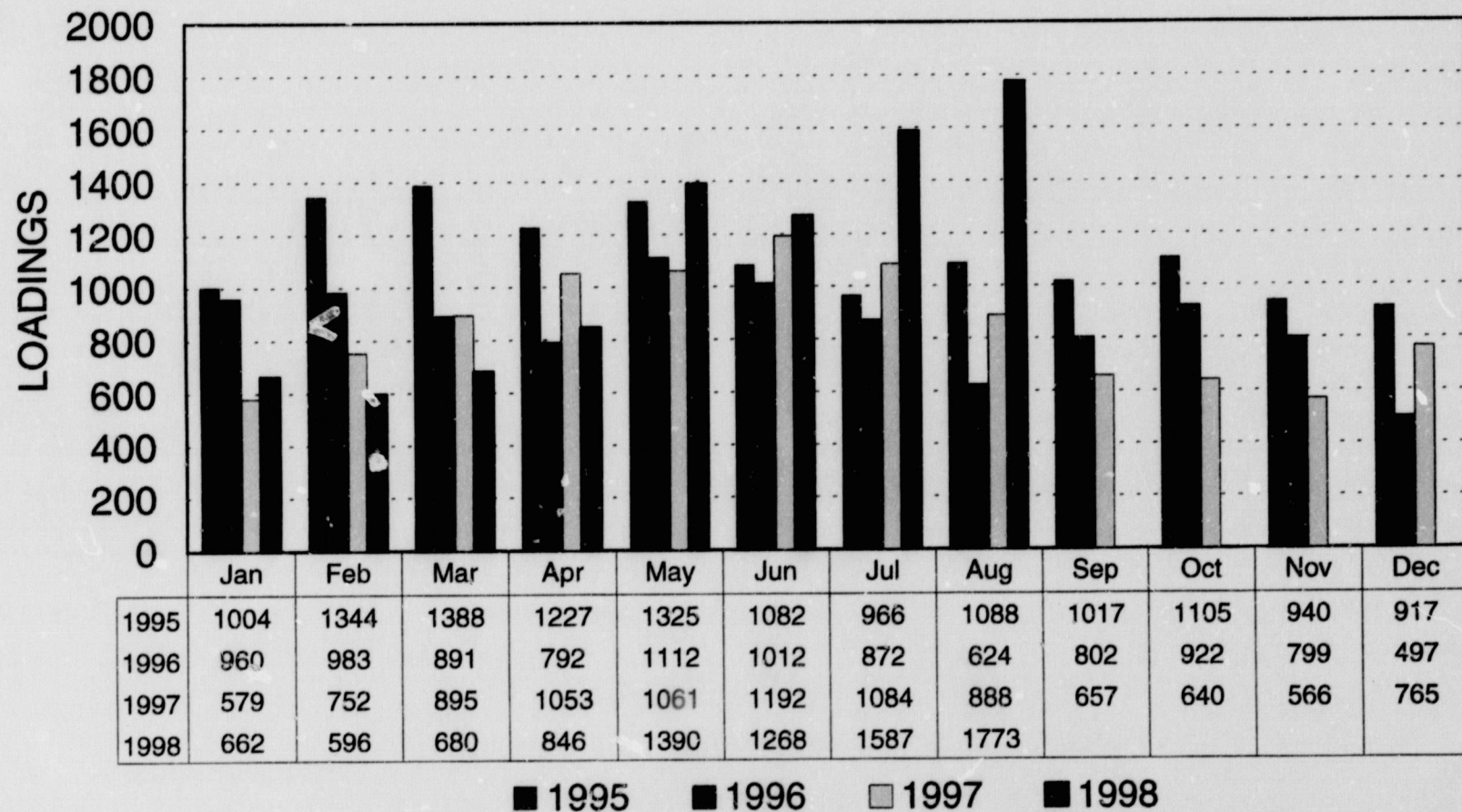
*Susan E. Lorence*  
\_\_\_\_\_  
Notary Public





# SUNBELT CEMEX

## STONE



Monthly Commitment - 1775 loads

**Verified Statement  
of  
Robert T. Opal**

My name is Robert T. Opal. I am General Attorney for Union Pacific Railroad Corporation (UP) with offices at 1416 Dodge Street, Omaha NE, 68179. I have been employed by UP since the UP/CNW merger in 1995. Prior to that time, I was Senior Commerce Counsel of the Chicago & North Western Railway Company.

I was responsible for overseeing the abandonments which were proposed in the UP/SP merger application, including three line segments in Colorado. These were the Towner-NA Junction Line, AB-3 (Sub-No. 130), the Sage-Leadville Line, AB-8 (Sub-No. 36X), and the Malta-Canon City Line, AB-8 (Sub-No. 39). I was also heavily involved in the efforts by the State of Colorado to find a purchaser for these lines in 1997, UP's negotiations with various entities for purchase of the Towner - NA Junction line in 1997 and early 1998 and, finally, the successful sale of that line to the State of Colorado in July, 1998.

I am submitting this statement in response to the August 14, 1998 comments submitted on behalf of an entity calling itself the "Colorado, Kansas & Pacific Railway Company" ("CK&P"). The ultimate relief requested by these comments is that the Board continue a "condition it previously imposed" requiring UP to preserve the "Tennessee Pass Line" as a potential through route between Pueblo and Dotsero, CO. That relief has become moot, because UP advised the Board on August 21, 1998 that it is removing the line from Category 1 of it's system diagram map and is retaining it in place. Thus, UP is already doing what CK&P requests.

I am nonetheless submitting this statement to address the misrepresentations contained in CK&P's comments as to its business dealings with UP. The picture CK&P tries to paint is that it was a group of investors making a good faith effort to purchase various Colorado lines from UP, and that UP engaged in pattern of unreasonable conduct designed to subvert this effort. The fact of the matter, however, is that "CK&P" is simply a name for a group of individuals, most of whom appear to be rail enthusiasts, with a completely unrealistic business plan, who had no prospect of securing the funds to acquire any of the Colorado abandonment lines, and who made material misrepresentations to Governor Romer and UP. Any problems CK&P had with UP arose from the unbusinesslike way in which it dealt with UP officials.

At the outset, it would be useful for the Board to have a complete picture of CK&P's dealings with UP, since CK&P's comments omit all that occurred before October 1, 1997. UP's unhappy experience with CK&P grew out of commitments UP made to the State of Colorado in the UP/SP merger proceeding. Among those commitments, UP agreed to cooperate with the State in an effort to identify viable rail alternatives for the Colorado lines UP had proposed to abandon in its merger application. UP agreed that, if such rail alternatives were identified, it would sell the abandonment lines, or parts of them, for net liquidation value. UP also agreed that it would not abandon the lines for 6 months following the merger, and would keep them in place for a year.

The State's effort to find viable rail service options commenced in April, 1997 with a solicitation for bids to over 180 entities, including the major short line



operators. UP cooperated very extensively in this effort, through participation of UP personnel, preparation of bidding information and provision of line inspections and access to UP records. However, only 5 bids were ultimately submitted. One of these was a bid submitted by "Mile High Transportation Company" for CK&P. This was, frankly, a far-fetched proposal for a combined freight - passenger railroad between Towner and Sage, CO (about 370 miles) which would be supported largely by passenger excursion revenue from long distance steam trains. Some of the more curious features of this proposal were CK&P's assumptions that it could use 70 miles of UP and BNSF track between NA Junction and Canon City, CO (which was not being abandoned and was not for sale) without paying anything for it, that freight traffic on the lines would increase by 1,000% or more from the levels handled by UP and SP, that CK&P could handle interline traffic without sharing the interline revenues with connecting carriers, and that it would earn revenues from operation of a non-existent land-cruise excursion service ranging over busy UP and BNSF main lines between Pueblo and Denver, and over UP's Moffat Tunnel route.

The State utilized a panel of outside rail experts to evaluate the 5 bids. The panel was put together by the Western Governors' Association, not UP, and none of the panelists was affiliated with UP. The panel judged the Mile-High/CK&P bid to be non-responsive, found its proposed operating plan to be "highly questionable and speculative," and expressed "serious concern" with its proposed financial structure. The portions of the panel's public report discussing CK&P and containing the resumes of the panel members are attached as Exhibit 1. In a later newspaper interview, one of

the panelists bluntly described the CK&P bid as "impractical, unfinanceable and unusable."<sup>1</sup> The panel recommended a bid submitted on behalf of Royal Gorge Express ("RGX", sometimes described as the "Marcus" or the "Denver & Royal Gorge" bid) for a combined freight-passenger railroad between Canon City and Parkdale or Texas Creek. This recommendation was accepted by the State on September 25, 1997. Consistent with its merger commitments, UP then negotiated with this entity. The negotiations were successful, and the purchase of the Canon City - Parkdale segment was closed in July, 1998 (see Finance Docket No. 33622).<sup>2</sup>

Since the State rejected the CK&P bid, UP had no obligation under its merger commitments to conduct any negotiations with CK&P. In retrospect, it is probably unfortunate that we then allowed ourselves to be drawn into negotiations with this firm, since we had serious doubts that as to its railroad expertise and ability to raise financing. The reason we negotiated with CK&P on the Towner-NA line is because we were requested to do so by State officials, following an October 8, 1997 meeting between Governor Romer and Court Hammond, CK&P's President. The officials advised us that Mr. Hammond told the Governor that CK&P had the money to

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<sup>1</sup> Pueblo Chieftain, October 9, 1997.

<sup>2</sup> At p. 4 n. 5 of its comments, CKPR suggests that the Board ask whether UP required RGX to pay "fair value for the line as it required CKPR to pay." The purchase price for the RGX transaction is confidential. However, we can state that, consistent with our commitments to the State, the price to RGX was based on the net liquidation value of the line being acquired, the same method of valuation used in the CK&P transaction. UP has no objection to providing the Board with a copy of the RGX agreement under seal, if the Board desires it.



purchase the Towner line,<sup>3</sup> and asked if we were willing to negotiate with CK&P for a purchase of the line based on this representation. We agreed that we would attempt to negotiate a quick cash sale of the Towner line to CK&P, even though it would delay salvage of the line. We would never have agreed to negotiations with CK&P if its purchase had been dependent on "complicated financing arrangements," since we believed CK&P's proposal to be unfinanceable (as it proved to be).

With this history in mind, I turn to the misrepresentations made in CK&P's comments about the subsequent events:

(1) CK&P characterizes the negotiations as pertaining to the Towner-NA Junction Line and the Tennessee Pass line (CK&P Comments, p. 2). This is false. I specifically advised Court Hammond at our first meeting that the only line on the table was the Towner line. In fact, when UP transmitted the first draft of the line sale contract to CK&P on October 10, 1997, the transmittal letter specifically stated as follows:

"The contract covers only the above line (MP 747.5 to 869.4). No other trackage or operating rights is included, nor are we willing to include any additional trackage or operating rights." (Exhibit 2, emphasis in original. "MP 747.5 to 869.4" are the milepost limits of the Towner NA Junction line.)

(2) CK&P claims that it advised UP during the October negotiations that it needed to assemble "complicated financing arrangements" in order to close the Towner line purchase (CK&P Comments, pp. 2-3). This is false. CK&P repeatedly

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<sup>3</sup> The October 9, 1997 Pueblo Chieftain describes CK&P's meeting with Governor Romer as follows: "Rep. Lola Spradley, R-Beulah, attended the meeting and reported that the governor asked 'Do you have the money,' and Hammond replied 'Yes'."



represented that it already had the money to purchase the Towner line. At no time during our contacts with CK&P in October-November, 1997 did CK&P represent that it would have to assemble a "two part financing package" consisting of "revenue bonds" and "bridge loans" in order to obtain the funds to close, as it now claims (which would have resulted in the immediate termination of negotiations). The first time CK&P indicated that it did not have the funds and needed to make "complicated financing arrangements" was when it disclosed this to UP on December 5, one business day before the planned closing, as described in paragraph 4 below.

(3) CK&P's claims that it requested "several months" to close, but that UP "junior management" responded with a short closing deadline and a "series of short extensions" (CK&P Comments, p. 3).<sup>4</sup> This is false. CK&P never indicated during the October-November negotiations that it needed "several months" to close, as it now states. The very reason UP initially proposed a 30-day closing was because of CK&P's representations that it already had the necessary funds. In response, CK&P requested 60 days -- not "several months" -- because it was concerned that STB approval could not be obtained in 30 days (Exhibit 3, p. 2). However, CK&P signed the contract with a closing deadline of November 18, 1997 after we pointed out that the transaction could be closed 7 days after a STB notice filing.

There were two subsequent extensions (which, taken together, gave CK&P more than the 60 days to close it had initially requested), one in November and

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<sup>4</sup> CK&P's suggestion that UP's "junior management" was somehow undermining decisions made by UP's "senior management" is inaccurate. UP's dealings with CK&P were directed throughout by UP senior management, in particular, John Rebensdorf, UP Vice President - Strategic Planning.

one in December. On Friday, November 14, just two business days before the planned November 17th closing, CK&P faxed UP a request for an extension to "the week of December 8" (Exhibit 4).<sup>5</sup> The Board will note from Exhibit 3 that CK&P did not request an extension of "several months" as CK&P falsely claims in its comments. It requested an extension of less than a month. UP agreed to this request, and extended the closing deadline to December 9. CK&P did not indicate it needed "several months" until it requested a second extension on December 5, as described in paragraph (4) below.

(4) While we always had internal doubts as to CK&P finances, the first indication from CK&P itself that it did not have the funds to close came on Friday, December 5, one business day before the planned December 8 closing. On December 5, a consultant newly engaged by CK&P met with John Rebensdorf, UP Vice President - Strategic Planning, other UP officials and me to present a proposal for purchase of the Towner Line, the Tennessee Pass line, and the intermediate 70 miles of UP and BNSF tracks that were not proposed for abandonment and were not for sale, with a closing in the Spring of 1998. The proposal was very similar to the Mile High / CK&P proposal which had been rejected by the State in the earlier line sale solicitation. This was the first time CK&P indicated that it needed "several months" to make "complicated financing arrangements" to close the Towner line transaction. The consultant was asked directly if CK&P had the funds to close the Towner line sale by

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<sup>5</sup> CK&P's November 13 fax did not state any reason for the requested extension. However, Mr. Hammond personally assured me in a telephone conversation that CK&P had the money to close and that the extension was needed only to take care of "lawyer details."



December 8, as it had agreed to do, and the consultant said that CK&P did not. On the afternoon of the 5th, UP hand delivered a letter to CK&P's consultant (approved by UP senior management) in response to CK&P's new 11th hour proposal (Exhibit 5), a copy of which was faxed to Mr. Hammond. As can be seen, the letter took strong exception to CK&P's prior misrepresentations as to its financial resources, rejected the new proposal, and offered to extend the closing deadline on the Towner line only to December 22, 1997 in return for a \$100,000 non-refundable deposit. Since CK&P had obviously not been candid with us in its negotiations, we seriously considered refusing any further extensions. We decided instead to give CK&P one last opportunity to close if it could demonstrate, by making the deposit, that it had at least some funds, and that it was willing to commit these funds to the purchase (the line sale contract had not previously required any deposit or earnest money).

(5) CK&P's claims that UP "senior management" indicated that, if CK&P tendered a \$100,000 deposit, UP would "favorably consider" an extension of "several months" but that, after UP received the deposit, it granted an extension only to December 22 (CK&P Comments, p. 3). This is false. UP's December 5 letter (Exhibit 5) was given to CK&P fully six days before the deposit was paid on December 11. The letter offered only an extension to December 22, not "several months". Late on December 8 (at 10:53 PM), CK&P sent us a fax proposing an extension to March 14 (Exhibit 6), but this was rejected by UP in a faxed letter dated December 10, 1997 (Exhibit 7). The December 10 letter also explicitly advised CK&P's as follows:

"if you are not willing to abide by the terms of the December 5, 1997 letter agreement as originally proposed, then you should not tender the \$100,000



deposit which is provided for in that agreement. **You are specifically advised that your tender of the \$100,000 deposit provided in Paragraph 2 of said agreement will constitute your acceptance of the December 5 letter agreement as originally proposed.**" (emphasis in original).

CK&P was obviously well aware of the fact that the extension was only to December 22 and it knew this before the deposit was paid. It is difficult to see how we could have made our position any clearer.

(6) CK&P claims that it tendered a \$100,000 non-refundable deposit to UP (CK&P, p. 3). This is false. CK&P never paid anything to UP. On December 11, 1997, UP received a wire transfer of \$100,000 from Bowman Family Farms, not CK&P (thus demonstrating that CK&P did not itself have even this small fraction of the purchase price). Bowman later advised UP in a letter dated December 23, 1998 (after the contract had been terminated for failure to close) that Bowman had provided these funds because it understood that UP had agreed with CK&P on an extension to late March, 1998 (copies of this letter, and of UP's January 8 response, are attached as Exhibits 8 and 9). UP had made no such representations to Bowman, so this "understanding" could only have come from representations by CK&P. But CK&P had no basis to make any such representations. As discussed above, UP had advised CK&P in writing that the extension was only to December 22, and that it should not tender the deposit if it was not willing to abide by this.

(7) On December 22, UP outside counsel was present at the appointed time and place for the closing with all of the closing documents, ready, willing and able

to close. No one from CK&P showed up, and UP terminated the line sale contract in accordance with its terms when the closing deadline passed.

(8) CK&P claims "UP has told the State that it does not want the State to select CK&PR or any affiliate thereof as an operator and wants to forbid the State from reselling the line to CK&PR or any affiliate thereof." This is false.<sup>6</sup> UP has had no involvement in the State's current efforts to find an operator, and has not even been told who the bidders are. Moreover, UP has no right under its contract with the State to dictate who the operator will be, nor to forbid the State from reselling the line to an operator. UP has a right of first refusal to buy back the line, but only if the State is unable to sell it for continued rail service.

(9) CK&P's claims that UP attempted "to persuade one of CK&PR shipper backers to refrain from supporting CK&PR in any future purchase or operating bids for the line". This is false. Until we received a copy of CK&P's August 14 comments, we were not even aware that CK&P was still in existence, or that it was making any "future purchase or operating bids for the line."<sup>7</sup>

Finally, I should comment on the overall theme in CK&P's comments that UP "did not go out of its way to bring this transaction to fruition." I have had primary

---

<sup>6</sup> UP sold the Towner-NA Junction line to the State in July, 1998. Our understanding is that, if the State is able to find an operator for the line, it will utilize a "modified certificate" as provided in Subpart C, 49 CFR Part 1150.

<sup>7</sup> Following termination of the CK&P line sale contract on December 22, 1997, UP stated on several occasions that it was unwilling to engage in any further negotiations with CK&P or its principals. Given the amount of time UP management had spent on the failed CK&P transaction, CK&P's obvious lack of funds, and its material misrepresentations, it was appropriate for UP to decide not to waste any more time dealing with this entity.

STB      FD      32760      (Sub 21)      9-30-98      D      191416      3/3



responsibility for over 70 abandonments at UP and CNW and have assisted in many more. I have not been involved in any abandonment in which the railroad devoted as much time and effort to sell a line for continued rail service, or accepted as many delays, as UP did on the Towner-NA Junction line. We first assisted the State in its efforts to find a private buyer for the line, which delayed the abandonment more than a year, to October, 1997. We then delayed it further, until December, 1997, because of our unsuccessful discussions with CK&P. After that, we offered to sell the line to another private entity (Bowman Family Farms), an offer that was not pursued. We also voluntarily complied with a new State law requiring a railroad to delay salvage of an abandoned line to give an opportunity for government entities to acquire the line in whole or in part, even though this law was obviously preempted by the ICCTA.<sup>8</sup> When UP's offer to sell to governmental entities expired on March 14, 1998, UP had an immediate use for the rail from the line for the nearby "KP" line upgrading project, and was ready to perform the salvage work. Nevertheless, in response to a request by Governor Romer, UP voluntarily left the line intact another 4 months, to give the State an opportunity to enact purchase legislation and to finalize a purchase. Given these facts, it is absurd to suggest, as CK&P does in its comments, that UP has not "gone out of its way" to facilitate a purchase of the Towner line. UP bent over backwards to do so.

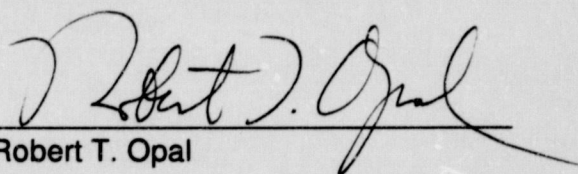
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<sup>8</sup> 49 USC 10501(b). In addition, the STB order approving this abandonment was a Certificate of Interim Trail Use (CITU), which expressly permitted UP to salvage the line 30 days after issuance, 49 CFR § 1152.29(c)(1). The CITU was "issued" (served) on September 10, 1996.

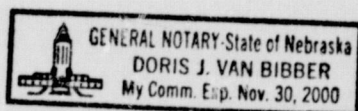
**VERIFICATION**

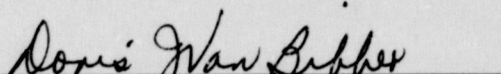
STATE OF NEBRASKA    )  
                                  )   ss.  
COUNTY OF DOUGLAS   )

Robert T. Opal, being first duly sworn, deposes and says that he has read the foregoing document, knows the facts asserted therein, and that the same are true as stated.

  
Robert T. Opal

Subscribed and sworn to before me this 14<sup>th</sup> day of September, 1998.



  
Notary Public

My Commission Expires:

Nov. 30, 2000

## **EXHIBITS**

- Exhibit 1** Western Governors' Association Colorado Rail Panel. "Evaluation and Recommendation for the Tennessee Pass and Towner-NA Rail Line Segments," September 25, 1997 (excerpts).
- Exhibit 2** UP letter to CK&P, October 10, 1997 advising that only line to be negotiated is Towner-NA Jct. Line.
- Exhibit 3** CK&P letter to UP, October 13, 1997 requesting 60 days to close.
- Exhibit 4** CK&P letter to UP, November 13, 1997 requesting extension of closing to week of December 8, 1997.
- Exhibit 5** UP letter to CK&P, December 5, 1997 offering to extend closing deadline to December 22, 1997 if \$100,000 deposit paid.
- Exhibit 6** CK&P letter to UP, December 8, 1997 (10:54 p.m.) requesting extension of closing to March 14, 1998.
- Exhibit 7** UP letter to CK&P, December 10, 1997 rejecting CK&P's requested extension, and advising CK&P that tender of deposit would constitute acceptance of December 5 letter agreement (Exhibit 5) as originally proposed.
- Exhibit 8** Bowman Family Farms letter to UP, December 23, 1997 describing representations made to Bowman.
- Exhibit 9** UP letter to Bowman Family Farms, January 8, 1998 responding to Exhibit 8.



*Western Governors' Association  
Colorado Rail Panel*

**EVALUATION AND RECOMMENDATIONS FOR  
THE TENNESSEE PASS AND TOWNER-N.A RAIL LINE  
SEGMENTS**

**EXECUTIVE SUMMARY**

**Submitted by Colorado Rail Panel**

**Lee White, George K. Baum Company  
Lynn Cecil, Kyle Railways, Incorporated  
Charles Banks, R.L. Banks and Associates, Inc.  
Western Governors' Association**

**September 25, 1997**

## ***THE WESTERN GOVERNORS' ASSOCIATION COLORADO RAIL PANEL EVALUATION***

### **Introduction:**

The Western Governors' Association (WGA), at the request of the State of Colorado Office of Business Development, completed an evaluation of five proposals submitted for the purchase of the Tennessee Pass and Towner-N.A. Junction rail lines. Those lines are proposed to be abandoned by the Union Pacific Railroad as a result of its merger with the Southern Pacific Railroad.

The State of Colorado, in an effort to keep the maximum sustainable amount of service available to shippers and preserve the maximum tax base for local communities along the lines, sought proposals to operate the lines or portions of them in a process that began in February, 1997. Under written agreements with the Union Pacific Railroad, the State or its "designee" is allowed to purchase the abandoned rail lines for net liquidation value (NLV). The work of the independent Western Governors' Association (WGA) Panel was designed to assist the State in identifying a "designee." The Office of Business Development requested WGA's independent assessment of the viability of the five proposals in order to ensure that its evaluation process was thorough and unbiased.

To conduct the evaluation, WGA empaneled three individuals with expertise in the operation of short line railroads, the conduct of rail line sale due diligence and business finance. These individuals were: Mr. Lynn Cecil of Pinetop, Arizona, Mr. Charles Banks of Washington, DC; and Mr. Lee White, of Denver, Colorado. Resumes of these individuals are contained in Appendix A. Mr. Ronald Ross and Mr. James M. Souby of the Western Governors' Association, along with the Office of Business Development, supported the Panel throughout the evaluation process. Representatives from the Union Pacific Railroad were available to provide technical information on request.

### **Recommendations:**

After a thorough evaluation of each proposal, the Panel unanimously recommended that the State of Colorado advance the proposal submitted by the Denver & Royal Gorge Railway, to be operated by the Marcus Corporation, as the State's designee to negotiate with the Union Pacific Railroad for the purchase and operation over portions of the Tennessee Pass Rail Line.

The Panel also found the bids from the INAP, Inc./Rock & Rail, Inc. and the Royal Gorge Canyon Railway were responsive to the State's solicitation and recommended that they be advanced in that order, in the event that the initial bidder does not come to terms with Union Pacific Railroad.

The Panel did not recommend the bids submitted by the Tulare Valley Railroad and the Colorado Kansas and Pacific Railway Company. For reasons discussed later in this report, those bids were considered both non-responsive to the criteria listed in the request for proposal and seriously lacking with regard to financial and operational plans.



### Process:

The two subject rail lines were designated for abandonment by the Union Pacific Railroad as part of its merger with the Southern Pacific Railroad, owner of the lines. These rail lines had served as part of Southern Pacific Railroad's transcontinental rail line, but were deemed redundant by Union Pacific Railroad. As part of a written agreement with the State of Colorado, the Union Pacific Railroad and the Southern Pacific Railroad agreed to a process by which any abandonment of the rail lines would be delayed pending a process to seek alternative service on the subject lines.

The effort began in February 1997 when the State solicited interest in the lines from over 180 short line rail companies across the country. This solicitation resulted in a total of 14 expressions of interest in bidding on the lines. The potential bidders were given confidential information concerning the lines, were afforded an opportunity to inspect the rail lines being abandoned, and participated in a formal bidders' conference. By the July 21 deadline, the State had received a total of five bids for all, or portions of the lines.

Following the receipt of the bid proposals, the State of Colorado requested WGA to conduct an independent evaluation of the proposals and provide the Office of Business Development with a recommendation on which bidder(s) should be advanced to negotiate with the Union Pacific Railroad for the purchase/lease and operation of the two rail lines. WGA was requested to assist in the evaluation process because of its recent and ongoing experience addressing western transportation issues.

WGA accepted the request as part of its efforts to support the western governors and assembled a three member Rail Panel to conduct an independent evaluation. WGA sought experts from three disciplines in order to balance the evaluation process, a short line operator, a rail line sale due diligence consultant, and a business financier. The following three individuals agreed to assist WGA by serving on the Rail Panel.

- ▶ Lynn T. Cecil, retired president, Kyle Railways, Inc., Pinetop, Arizona
- ▶ Charles Banks, R.L. Banks & Associates, Inc., Washington, D.C.
- ▶ Lee White, George K. Baum & Company, Denver, Colorado

Copies of all documents were provided to the panelists. Three conference calls and one meeting were then convened for Panel members to discuss their evaluations and to obtain additional technical information from both the State and Union Pacific Railroad. The Panel members completed their evaluations and prepared their recommendations independently prior to the meeting on September 19, 1997. At that meeting, the Rail Panel reached consensus on a designee to recommend to the State as the most responsive based on the criteria set forth in the bidders' letter dated April 21, 1997.



Process: (continued)

All five bids were thoroughly evaluated by the Panel, including two bids that were ultimately judged as being non-responsive to the *Bid Information Packet* and the April 21, 1997 bidders' letter. The bids from the Tulare Valley Railroad and the Colorado, Kansas and Pacific Railway Company were evaluated, considered non-responsive and set aside at the final meeting of the Panel. Bids from the Denver & Royal Gorge Railway, INAP, Inc./Rock & Rail, Inc. and Royal Gorge Canyon Railway were considered responsive. The Panel's evaluations are presented in the order the Panel recommended they be considered by the State. The rankings were approved unanimously by the three Panel members.

## **COLORADO KANSAS & PACIFIC RAILWAY COMPANY**

**Bidder:** Mile High Transportation Company

### **Bid Description:**

Mile High Transportation proposed to purchase all of the Tennessee Pass and Towner - N.A. Junction rail line segments. The bid specifically stated that Mile-High intended to purchase the Tennessee Pass line between Milepost 162.0 near Cañon City and Milepost 335.0 near Sage. In addition, the purchase of a short segment of the Leadville branch between Milepost 271 near Malta and Milepost 273.4 near Leadville, was included in the bid. Mile High also intended to purchase the Towner line between Milepost 747.0 near Towner and Milepost 864.4 near N.A. Junction.

The bid, however, was premised not only on operations along the proposed abandonment sections, but also assumed the ability of the bidder to obtain operating or trackage rights over additional Union Pacific Railroad assets beyond those offered in the Bid Package. The bid also included obtaining similar operating or trackage rights from other carriers, such as the Burlington Northern Santa Fe Railroad, which were not part of this process.

### **Purchase Price:**

Mile High proposed to purchase the segments for full NLV as follows: \$19,017,192 for the Cañon City/Malta/Sage segments, including Malta/Leadville segments, and \$10,267,521 for the Towner-N.A. Junction segment. The total purchase price offered: \$29,284,713.

### **Overall Panel Evaluation:**

The proposal was judged to be non-responsive because of its reliance on operating and/or trackage rights which were not part of the proposed sale, that was clearly spelled-out in the bidders' letter as being beyond the scope of the solicitation. Not only did the bid rely on additional trackage rights to be obtained from Union Pacific Railroad, but it also assumed accepting the same from other carriers, not part of this process, such as the Burlington Northern Santa Fe Railroad. Moreover, the bid contained no payment plans for obtaining and compensating for such rights, even if they were made available. For this reason, the bid could have been summarily rejected. Nevertheless, the Panel thoroughly evaluated the bid.

The Panel found the operating plan to be highly questionable and/or speculative in a number of areas. The plan contained few firm commitments from new shippers. At the same time, the revenue projections shown in the bid proposal assumed an unrealistically huge increase in shipper traffic, well in excess of 1,000 percent; an amount that far surpasses the normal 5 to 30% increase in shipping volume traditionally experienced by new short line operations. The plan also assumed



### **Overall Panel Evaluation: (continued)**

access to shippers along segments of track not part of this process (see comments regarding trackage and operating rights). The Panel believed the proposal fundamentally misunderstood the process by which railroad freight rates are established.

The Panel was very concerned about the reliance of the proposal on passenger and excursion activities which accounted for a significant amount of the five year revenue projections. While intuitively attractive, the Panel believed that such assumptions were far too optimistic, particularly in light of the assumptions that were premised on operating and trackage rights not available as part of this solicitation. There were serious concerns about the ability of the bidder to timely obtain and renovate vintage rail equipment, including steam locomotives, for some of the tourism proposals in the bid, as well as the ability of some of the referenced equipment to operate on the tracks in question.

### **Financial Capacity:**

In light of the operational concerns, the Panel expressed serious concern about the financial structure presented by the bidder.



APPENDIX  
RESUMES FOR THE COLORADO RAIL LINE EVALUATION PANEL

## Charles H. Banks

Charles H. Banks is President of R.L. Banks & Associates, Inc. (RLBA), a Washington, D.C.-based, multi disciplinary consulting firm providing economic, operational and engineering counsel in all major modes of surface transport. Among other lines of business, RLBA is the nation's leading provider of rail line transaction due diligence services to private sector financial institutions.

Mr. Banks earned an MBA from the Wharton School of the University of Pennsylvania in 1977 with a concentration in finance and transportation curriculum, and received a BA in Economics from Haverford College in 1974.

Since joining RLBA in 1985, Mr. Banks has focused on evaluating the economics associated with private and public financing of railroad transactions. Mr. Banks has interviewed hundreds of the largest existing and prospective rail customers on nearly two dozen prospective enterprises in connection with financing the rehabilitation, expansion or acquisition of numerous short line and regional railroads and assessing their potential viability. He researched the economics of unit train operations on light density freight lines, has participated in a number of the firm's waste-by-rail assignments and, with another RLBA colleague, co-authored articles published in *The Management of World Wastes*.

Mr. Banks also has provided strategic railroad line evaluation and acquisition counsel to more than two dozen clients and addressed the 1996 APTA Commuter Rail Conference regarding "Access to Freight Railroad Facilities." On behalf of public sector clients including the Roaring Fork Railroad Holding Authority, Los Angeles County Transportation Commission, Virginia Railway Express, San Diego Association of Governments, Southwest Ohio Regional Transit Authority, Alameda Transportation Corridor, Metro-Dade (Miami, Florida), New Jersey Transit, and Maryland Mass Transportation Administration's MARC commuter rail service, Mr. Banks has: 1) evaluated alternative access arrangements (acquisition versus long term lease and operating rights), 2) derived rail line acquisition and negotiation strategies, 3) coordinated, managed or conducted rail line real property and/or rail asset valuations, 4) investigated and analyzed allegedly "comparable sales", and/or 5) created or edited purchase and sale and operating rights agreements.

Prior to joining RLBA, Mr. Banks was Director of Strategic and Financial Planning with the United States Railway Association, a public corporation which restructured bankrupt Northeast railroads into Conrail. His primary responsibility was to identify Conrail's potential for increased profits. He also directed studies to rebut claims, exceeding \$1.3 billion, against the government.

Previously, Mr. Banks conducted financial studies in the Costing and Economic Analysis section of Conrail's Finance Department and, subsequently, joined that carrier's Strategic Planning department. At Southern Pacific's Bureau of Transportation Research, he developed and implemented information systems and studied rail line viability. Mr. Banks also has worked in the Operating and Market Research Departments of three other large railroads.



## **Lynn T. Cecil**

Mr. Cecil has been an entrepreneur in the regional and short line railroad business since having purchased Kyle Railways, Inc. in January 1992. Kyle Railways included nine (9) railroad properties which were owned and/or operated by the Company. The lines consisted of about 1500 miles of trackage throughout the country with operations in the states of Alabama, Arizona, California, Colorado, Hawaii, Idaho and New Mexico. These railroads were predominately freight oriented, however four (4) of the properties either included passenger excursion operations, or were exclusively excursion lines. One of these properties, familiar to most Coloradans, is the Cumbres and Toltec Scenic Railroad which was operated by Kyle Railways from 1982 through 1996 under terms of a lease agreement with the States of Colorado and New Mexico.

Prior to acquisition of Kyle Railways Inc. Mr. Cecil's railroad experience included ten (10) years of employment on the Apache Railway Company located in Eastern Arizona where he held positions in the track maintenance department which included Track Foreman and Roadmaster. During his stay on the Apache Railway he also held positions as Freight Agent, Auditor and Traffic Manager.

In 1957 Mr. Cecil joined Willis Kyle, the owner of a Northern California short line, as General Manager of the property. Following this association and the formation of Kyle Railways' holding company, acquisitions began which included line segments of Southern Pacific, Union Pacific, Santa Fe, CSX and others. During most of this period of time, as acquisitions continued and until the Company was purchased in 1992 by Lynn and Suzie Cecil, Mr. Cecil held the position as Executive Vice President of the Company.

During the last several years of Mr. Cecil's active railroad career he served as a member of the Board of Directors of The American Short Line Railroad Association.

The holding company and its railroad properties were sold to StatesRail, Inc. in January 1997 at which time Mr. Cecil retired.



## Lee White

Lee White is a Senior Vice President with George K. Baum & Company. Mr. White has more than 14 years of investment banking experience assisting numerous state and local governments and private corporations finance their infrastructure investments. Mr. White has been responsible for directing the issuance of over \$4 billion municipal securities. His clients have included:

- |  |                                 |
|--|---------------------------------|
| - Metro Denver Baseball Stadium District   | - Denver Broncos Football Club  |
| - Public Service of Colorado               | - State of Montana              |
| - State of Colorado                        | - State of Arizona              |
| - Auraria Higher Education Center          | - State of Utah                 |
| - University of Denver                     | - Copper Mountain Resort        |
| - Colorado State University                | - Denver Tech Center            |
| - Cheyenne Light, Fuel & Power Company     | - City and County of Denver     |
| - Gray's Harbor Port Authority, Washington | - City of Colorado Springs      |
| - Century Development Company              | - Stapleton Redevelopment Corp. |

He came to investment banking with extensive cabinet level experience in state government. He was Executive Director of the Colorado Department of Administration in 1979-80 and then Executive Director of the Colorado Office of State Planning and Budget in 1981-82.

Mr. White participates in numerous professional and civic organizations, and has served as a Trustee of the Colorado Historical Society, the Greater Denver Corporation and Chairman of Denver Civic Ventures. He was an elder at Montview Presbyterian Church. He is a member of the Colorado Forum and the Mile High Club. He was appointed to the Denver Board of Education in 1995. Mr. White has served as:

- |                 |  |
|-----------------|--|
| Co-chairman     | U.S. Congress Joint Economic Committee's Study on Infrastructure in the U.S. |
| Co-chairman     | City of Denver, Comprehensive Planning Advisory Committee                    |
| Treasurer       | Colorado Martin Luther King Holiday Commission                               |
| Chairman        | Clayton Foundation   |
| President & CEO | Stapleton Redevelopment Foundation   |
| Chairman        | Denver Water Board Citizens Advisory Committee                               |

Mr. White received a Masters of Business Administration from Harvard Business School, a Masters of City Planning from the Massachusetts Institute of Technology, and a Bachelor of Science in Mechanical Engineering from Rensselaer Polytechnic Institute.

UNION PACIFIC RAILROAD COMPANY

**Exhibit 2**

1416 DODGE STREET  
ROOM 235  
OMAHA NEBRASKA 68179-0001  
FAX (402) 271-5610



October 10, 1997

**Via Facsimile (303) 628-5288**

Mr. Court Hammond  
President and CEO  
Colorado, Kansas & Pacific Railway Company  
1616 - 17th Street, Suite 382  
Denver, CO 80202

Re: Towner - NA Junction Line Sale

Dear Mr. Hammond:

Enclosed for your review prior to our meeting on October 13 is a draft line sale contract covering the above line. Your attention is directed to the following:

- 
1. The contract covers only the above line (MP 747.5 to 869.4). No other trackage or operating rights is included, nor are we willing to include any additional trackage or operating rights.
  2. The contract provides for an interchange between UP and CK&P at NA Junction, but not at Towner (Section 6(a)). The reason Towner was excluded is because UP no longer operates the line running east from Towner into Kansas. The latter line is now being operated by Central Kansas Railway Company (CKRY). You will need to make your own arrangements with CKRY for the Towner interchange. Since virtually all of the traffic which currently originates or terminates on the Towner-NA Junction line moves over Towner, you should make interchange arrangements with CKRY as soon as possible. CKRY's contact person is Gary Earnshaw, (316) 263-3113.
  3. The milepost limit of the line sale at Towner is 747.5, rather than 747.0 as stated in the Colorado bid information packet, which reduces the length of the line you are purchasing by approximately one-half mile. The reason is that this segment has been transferred to CKRY. The purchase price shown in the bid information packet has also been reduced by \$50,000

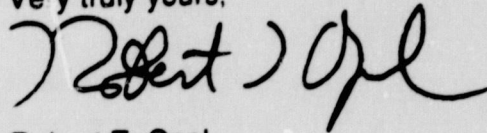


(from \$10,267,521 to \$10, 217,521) to reflect the reduction in track mileage.

4. The only consequence of failure to close the transaction is termination of the contract (see Sections 3(a) and 5(b)). You will have no monetary liability to UP in the event of a failure to close.

It is our desire to finalize the agreement and have it fully executed by October 15. As such, please be prepared to discuss any revisions you may desire at our meeting on the 13th.

Very truly yours,



Robert T. Opal  
General Attorney  
Direct dial: 402/ 271-3072  
Fax: 402/ 271-5610

cc: (w/attachments)  
Ray Allamong - Room 110  
Dick Hartman - Cheyenne, WY





1616 17<sup>th</sup> Street Suite 382  
Denver, Colorado 80202  
Phone 303-628-5470  
Fax 303-628-5588

## Colorado Kansas & Pacific Railway Company

October 13, 1997

Mr. Robert Opal  
General Attorney  
Union Pacific Railroad Company  
1416 Dodge Street  
Omaha, NE 68179

**Reference: Changes to Draft for Acquisition of Towner Line**

Dear Mr. Opal,

We have reviewed the contract you faxed to the Colorado Kansas & Pacific Railway on October 10, 1997. Given such short notice for an in-depth review of this length of document, we have made a list of comments and concerns. The following comments in this letter refer to contract negotiations for NA-Towner Line only.

- Property Description: NA Junction to Towner, Colorado, Milepost (747.5 to 869.4).
- At the minimum, we need time to have legal review after our initial discussions with the UP, the follow up meeting for Wednesday the 15<sup>th</sup> should be scheduled to resolve possible conflicts between parties.
- The CK&P have had an independent NLV calculation from United Railroad Services, of Aurora, Colorado. NLV calculations are \$ 6,450,000.
- The reduction of 1/2 mile of track at Towner is acceptable.
- Under the bid proposal, UPRR is responsible for providing interchange at Towner.
- Under the bid proposal UPRR was willing to negotiate car supply agreements.
- This contract has no provisions for car supply and car hire reclaim, propose additional provision for 3-5 days.
- Line must be delivered to purchaser intact, including track sightings, bridges, etc. Signal system not included.
- CK&P must be able to review the recent UPRR agreement with CKRY to verify interchange point.
- Issues of Quitclaim deed vs. general or special warranty deed.
- On page 3, section d, what are the superior rights granted to seller?
- Assignment of agreement by either party by written consent only.

## CONTRACT NOTES

### Section 3. Closing (b)

Quitclaim deed not due until one year from the date of agreement

Change provision to: Quitclaim deed due at closing, with first right of refusal to UPRR

### Section 3. Closing (d, e, f)

UPRR to retain all mineral rights, pipeline etc.

Change provision to: providing that development will not interfere with activities of buyer

### Section 3. Closing (h)

Addition of provision to: adopt existing rates, contracts, provisions etc. by Purchaser of provisions in place just before closing

### Section 4. Payment for the line by Purchaser

Change provision to: 30 days following STB approval or 60 days, whichever is greater.

### Section 5. Failure to Close (A, 2)

We have concerns over STB approval between October 15 and November 18.

This is a paper chase question as well as the ability to obtain governmental approval. Change to provide a time frame of 60 days at a minimum. This should not be a failure to close issue.

### Section 7. Liability and Insurance; Standard agreements (a)

Change provision to Seller responsible for all "latent or obvious, discovered or undiscovered" environmental problems. Purchaser responsible for the first \$15,000 of claims in order to protect Seller from frivolous claims. Provisions for cost sharing of a Phase 1 environmental assessment to establish a base conditions, providing that Phase 1 has not already been conducted or established by seller.

### Section 7 Liability and Insurance; Standard Agreements (d)

The waiver of rights or subrogation will be subject to changes in provisions to "Section 7. Liability and Insurance; Standard agreements (a)". (This will need further legal review.)

### Section 8. Services to be Provided to Purchaser (a)

Maps, track charts, etc.

All documents except those provided in the bid solicitation package, as well as other historic documentation pertaining to the line, should be available for inspection PRIOR to closing during due diligence and provided at closing.

### Section 8. Services to be Provided to Purchaser (b)

Seller to provide Purchaser with rates. Purchaser to adopt all rates, routes and provisions in place at the time of the sale. Provide examination in advance of closing of all contracts that are involved from a transportation or property standpoint.

Addition of provisions for: payment of revenue to Purchaser, NA Junction or origin or destination on the line.

### Section 9. Equipment Supplied (c) Car Hire.

Addition of provisions for: Seller to have some responsibility for providing cars, also to give some car reclaim relief to Purchaser. A sale provision of 4 days reclaim for Purchaser.



**EXHIBIT A. Quitclaim Deed**

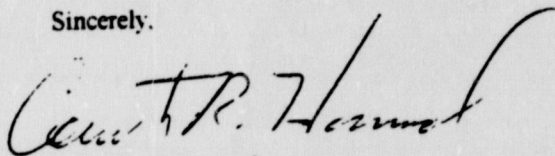
The numbers don't match Letter has milepost 747.5 to 869.4 and Quitclaim deed has 864.4  
Clarification and correction required

**EXHIBIT B-1 Assigned Agreements**

Change provision to: review prior to closing

The Colorado Kansas & Pacific Railway Company is willing to assist the Union Pacific Railroad regarding the current congestion issues and to provide for economic development to the six counties effected by these lines. CK&P is not attempting to acquire other trackage rights or operating rights unless addressed expressly in the terms of this agreement.

Sincerely,



Court R. Hammond  
President & CEO

CRH/klw





1616 17<sup>th</sup> Street Suite 382  
Denver, Colorado 80202  
Phone: 303-628-5470  
Fax: 303-628-5588

**Colorado Kansas & Pacific Railway Company**

November 13, 1997

Mr. Robert T. Opal  
General Attorney  
Union Pacific Railroad Company  
1416 Dodge Street  
Omaha, NE 68179

Dear Mr. Opal,

As per my conversation with Mr. Jerry Davis today, a closing during the week of December 8, 1997 is more appropriate.

We would like to provide as much positive media coverage for this event as possible. Could we get the Union Pacific Executive Car on the Towner Line or at the Pueblo Union Depot for the closing? Governor Romer, various county commissioners and several of our local television stations could also attend. Any suggestions you have would be helpful.

Thank you for your support in this matter.

Sincerely,

Court R. Hammond  
President & CEO

CRH/klw

Law Department

**UNION PACIFIC RAILROAD COMPANY**

1416 DODGE STREET  
ROOM 830  
OMAHA, NEBRASKA 68179-0001  
FAX (402) 271-5610



December 5, 1997

**Via Fax and UPS Overnight**

Mr. Court Hammond  
President and CEO  
Colorado, Kansas & Pacific Railway Company  
1616 - 17th Street, Suite 382  
Denver, CO 80202

Re: Towner - NA Jct. Line Sale  
Law File: AB-3 (Sub-No. 130)

Dear Mr. Hammond:

I attended a meeting this morning with Mr. John Reed, who you have recently engaged as a consultant, John Rebensdorf, UP's Vice President-Strategic Planning, and other UP personnel. During the meeting, Mr. Reed requested a second extension of the closing deadline (presently 12:01 A.M. MST, December 9, 1997), and indicated that CK&P did not have the funds to close this transaction on the scheduled December 8 closing date. He also presented a proposal for CK&P to purchase UP's route from Sage to Towner, Colorado, including purchase of, or acquisition of operating rights over, the segment between Canon City and NA Junction. The proposal is a slightly reworked version of the proposal that CK&P made in the Colorado line sale process, and which was rejected by the evaluation panel.

I am, frankly, surprised and disappointed. You have repeatedly represented to me and others that you already had the funds to purchase the Towner - NA Jct. line. In fact, when we previously agreed to extend the closing from November 18 to December 9, you represented to me that the funding was all lined up, and you simply needed the additional time to deal with "lawyer details", or words to that effect. I now learn, only one business day before scheduled closing, that you have never had the funds to close this transaction.

In addition, I have repeatedly told you that the only line that is now on the table is the Towner - NA Jct line. In fact, my letter of October 10, transmitting the draft line sale contract for our first meeting, specifically stated that "The contract covers only the above line (MP 747.5 to 869.4). No other trackage or operating



*rights is included nor are we willing to include any other trackage or operating rights."* Now, only one business day before the closing on the Towner line, we are suddenly presented with a proposal covering the Tennessee Pass line (including the portion we will be selling to Marcus Corp., the winning bidder in the State line sale effort) and 70 miles of track and operating rights from Canon City to NA Jct. that we have never proposed to abandon and which is not for sale.

While we would be entirely justified in holding CK&P to the December 9 closing deadline (which itself was an extension of the deadline in the original contract), we have elected to allow CK&P a second extension (to COB December 22, 1997) to close this sale, if CK&P pays UP a non-refundable deposit of \$100,000 by COB December 10, 1997. We are not willing to grant further extensions.

Accordingly, by this letter, the parties to the October 21, 1997 Line Sale Contract ("Contract") agree as follows:

1. The Termination Date of 12:01 A.M. Mountain Standard Time, December 9, 1997 provided in Section 5(a) of the Contract, as amended by letter agreement dated November 14, 1997, is further amended to read "5:00 P.M. Central Standard Time, December 10, 1997."
2. CK&P shall pay to UP a non-refundable deposit of \$100,000 no later than 5:00 P.M. Central Standard Time, December 10, 1997. Payment shall be made by wire transfer to First Bank NA, 17th and Farnam, Omaha, NE, ABA routing number 1040000, Account No. 1487-445-7-116-4, Payee: Union Pacific Railroad.
3. If the \$100,000 non-refundable deposit provided in '2' above is paid to UP by 5:00 P.M. Central Standard Time, December 10, 1997, the Termination Date provided in Section 5(a) of the Contract shall be further amended to read "5:00 P.M. Central Standard Time, December 22, 1997".
4. If the \$100,000 non-refundable deposit in '2' above is not paid to UP by 5:00 P.M. Central Standard Time, December 22, 1997, the Contract shall terminate as provided in '1' above.
5. The \$100,000 non-refundable deposit, if paid, shall be credited at closing against the purchase price provided in Section 4 of the Contract. In the event that the line sale provided in the Contract is not

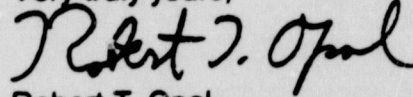


closed by the Termination Date of 5:00 P.M. Central Standard Time, December 22, 1997, UP shall retain the deposit as liquidated damages, provided, however, that UP shall refund the deposit to Seller should the failure to close be due to UP's exercise of its right to cancel and terminate the Contract as provided in Section 3(a) thereof.

6. Except as provided herein, the Contract, as amended by letter agreements dated October 31, 1997 and November 14, 1997, is unchanged.

Please indicate your acceptance of 1-6 above by signing one copy of this letter in the space provided and returning it to me. The second copy is for your files.

Very truly yours,



Robert T. Opal

General Attorney

Direct dial: 402/271-3072

Fax: 402/271-5610

ACCEPTED:

---

Court R. Hammond  
Colorado, Kansas & Pacific  
Railway Company

cc: John Reed  
Jill Rood, Esq.  
John Rebensdorf  
Ray Allamong

hammon11.wpd



**Exhibit 6**

1616 17<sup>th</sup> Street Suite 382  
Denver, Colorado 80202  
Phone: 303-628-5470  
Fax: 303-628-5588

## Colorado Kansas & Pacific Railway Company

December 8, 1997

Via Fax  
402-271-5610

Mr. Robert T. Opal  
General Attorney, Union Pacific Railroad Company  
1416 Dodge Street, Rm. 830  
Omaha, Nebraska. 68179-0001

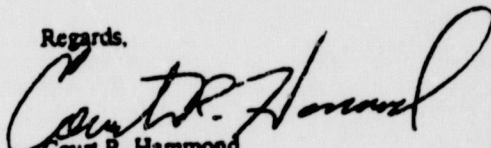
Please find the signed copy of the extension granted for the closing of the Towner Line.

In accordance with the recommendation made by our consultant, Mr. John Reed, referencing his meeting with Mr. Davidson on Thursday, December 4<sup>th</sup>, 1997:

- Following the deposit of funds (\$100,000) on Wednesday December 10<sup>th</sup>, 1997 an appropriate time frame will be negotiated for the final closing on the Towner Line. (reference paragraph 3 of your letter dated December 5<sup>th</sup>, attached).
- This time frame, Mr. Davidson noted, will allow for the closing using conventional long-term financing as outlined in the Kirkpatrick Petus financing proposal, amended to exclude the Tennessee Pass Line.

In addition, concerning the letter dated November 17<sup>th</sup>, 1997 (attached), from Mr. Guillermo Vidal, Executive Director of the Colorado Department of Transportation, and a time frame for entities with interest in the line would have an opportunity to purchase the assets concerned by March 14<sup>th</sup>, 1998 on behalf of the municipalities along the line. We feel that this March 14th deadline is consistent with the time frame needed to successfully close the sale.

Regards,

  
Court R. Hammond  
President/CEO  
Colorado Kansas & Pacific Railway

cc  
Richard K. Davidson  
Commissioner Berry  
Directors of CK&P



Law Department

**UNION PACIFIC RAILROAD COMPANY**

1416 DODGE STREET  
ROOM 830  
OMAHA, NEBRASKA 68179-0001  
FAX (402) 271-5610

December 10, 1997

**Via Fax and UPS Overnight**

Mr. Court Hammond  
President and CEO  
Colorado, Kansas & Pacific Railway Company  
1616 - 17th Street, Suite 382  
Denver, CO 80202

Re: Towner - NA Jct. Line Sale  
Law File: AB-3 (Sub-No. 130)

Dear Mr. Hammond:

This is in response to your fax of 10:53 P.M., December 8, 1997. I was out of the office all day December 9 and did not see it until this morning.

It is apparent from your letter of December 8 (included with the fax) and from notations you have made on the December 5 letter agreement that, although you have signed the agreement, you are not accepting all of its terms. You are, instead, proposing materially different terms for closing. In other words, your fax is not an agreement, but a counterproposal. As a result, there is no agreement to extend the closing deadline of December 9 that is provided in the amended line sale contract. Nevertheless, even though this deadline has passed, we remain willing to extend the deadline to December 22, based on the terms contained in the December 5 letter agreement as originally proposed.

UP's responses to changes proposed in your counterproposal are as follows:

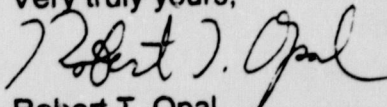
(1) UP is not willing to negotiate an extension of the closing beyond December 22. I point out to you that we entered into the line sale contract based on your representations to us and to Governor Romer that you already had the funds required to purchase the line. In the original line sale contract, you agreed to a closing deadline of November 18. This was later extended to December 9 based on your representation that you had the funding all lined up, but needed the additional time to deal with some "lawyer details". It is apparent from the events of the last few days that you have never had the funds. We would not have entered into the line

sale contract in the first place had we known that your representations were false.

(2) The notice sent out by CDOT on November 17 has absolutely no relevance to this matter. The notice was given to comply with a State law (Sec. 43-1-1304 C.R.S.) which requires an abandoning railroad to give various governmental entities the right to purchase line assets prior to removal. CK&P is not a governmental entity. I point out, again, that you agreed to a closing deadline of November 18, later extended to December 9. We would not have entered into the contract in the first place had you insisted on a closing date in March 1998.

If you are not willing to abide by the terms of the December 5 letter agreement as originally proposed, then you should not tender the \$100,000 deposit which is provided for in that agreement. **You are specifically advised that your tender of the \$100,000 deposit provided in Paragraph No. 2 of said agreement, will constitute your acceptance of the terms of the December 5 letter agreement as originally proposed.**

Very truly yours,



Robert T. Opal  
General Attorney  
Direct dial: 402/271-3072  
Fax: 402/271-5610

cc: John Rebensdorf  
Warren Wilson  
Ray Allamong  
Dick M. Hartman





December 23, 1997

Mr. Robert T. Opal  
General Attorney, Union Pacific Railroad Company  
1416 Dodge Street, Room 830  
Omaha, Nebraska 68179-0001

Dear Mr. Opal,

Bob, first, I want to apologize to you for the discrepancies in communication which have apparently led to the cancellation of the CK&P/UP contract as of yesterday. While the outcome of the transaction was unfortunate for the CK&P, I wanted to state to you for the record what my understandings of the transaction were, and as they specifically relate to Bowman Family Farms and our own desire to purchase the Towner Line.

It was my understanding based upon negotiations that had reportedly taken place between Dick Davidson and John Reed in Omaha on December 4, 1997, that upon receipt of \$100,000.00 earnest funds, and acceptable assurances by Bowman Family Farms to the UP a late March 1998 closing would be successful, we would meet the requirements for a contract extension as set forth to us by Mr. Reed. Upon reliance of those representations, I advanced \$100,000 to the UP as a non-refundable deposit towards the closing of the Towner Line. Moreover, I arranged for communications to occur between Mr. Reef Ivey, II, corporate counsel for our contracted integrator, and Mr. John Reed. Then as I understand it, the two of them, as well as Mr. White Matthews, the Executive VP and Treasurer of the Union Pacific, Mr. Ray Allamong of the UP, as well as yourself participated in that conversation. It is also my direct understanding that during that call, Mr. Ivey agreed to provide the necessary assurances to the UP to set a March 1998 closing date, and further suggested we all get together in person after the holidays to arrange this.

Although it is unfortunate this series of events has resulted in neither the UP nor the CK&P realizing their intended goals in this transaction, I respectfully request you consider re-opening contract negotiations with Bowman Family Farms for the purchase of the Towner Line. Bowman Family Farms remains deeply committed to the successful evolution of our proposed developments in Southeastern Colorado. However, the ultimate success of these developments in Southeastern Colorado, no doubt, rely heavily on maintaining the viability of the Towner Line.

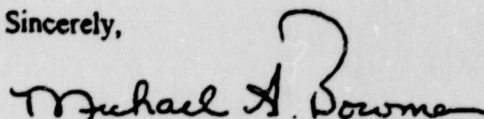


Therefore, I respectfully request a meeting at a time and place you designate, and at everyone's earliest convenience, to be attended by representatives of Bowman Family Farms, Mr. Reef Ivey, and yourself. I am quite confident this would result in a successful resolution to this unfortunate situation.

Bob, have a Merry Christmas, and I look forward to your reply.

With best personal regards,

Sincerely,

A handwritten signature in dark ink, reading "Michael A. Bowman". The signature is fluid and cursive, with a large, stylized initial "M" and "B".

Michael A. Bowman, President  
Bowman Family Farms, Inc.

cc: Mr. Reef Ivey, II

Law Department

**UNION PACIFIC RAILROAD COMPANY**

1416 DODGE STREET  
ROOM 830  
OMAHA, NEBRASKA 68179-0001  
FAX (402) 271-5610

January 8, 1998

**Via Fax and U. S. Mail**

Michael A. Bowman, President  
Bowman Family Farms, Inc.  
P. O. Box 126  
Wray, CO 80758

RE: Towner - NA Jct. Line  
Law File: AB-3 (Sub-No. 130)

Dear Mr. Bowman:

I am sorry that I did not respond earlier to your letter of December 23. I was on vacation when it came in and did not return to the office until January 5. I also wanted to discuss your letter with UP management before responding.

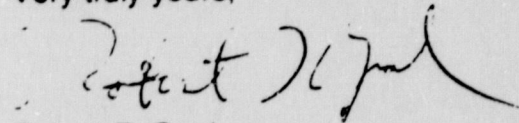
I had been aware from a previous conversation with Mr. Ivey that someone had misrepresented the status of the line sale negotiations to the two of you when the \$100,000 deposit was obtained. Your letter makes clear how extensive the misrepresentations were. Suffice it to say that UP officials never agreed to a late March closing and never suggested to CK&P's representatives that a late March closing would be acceptable. To the contrary, we consistently stated -- both orally and in writing -- that we were willing to extend the closing only to December 22 if the \$100,000 deposit was paid. I have furnished Mr. Ivey copies of UP - CK&P correspondence on this point which should leave no question about this. Let me know if you would also like copies of this material.

With respect to your request for a meeting, we would be happy to meet with you and Mr. Ivey to discuss what actually occurred in the dealings we had with CK&P for the purchase of this line. You should be aware, however, that UP management is not inclined to entertain additional proposals for the purchase of this line beyond what is required by State law. We have had authority to abandon and salvage this line since September, 1996. We voluntarily left the line in place over a year beyond this date for a widely publicized line sale initiative sponsored by the State, and then for the CK&P transaction. The view here is that we have afforded an ample opportunity for interested parties to purchase this line -- far more than is normally provided in a railroad abandonment -- and the time has come to bring the process to a

close. Also, we intend to use materials from this line during the 1998 construction season in upgrading the "KP Line" through Colorado and Kansas. Further delays in salvaging the Towner line will interfere with this work.

If you would like to meet with UP personnel, I suggest a meeting at UP's offices in Omaha at 10:00 AM Friday, January 16, 1998. Let me know whether this is acceptable and I will make the necessary arrangements. Also let me know if you would prefer to have the meeting on a different date.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Robert T. Opal", written in a cursive style.

Robert T. Opal  
General Attorney  
Phone: (402) 271-3072  
Fax: (402) 271-5610

cc: John Rebensdorf  
Warren C. Wilson  
Raymond E. Allamong

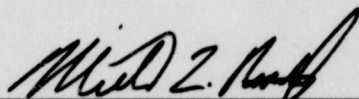


CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that, on this 30th day of September, 1998, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery on parties of record in Finance Docket No. 32760 (Sub-No. 21), and on

Director of Operations  
Antitrust Division  
Suite 500  
Department of Justice  
Washington, D.C. 20530

Premarmer Notification Office  
Bureau of Competition  
Room 303  
Federal Trade Commission  
Washington, D.C. 20580



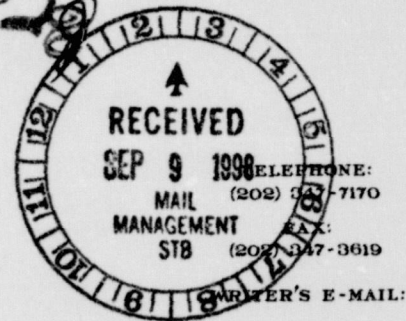
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Michael L. Rosenthal

STB FD 32760 (Sub 21) 9-9-98 1 191029

WILLIAM L. SLOVER  
C. MICHAEL LOFTUS  
DONALD G. AVERY  
JOHN H. LE SEUR  
KELVIN J. DOWD  
ROBERT D. ROSENBERG  
CHRISTOPHER A. MILLS  
FRANK J. PERGOLIZZI  
ANDREW B. KOLESAR III  
PETER A. PFOHL

**SLOVER & LOFTUS**  
ATTORNEYS AT LAW  
1224 SEVENTEENTH STREET, N. W.  
WASHINGTON, D. C. 20036



wls@sloverandloftus.com

ENTERED  
Office of the Secretary

September 9, 1998

SEP 10 1998

Part of  
Public Record

Via: Hand Delivery

Honorable Vernon A. Williams, Secretary  
Surface Transportation Board  
Case Control Unit  
ATTN: STB Finance Docket No. 32760 (Sub-No. 21)  
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. \_\_\_\_\_

Dear Mr. Secretary:

Enclosed for filing in the above-referenced proceeding are an original and 25 copies of Notice of Withdrawal Without Prejudice of the Western Coal Traffic League. A 3.5 disk in 8.0 format is also enclosed containing the text of the Notice.

An additional copy of the pleading is also enclosed. Kindly indicate receipt by date-stamping this extra copy and returning it with our messenger.

Very Truly Yours,

William L. Slover  
An Attorney for the Western Coal  
Traffic League

Enclosures  
cc: Parties of Record



191029

BEFORE THE  
SURFACE TRANSPORTATION BOARD



UNION PACIFIC CORPORATION, UNION )  
PACIFIC RAILROAD COMPANY, AND )  
MISSOURI PACIFIC RAILROAD COMPANY )  
-- CONTROL AND MERGER -- SOUTHERN )  
PACIFIC RAIL CORPORATION, SOUTHERN )  
PACIFIC TRANSPORTATION COMPANY, )  
ST. LOUIS SOUTHWESTERN RAILWAY )  
COMPANY, SPCSL CORP., AND THE )  
DENVER AND RIO GRANDE WESTERN )  
RAILROAD COMPANY )

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

NOTICE OF  
WITHDRAWAL WITHOUT PREJUDICE

OF COUNSEL:  
Slover & Loftus  
1224 Seventeenth Street, N.W.  
Washington, D.C. 20036

By: William L. Slover  
Donald G. Avery  
Slover & Loftus  
1224 Seventeenth Street, N.W.  
Washington, D.C. 20036  
(202) 347-7170

Dated: September 9, 1998

Attorneys for the Western  
Coal Traffic League

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

UNION PACIFIC CORPORATION, UNION	)	
PACIFIC RAILROAD COMPANY, AND	)	
MISSOURI PACIFIC RAILROAD COMPANY	)	
-- CONTROL AND MERGER -- SOUTHERN	)	
PACIFIC RAIL CORPORATION, SOUTHERN	)	Finance Docket No. 32760
PACIFIC TRANSPORTATION COMPANY,	)	(Sub-No. 21)
ST. LOUIS SOUTHWESTERN RAILWAY	)	
COMPANY, SPCSL CORP., AND THE	)	
DENVER AND RIO GRANDE WESTERN	)	
RAILROAD COMPANY	)	

---

NOTICE OF  
WITHDRAWAL WITHOUT PREJUDICE

Comes now the Western Coal Traffic League ("WCTL") and withdraws without prejudice its request for a remedial condition now before the Board in this proceeding. In support of this Notice, WCTL shows:

I

BACKGROUND

WCTL is a voluntary association of organizations which consume coal from mines in the west. Union Pacific serves nearly all major western coal mines and therefore its services and especially its service costs are matters of great importance to

WCTL, its members, and their electric ratepayers. UP's service costs are derived from public data contained in its Annual Report (R-1) filed with the Board. WCTL is concerned that UP's most recent Annual Report (1997) fails to conform to the Board's rules and regulations and has sought the imposition of an accounting condition in the context of the UP/SP oversight proceeding. WCTL now desires to withdraw that request from consideration by the Board in the context of the UP/SP oversight proceedings.

## II

### RIGHT TO WITHDRAW

The only substantive filing in the oversight proceedings in connection with WCTL's request is its formal Request and supporting evidence which was filed on July 8, 1998 in Sub-No. 26. WCTL enjoys the unfettered right to dismiss or withdraw without prejudice its request for a condition, unless such a withdrawal will result in legal prejudice to other parties. Under the recounted procedural circumstances, no party can be prejudiced. The law is therefore clear that WCTL is entitled to withdraw its request of July 8, 1998 without prejudice, which it hereby does. Jones v. Securities and Exchange Commission, 298 U.S. 1, 19 (1934); cf. Fed. R. Civ. Proc. 41(a); Marcucci v. NY District Council, 1998 WL 524898 (S.D.N.Y. August 21, 1998).

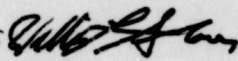


WHEREFORE, WCTL respectfully notifies the Board and parties of record that it withdraws without prejudice its Request of July 8, 1998 for a remedial condition.

Respectfully submitted,

OF COUNSEL:

Slover & Loftus  
1224 Seventeenth Street, N.W.  
Washington, D.C. 20036

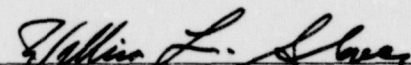
By: William L. Slover   
Donald G. Avery  
Slover & Loftus  
1224 Seventeenth Street, N.W.  
Washington, D.C. 20036  
(202) 347-7170

Attorneys for the Western Coal  
Traffic League

Dated: September 9, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September, 1998 a copy of the foregoing Notice of Withdrawal Without Prejudice was served via first-class United States mail, postage prepaid on all persons on the service list for Finance Docket No. 32760 (Sub-No. 21).

  
\_\_\_\_\_  
William L. Slover

STB FDS 32760 (Sub 21) 9-3-98 D 190957



190957

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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

*Union Pacific Corporation, Union Pacific Railroad Company  
And Missouri Pacific Railroad Company*

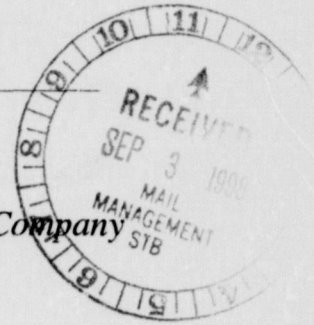
*– Control And Merger –  
Southern Pacific Rail Corporation,*

ENTERED  
Office of the Secretary

SEP 04 1998

Part of  
Public Record

*Southern Pacific Transportation Company, St. Louis  
Southwestern Railway Company, SPCSL Corp. And The  
Denver And Rio Grande Western Railroad Company*



D

**SUPPLEMENTAL COMMENTS**

**submitted on behalf of**

**THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

The National Industrial Transportation League ("League") respectfully files these Supplemental Comments in response to the Applicant's July 1, 1998 Second Annual Report on Merger and Condition Implementation, filed by Union Pacific Corporation, Union Pacific Railroad Company, and Southern Pacific Rail Corporation (together referred to as "UP"), as part of the five-year oversight condition imposed by the Board in *Union Pacific Corp., Union Pacific R.R. Co., and Missouri Pacific R.R. Co. – Control and Merger – Southern Pacific Rail Corp., Southern Pacific Transportation Co., St. Louis Southwestern Ry. Co., and The Denver and Rio Grande Western R.R. Co.*, Finance Docket No. 32760, Decision No. 44 (served Aug. 12, 1996) ("*UP/SP Merger Decision*").

The League originally filed Comments on the due date of August 14, 1998. As part of those Comments, the League suggested that the Board should consider

further revisions to the reporting requirements that it has imposed on the UP. Specifically, the League indicated its concern that the revised reporting information for UP ordered by the Board in its decision in STB Service Order No. 1518 (Sub-No. 1), *Joint Petition for a Further Service Order*, and consolidated cases, served July 31, 1998, relies too heavily on systemwide information, and does not reveal the nature and extent of potential problems in impacted locations, routes, and corridors. Moreover, one of the primary "locationally" focused piece of information that UP is still required to file under the Board's July 31 order -- the terminal processing report, which is to contain information on cars on hand, switched and dwell time -- is to be filed confidentially with the Board alone, so that the shipping public is not able to determine the status of key terminals in the UP's system. See, Comments of The National Industrial Transportation League ("Comments"), dated August 14, 1998, pp. 3-5.

Accordingly, the League suggested in its Comments on August 14th that the Board should require the UP to publicly submit, among other things, "average weekly terminal volume and dwell at key terminals, both for an appropriate base period prior to the UP's service problems and prior to the merger. . . ." Comments, p. 5.

In a reply to the League's Comments filed on August 19, 1998, UP vociferously objected to the League's suggestions. The UP strenuously argued that the public filing of such information by UP would cause competitive harm to the railroad; that the League had implicitly questioned the Board's own competence to evaluate and act upon the confidential data submitted to it; that the reporting requirements in Finance Docket No. 33388 (which the League had cited in support of its Comments) are "plainly different" and that the reporting required by the Board for the Shared Asset Areas ordered in that proceeding



"does not involve revealing sensitive operating data on a single railroad's terminals . . . "; and lastly, that there would be "tremendous time and effort involved" in compiling and verifying the requested data. See, letter of Arvid Roach II, counsel for Union Pacific Railroad Company, dated August 19, 1998 [emphasis in original].

As part of the Settlement Agreement that the League entered with CSX Corporation ("CSX") and Norfolk Southern Corporation ("NS") in Docket No. 33388, *CSX Corp. and CSX Transportation Inc., Norfolk Southern Corp. and Norfolk Southern Ry. -- Control and Operating Leases/Agreements -- Conrail, Inc. and Consolidated Rail Corp.*, ("CSX/NS/Conrail Transaction"), and as part of the Board's own decision in that proceeding (see Decision No. 89, served July 23, 1998), there was established a Conrail Transaction Council, composed of NS and CSX and numerous interested shipper organizations. Among other things, the Conrail Transaction Council was to develop "objective, measurable standards" for examining the implementation of that transaction. See, Agreement between The National Industrial Transportation League, Norfolk Southern and CSX, dated December 12, 1998, Sections I.A. and II.B, and *CSX/NS/Conrail Transaction*, p. 55.

On August 20, 1998, counsel for the League, NS and CSX, in the name of the Conrail Transaction Council, submitted to the Board a letter ("August 20th Letter") indicating that the parties were "pleased to report that the shipper and railroad members of the Council have come to an agreement on a set of objective, measurable standards" which were set out in an attachment to the August 20th Letter. Information consistent with these standards would be provided by NS and CSX to the shipper members of the Council on a weekly basis. The August 20th Letter, and the attachment to that letter setting out data responsive to the agreed-to "objective, measurable standards," is attached as Exhibit A to these



Supplemental Comments. It should be noted that the weekly data to be provided by NS and CSX is not limited by any confidentiality restrictions whatsoever.

The shipper and carrier members of the Council's agreement on "objective, measurable standards" provides for NS and CSX to develop far more detailed data, publicly submitted, twice as frequently, than that to be submitted by UP. For example, the "objective, measurable standards" agreed to by NS, CSX and the shipper members of the Conrail Transaction Council call for the railroads to submit information on average loaded and empty days on line for box, covered hopper, gondola, intermodal, multilevel and tank cars. This is information that UP does not file at all. Furthermore, whereas UP is required to file data on on-line car inventory (broken down among system, foreign and private cars), the "objective, measurable standards" agreed to by NS, CSX and shipper members of the Conrail Transaction Council call for the same information for cars on line, plus additional breakouts for box cars, covered hopper cars, gondolas, intermodal, multilevel, tank cars and others. Whereas UP is required to file a single number on system train speed, the objective, measurable standards agreed to by NS, CSX and shipper members of the Conrail Transaction Council call for the same information from NS and CSX, plus additional breakouts for train speeds by train type, *i.e.*, intermodal, manifest, multilevel, coal and grain. Each of these additional "breakouts" will enable shippers of particular commodities to evaluate how the railroads are doing in their own particular area of interest.

Most importantly, the objective, measurable standards agreed to by NS, CSX and the shipper members of the Conrail Transaction Council call for the submission of average terminal dwell (in hours) and volume (in number of cars) for thirty-one separate terminals on NS, CSX and the remaining Conrail, including fourteen terminals each on the NS and CSX systems alone. These include numerous terminals owned by NS and CSX that were never owned by

Conrail. This data will be provided each week after the operational implementation of the transaction, and will include baseline data from key historical periods.

This terminal information is precisely the information requested by the League for the UP in its August 14th Comments, namely "average weekly terminal volume and dwell at key terminals, both for an appropriate base period prior to the UP's service problems and prior to the merger. . . ." Comments, p. 5. Indeed, it should be noted that NS and CSX have agreed to detailed reporting on individual terminals even though they have never suffered the same kind of service meltdown experienced by shippers on the UP within the past year.

The League warmly applauds the cooperation of NS and CSX in this matter. The effort to arrive at mutually acceptable "objective, measurable standards" was the result of many hours of discussion and negotiation between shipper and carrier representatives, conducted in an atmosphere of openness and mutual respect. This is not to say that there were no differences of opinion or disagreements. Indeed, as the August 20th Letter indicates, shipper and railroad members of the Council agreed to disagree on the inclusion of reporting requirements of transit times, an issue in which the shipper members of the council desired to have information, and the railroad members of the Council believed were competitively sensitive. Even in this case, however, the parties set forth their understanding that this issue could be revisited if "serious service problems" arise in implementation of the NS/CSX/Conrail transaction. See August 20th Letter, p. 2. UP, of course, already has experienced serious service problems after the implementation of its merger.

Clearly, the agreement reached between shipper and carrier members of the Conrail Transaction Council on a set of "objective, measurable standards" severely undermines UP's vociferous objections to the League's suggestions for



increased reporting. The information on operating data on thirty-one different terminals throughout the NS and CSX system, as requested by the League in its Comments for UP, was clearly not considered by NS and CSX to be likely to cause undue competitive harm. The same should be true of UP. Similarly, in light of NS' and CSX' agreement on the provision of this data consistent with the agreed-to "objective, measurable standards," UP's claim that its reporting is "unprecedented" is clearly wrong.

Furthermore, in view of NS' and CSX' much-appreciated willingness to provide this data voluntarily, at a time when many of their personnel are heavily involved in efforts to insure that their transaction is implemented smoothly, surely suggests that UP's remarkable claim that augmented reporting would "do serious harm to UP's continuing service improvement activities" is vastly overblown. See, August 19 letter from Arvid Roach II, p. 6. The League would note that even though its Settlement Agreement called for quarterly reporting, NS and CSX agreed to provide the data responsive to "objective, measurable standards" on a weekly basis. The League very much appreciates NS' and CSX' willingness to accommodate shippers' desires for frequent reporting.

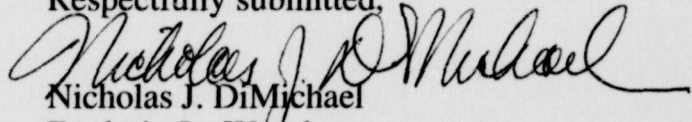
Finally, the League wishes to make perfectly clear that, in calling for augmented reporting for UP, it is not either implicitly or explicitly calling into question the Board's competence to evaluate and act upon data submitted to it. Any suggestion to the contrary is wrong. The shipping public are the users of the nation's railroad system -- they surely have a right to see data that indicates how smoothly that system is operating. If the data is properly configured -- as the League hopes and believes is true with the "objective, measurable standards" agreed to by NS, CSX and the shipper members of the Conrail Transaction Council -- the data will show improvements in service and lack of problems, as well as pockets of any continuing difficulties. Indeed, UP itself claimed during



the UP/SP merger proceeding that the merger would result in massive benefits to the shipping public: if those claims are true, properly developed data should show it. Moreover, the League believes that the Board would be assisted in its oversight if it has the informed views of the shipping public, views that can be informed only if timely information is conveyed on the state of operations of the nation's few remaining rail carriers.

**WHEREFORE,** The League respectfully requests the Board to consider and act upon the attached Supplemental Comments.

Respectfully submitted,



Nicholas J. DiMichael

Frederic L. Wood

Donelan, Cleary, Wood & Maser, P.C.

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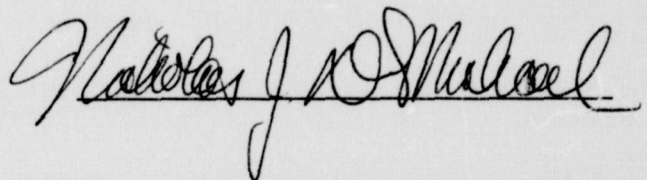
(202) 371-9500

*Attorneys for The National Industrial  
Transportation League*

September 3, 1998

### **Certificate of Service**

I hereby certify that I have on this 3rd day of September 1998 served a copy of these Supplemental Comments, by first-class mail, postage prepaid, on all parties of record in the above-captioned proceeding, in accordance with the Board's Rules of Practice, and by hand on counsel for the Union Pacific Railroad Company.





DONELAN CLEARY  
WOOD & MASER, P.C.

August 20, 1998

Hon. Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, NW  
Washington, DC 20423

Re: Finance Docket No. 33388, *CSX Corporation, et al*  
— *Control and Operating Leases/Agreements* —  
*Conrail Inc. et al*

Dear Mr. Williams:

In Decision No. 89 in the above proceeding (served on July 23, 1998), the Board, in ordering paragraph 20, imposed as a condition the implementation of the NITL Agreement between the applicants and The National Industrial Transportation League dated December 12, 1997. As part of that Agreement, a Conrail Transaction Council has been meeting for the last several months. NITL Agreement, App. A, Section I.A.

One of the tasks the Council has been addressing is the development of "objective, measurable standards" for inclusion in the quarterly reports to be submitted by the Applicants as part of the Board's continuing oversight of the transaction. NITL Agreement, App. A, Section II.B.

We are pleased to report that the shipper and railroad members of the Council have come to an agreement on a set of objective, measurable standards, which are set out in the attachment. The railroads will begin reporting this data with the first reporting period after the Closing Date (Day One). Although the NITL Agreement requires quarterly reports, the railroads have agreed to provide this information to the Council on a weekly basis.

However, the shipper and railroad members of the Council have agreed to disagree on the inclusion in the reporting requirements of transit times. The railroads believe that transit times are competitively sensitive information. On the other hand, the shippers believe that transit times are necessary to monitor the progress of the merger in terms of the benefits that have been promised.

ATTORNEYS AND COUNSELORS AT LAW

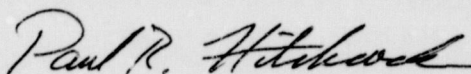
1100 New York Avenue, Suite 750, N.W., Washington, D.C. 20005-3934, Tel: 202-371-9500, Fax: 202-371-0900



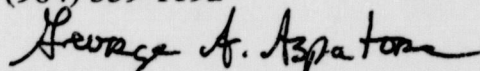
Letter to Mr. Williams  
August 20, 1998

The railroad members of the Council are willing to give individual shippers transit times on their own movements on request. If the railroad members respond reasonably to these requests, the shipper members will not request the Board to require the public reporting of more aggregated transit times, as long as serious service problems do not arise. It is also understood that the Board has requested the railroads to report to the Board on a non-public basis train performance in twelve corridors (six each). In the event of a general service deterioration after the implementation date of this transaction, the shippers would like this information provided to the Board to be made public.

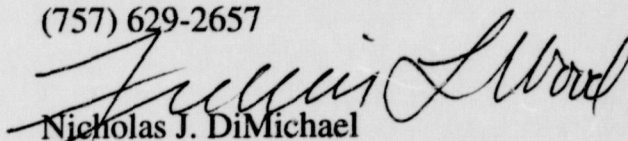
Respectfully submitted,



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*For the Conrail Transaction Council*





DONELAN CLEARY  
WOOD & MASER, P.C.

3

Letter to Mr. Williams  
August 20, 1998

cc: Mr. Melvin F. Clemens, Jr.  
Director  
Office of Compliance and Enforcement  
Surface Transportation Board

**Conrail Transaction Council**  
 Norfolk Southern Post Transaction Performance Measures  
 For the week ending: 99/99/99

Measure	Historical		Post "Day 1"											
	9 Qtr 99	Prior Mth	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99
<b>Total Cars On-Line</b>														
System	999,999	999,999	999,999											
Foreign	999,999	999,999	999,999											
Private	999,999	999,999	999,999											
Total	999,999	999,999	999,999											
Box	999,999	999,999	999,999											
Covered Hopper	999,999	999,999	999,999											
Gondola	999,999	999,999	999,999											
Intermodal	999,999	999,999	999,999											
Multilevel	999,999	999,999	999,999											
Tank	999,999	999,999	999,999											
Other	999,999	999,999	999,999											
Total	999,999	999,999	999,999											
<b>Average Train Speed (by train type)</b>														
Intermodal	99.9	99.9	99.9											
Manifest	99.9	99.9	99.9											
Multilevels	99.9	99.9	99.9											
Coal	99.9	99.9	99.9											
Grain	99.9	99.9	99.9											
System Average	99.9	99.9	99.9											



**Conrail Transaction Council**  
 Norfolk Southern Post Transaction Performance Measures  
 For the week ending: 99/99/99

Measure	Historical		Post "Day 1"											
	9 Qtr 99	Prior Mth	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99
<b>Average Terminal Dwell/Volume</b>														
Allentown, PA*	99.9	99.9	99.9											
	99,999	99,999	99,999											
Bellevue, OH	99.9	99.9	99.9											
	99,999	99,999	99,999											
Birmingham, AL	99.9	99.9	99.9											
	99,999	99,999	99,999											
Chattanooga, TN	99.9	99.9	99.9											
	99,999	99,999	99,999											
Columbus, OH*	99.9	99.9	99.9											
	99,999	99,999	99,999											
Conway, PA*	99.9	99.9	99.9											
	99,999	99,999	99,999											
Decatur, IL	99.9	99.9	99.9											
	99,999	99,999	99,999											
Elkhart, IN*	99.9	99.9	99.9											
	99,999	99,999	99,999											
Knoxville, TN	99.9	99.9	99.9											
	99,999	99,999	99,999											



**Conrail Transaction Council**  
 Norfolk Southern Post Transaction Performance Measures  
 For the week ending: 99/99/99

Measure	Historical		Post "Day 1"											
	9 Qtr 99	Prior Mth	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99
Linwood, NC	99.9	99.9	99.9											
	99,999	99,999	99,999											
Macon, GA	99.9	99.9	99.9											
	99,999	99,999	99,999											
New Orleans, LA	99.9	99.9	99.9											
	99,999	99,999	99,999											
Roanoke, VA	99.9	99.9	99.9											
	99,999	99,999	99,999											
Sheffield, AL	99.9	99.9	99.9											
	99,999	99,999	99,999											
System Average	99.9	99.9	99.9											
	99,999	99,999	99,999											

\* Terminals acquired from Conrail

**Average Loaded Days On-Line**

Box	99.9	99.9	99.9
Covered Hopper	99.9	99.9	99.9
Gondola	99.9	99.9	99.9
Intermodal	99.9	99.9	99.9
Multilevel	99.9	99.9	99.9
Tank	99.9	99.9	99.9

**Conrail Transaction Council**  
 Norfolk Southern Post Transaction Performance Measures  
 For the week ending: 99/99/99

Measure	Historical		Post "Day 1"											
	9 Qtr 99	Prior Mth	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99

**Average Empty Days On-Line (private cars only)**

Box	99.9	99.9	99.9
Covered Hopper	99.9	99.9	99.9
Gondola	99.9	99.9	99.9
Tank	99.9	99.9	99.9



**Conrail Transaction Council**  
**CSXT Post Transaction Performance Measures**  
 For the week ending: 99/99/99

Measure	Historical		Post "Day 1"											
	9 Qtr 99	Prior Mth	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99
<b>Total Cars On-Line</b>														
System	999,999	999,999	999,999											
Foreign	999,999	999,999	999,999											
Private	999,999	999,999	999,999											
Total	999,999	999,999	999,999											
Box	999,999	999,999	999,999											
Covered Hopper	999,999	999,999	999,999											
Gondola	999,999	999,999	999,999											
Intermodal	999,999	999,999	999,999											
Multilevel	999,999	999,999	999,999											
Tank	999,999	999,999	999,999											
Other	999,999	999,999	999,999											
Total	999,999	999,999	999,999											
<b>Average Train Speed (by train type)</b>														
Intermodal	99.9	99.9	99.9											
Manifest	99.9	99.9	99.9											
Multilevels	99.9	99.9	99.9											
Coal	99.9	99.9	99.9											
Grain	99.9	99.9	99.9											
System Average	99.9	99.9	99.9											



**Conrail Transaction Council**  
**CSXT Post Transaction Performance Measures**  
 For the week ending: 99/99/99

Measure	Historical		Post "Day 1"										
	9 Qtr 99	Prior Mth	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99
<b>Average Terminal Dwell/Volume</b>													
Buffalo, NY*	99.9	99.9	99.9										
	99,999	99,999	99,999										
Chicago, IL	99.9	99.9	99.9										
	99,999	99,999	99,999										
Cincinnati, OH	99.9	99.9	99.9										
	99,999	99,999	99,999										
Corbin, KY	99.9	99.9	99.9										
	99,999	99,999	99,999										
Hamlet, NC	99.9	99.9	99.9										
	99,999	99,999	99,999										
Indianapolis, IN*	99.9	99.9	99.9										
	99,999	99,999	99,999										
Louisville, KY	99.9	99.9	99.9										
	99,999	99,999	99,999										
Montgomery, AL	99.9	99.9	99.9										
	99,999	99,999	99,999										
Nashville, TN	99.9	99.9	99.9										
	99,999	99,999	99,999										

**Conrail Transaction Council**  
**CSXT Post Transaction Performance Measures**  
 For the week ending: 99/99/99

Measure	Historical		Post "Day 1"									
	9 Qtr 99	Prior Mth	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99
Russell, KY	99.9	99.9	99.9									
	99,999	99,999	99,999									
Selkirk, NY*	99.9	99.9	99.9									
	99,999	99,999	99,999									
Toledo, OH*	99.9	99.9	99.9									
	99,999	99,999	99,999									
Willard, OH	99.9	99.9	99.9									
	99,999	99,999	99,999									
Waycross, GA	99.9	99.9	99.9									
	99,999	99,999	99,999									
System Average	99.9	99.9	99.9									
	99,999	99,999	99,999									

\* Terminals acquired from Conrail

**Average Loaded Days On-Line**

Box	99.9	99.9	99.9
Covered Hopper	99.9	99.9	99.9
Gondola	99.9	99.9	99.9
Intermodal	99.9	99.9	99.9
Multilevel	99.9	99.9	99.9
Tank	99.9	99.9	99.9



**Conrail Transaction Council**  
**CSXT Post Transaction Performance Measures**  
 For the week ending: 99/99/99

Measure	Historical 9 Qtr 99	Prior Mth	Post "Day 1"									
			99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99

**Average Empty Days On-Line (private cars only)**

Box	99.9	99.9	99.9
Covered Hopper	99.9	99.9	99.9
Gondola	99.9	99.9	99.9
Tank	99.9	99.9	99.9



**Conrail Transaction Council**  
**CSAO Post Transaction Performance Measures**  
 For the week ending: 99/99/99

Measure	Historical		Post "Day 1"									
	9 Qtr 99	Prior Mth	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99	99/99/99
<b>Average Terminal Dwell/Volume</b>												
Oak Island, NJ	99.9	99.9	99.9									
	99,999	99,999	99,999									
Pavonia, NJ	99.9	99.9	99.9									
	99,999	99,999	99,999									
Detroit North Yard, MI	99.9	99.9	99.9									
	99,999	99,999	99,999									

STB FD 32760 (Sub 21) 9-3-98 1 190956



DONELAN CLEARY  
WOOD & MASER, P.C.

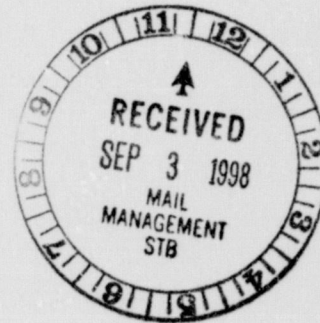
190856

ENTERED  
Office of the Secretary

SEP 04 1998

Part of  
Public Record

September 3, 1998



Via Hand Delivery

Honorable Vernon A. Williams  
Office of the 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, 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.*

Dear Secretary Williams:

Please find enclosed for filing in the above-referenced proceeding an original and twenty-five (25) copies of the *Petition to file Supplemental Comments and Supplemental Comments* submitted on behalf of The National Industrial Transportation League. A copy of this filing is also enclosed on a 3.5-inch diskette in WordPerfect 7.0 format.

Respectfully submitted,

*Nicholas J. DiMichael* <sup>SL</sup>

Nicholas J. DiMichael  
Attorney for The National Industrial  
Transportation League

ENCLOSURES

cc: All Parties of Record

ATTORNEYS AND COUNSELORS AT LAW

1100 New York Avenue, Suite 750, N.W., Washington, D.C. 20005-3934, Tel: 202-371-9500, Fax: 202-371-0900



190956

BEFORE THE  
SURFACE TRANSPORTATION BOARD



ENTERED  
Office of the Secretary

SEP 01 1998

Part of  
Public Record

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*

**PETITION TO FILE SUPPLEMENTAL COMMENTS**

**submitted on behalf of**

**THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

The National Industrial Transportation League ("League") respectfully petitions the Board for leave to file the attached Supplemental Comments in response to the Applicant's July 1, 1998 Second Annual Report on Merger and Condition Implementation, filed by Union Pacific Corporation, Union Pacific Railroad Company, and Southern Pacific Rail Corporation (together referred to as "UP"), as part of the five-year oversight condition imposed in *Union Pacific Corp., Union Pacific R.R. Co., and Missouri Pacific R.R. Co. – Control and Merger – Southern Pacific Rail Corp., Southern Pacific Transportation Co., St. Louis Southwestern Ry. Co., and The Denver and Rio Grande Western R.R. Co.*, Finance Docket No. 32760, Decision No. 44 (served Aug. 12, 1996).

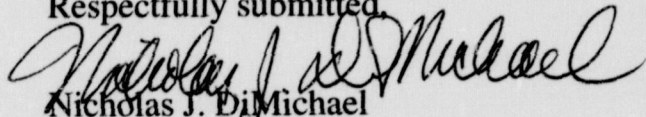
The League filed Comments on the due date of August 14, 1998. As part of those Comments, the League suggested that the Board consider further revisions to its reporting requirements. See, Comments of The National

Industrial Transportation League ("Comments"), dated August 14, 1998, pp. 3-6. Subsequent to the filing of those Comments, however, additional information relating directly to the subject of carrier reporting requirements became available, in the form of reporting requirements agreed-to by shippers and carriers for the other major control transaction decided by the Board in the last two years, in Finance Docket No. 33388, *CSX Corporation, et al -- Control and Operating Leases/Agreements - Conrail Inc., et al.*, served July 23, 1998.

The League believes that the agreement between carriers and shippers regarding reporting requirements would be helpful to the Board as it considers this question in this proceeding, and respectfully requests the Board to consider the attached Supplemental Comments. The League would not object if the UP was granted a reasonable time to file a reply to these Supplemental Comments.

**WHEREFORE**, The League respectfully requests the Board grant leave to file the attached Supplemental Comments.

Respectfully submitted,



Nicholas J. DiMichael

Frederic L. Wood

Donelan, Cleary, Wood & Maser, P.C.

1100 New York Avenue, N.W., Suite 750

Washington, D.C. 20005-3934

(202) 371-9500

*Attorneys for The National Industrial  
Transportation League*

September 3, 1998

### **Certificate of Service**

I hereby certify that I have on this 3rd day of September 1998 served a copy of this Petition to File Supplemental Comments, by first-class mail, postage prepaid, on all parties of record in the above-captioned proceeding, in accordance with the Board's Rules of Practice, and by hand on counsel for the Union Pacific Railroad Company.

Marsha Harris



STB

FD

32760

(Sub 21)

9-2-98

D

190949

COVINGTON & BURLING

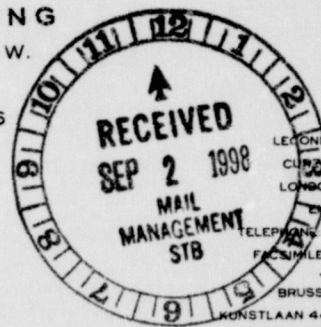
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190849

ARVID E. ROACH II

DIRECT DIAL NUMBER  
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DIRECT FACSIMILE  
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ENTERED  
Office of the Secretary

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September 2, 1998

BY HAND

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 Corp., et. al. -- Control & Merger --  
Southern Pacific Rail Corp., et al. -- Oversight

Dear Secretary Williams:

Please note one correction to Applicants' Second Annual  
Report on Merger and Condition Implementation (UP/SP-334), filed  
July 1, 1998. On page 101, in line 14, "June 1996-May 1997"  
should read "June 1997-May 1998."

Sincerely,

Arvid E. Roach II

cc: All Parties of Record

STB FD 32760 (Sub 21) 9-1-98 D 190930





**U.S. Department of  
Transportation**

Office of the Secretary  
of Transportation

GENERAL COUNSEL

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

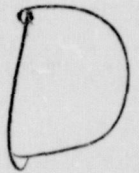
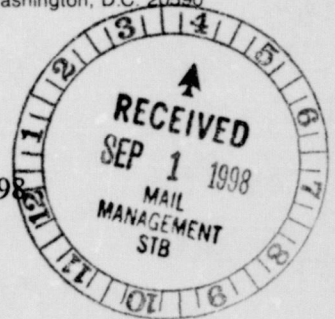
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September 1, 1998

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

Re: Finance Docket No. 32760 (Sub-No. 21)

Dear Secretary Williams:

Enclosed herewith are an original and twenty-five copies of the Reply Comments of the United States Department of Transportation in the above-referenced proceeding. I have also enclosed a computer diskette containing these Reply 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  
Senior Trial Attorney

Enclosures

cc: All Parties of Record

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Office of the Secretary

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BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, D.C.

DOT-3



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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        )     F.D. No. 32760 (Sub-No. 21)  
Co., St. Louis Southwestern Railway Co.,                )  
SPCSL Corp., and the Denver & Rio Grande             )  
Western Railroad Company (OVERSIGHT)                 )  
\_\_\_\_\_)

REPLY COMMENTS OF THE  
UNITED STATES DEPARTMENT OF TRANSPORTATION

Introduction

The Surface Transportation Board ("STB" or "Board") instituted this proceeding to implement the oversight condition it imposed in Finance Docket No. 32760, the merger of the Union Pacific ("UP") and Southern Pacific ("SP") railroads. Decision No. 1, served May 7, 1997 ("Decision"). The Board specifically sought comments on the effects of the merger and on the implementation of the conditions used to address the transaction's competitive harms. *Id.* at 2. By Decision No. 10, served October 27, 1997, the STB addressed competitive and other questions presented during the first year after the merger. The Board at that time (1) preliminarily concluded that the merger as conditioned had not caused substantial competitive harm, and (2) expressed concern with UP's post-merger safety and service problems, although it found no basis to indicate that they arose from market power created by the merger. *Id.* at 2-3. Since then the UP's



ongoing service problems have prompted the Board to bifurcate its oversight of the merger by establishing a separate proceeding to concentrate on the transaction's effects in the Texas-Gulf Coast region. Finance Docket No. 32760 (Sub-No. 26) Decision No. 1, served May 19, 1998.

The United States Department of Transportation ("DOT" or "Department") commends the Board for its continued vigilance over questions of competition, service, and safety in the aftermath of the UP/SP merger. Like the STB and many other parties, DOT is most interested in ensuring that the conditions either serve their intended purposes or are modified accordingly.

To evaluate a rail consolidation, the Department typically assesses the information, evidence, and argument presented by other private and public parties before expressing its position on the merits. We followed this approach with respect to both our assessment of the UP/SP merger itself and in last year's oversight proceeding on the efficacy of the conditions imposed by the Board. DOT-1, filed August 1, 1997, and DOT-2, filed August 20, 1997. The Department has done so again this year. We have now reviewed the initial submissions of other parties on the competition and service matters at issue, and hereby submit reply comments thereon.<sup>1</sup>

Last year, too, DOT addressed the fundamental issue of rail safety on the merged UP. DOT-1. We described the investigation conducted by the Federal Railroad Administration ("FRA"), an operating administration within DOT responsible for overseeing the safety of railroad operations, identified several areas of concern, and reported that FRA would continue to work with the carrier. *Id.* at 2-5. The Department now wishes to apprise the Board of the current status of safety on the merged UP.

#### Safety on the Merged UPSP

In 1997, FRA conducted an investigation of the merged UP. As a result of that investigation, FRA identified several areas that raised safety concerns, such as hazardous materials handling and hours-of-service compliance. DOT advised the Board on several occasions of the ongoing investigation and its findings in DOT-1 at 2-5. In addition, in

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<sup>1</sup>/ DOT intends to present its views on the merger's effects in the Houston/Gulf Coast region in Finance Docket 32760 (Sub-No. 26).



the course of the Board's proceeding in Ex Parte No. 573, FRA Administrator Jolene M. Molitoris testified on two occasions in 1997 concerning the safety audits then underway on the UP system. DOT noted that FRA would continue to work with the rail carrier on these matters.

Since Administrator Molitoris' testimony, FRA has completed a comprehensive safety review of UP's operations, through a Safety Assurance and Compliance Program ("SACP"). The program's goal is to involve railroad management and rail labor in identifying and eliminating the basic causes of safety problems throughout the railroad industry. The continuing SACP process on UP involves the efforts of over 500 individuals from management and labor organizations.

The Final Safety Assurance and Compliance Report ("Report") on the UP was issued on February 25, 1998, and a copy was forwarded to the Board. The Report indicated that the UP was making progress in remedying safety deficiencies discovered during the safety audits in 1997, and that continued efforts and commitment were needed to remedy the underlying problems. The Report also identified several interrelated problems: understaffing; fatigue; insufficient levels of supervision; and dispatching deficiencies.

To address these problems FRA conducted a Senior Management Meeting, in February 1998, with representatives from UP, rail labor, and FRA. The participants discussed the root causes of the safety problems that led to the collisions and derailments of the previous six months and presented recommendations to prevent their recurrence. The UP formally presented its Safety Action Plan ("Plan"), developed with the input of rail labor and FRA, detailing both long-term and interim measures to correct the safety problems.

FRA has been working closely with the UP to implement the Plan and to assure a continued reduction of accidents and incidents. Since the completion of the FRA safety audits, key programs and initiatives by railroad management and labor are underway to establish system-wide solutions to chronic and systemic safety concerns.

Several concerns that were identified are being addressed through the Plan. To assure continued progress toward the goals of the Plan, FRA has developed a detailed monitoring program that tracks the railroad's progress. As a result of the FRA's audits,

follow-up SACP efforts, and the monitoring program, significant results have been achieved. Since August 1997, there has been a 19% reduction in reportable employee injuries; a 21% reduction in lost work days by employees; and reductions of 20% and 9%, respectively, in grade crossing accidents and injuries.

The SACP has worked to develop a number of programs and initiatives that have been successful in achieving safety gains. The safety teams monitored and assessed safety in the specific areas delineated.

- **Corporate Culture** – the body of corporate policy that directly addresses or is related to safe rail operations.
- **Dispatcher/Crew Utilization and Fatigue** – the assignment of appropriate workloads to dispatchers, crew, and supervisory staff to guarantee sufficient rest to reduce fatigue-related accidents.
- **Supervisory Staffing and Operational Compliance** – training, monitoring, and staffing program to ensure that all employees operate all equipment safely and in accordance with FRA requirements.
- **Mechanical Inspections** – a mechanical inspections quality control program to reduce the number of accidents resulting from mechanical failure.
- **Harassment and Intimidation** – a protection policy that ensures employees will not suffer any repercussions after reporting accidents, injuries, or unsafe working conditions. The reporting is key to successful efforts to determine the root causes of accidents.
- **Control of Alcohol and Drug Use** – the use of training, guide documents, manuals, and random selection testing to control on-the-job use of alcohol and drugs to assure safe operations.

Attachment 1 to the Reply Comments highlights significant results achieved in the above categories through the SACP process. FRA believes that, through the cooperation and trust created by the efforts of UP employees, both labor and management, much has been accomplished and that much more will be achieved as this process continues. FRA headquarters and field personnel will continue regular inspection activities, working with the ongoing SACP and will work with UP management and labor to develop additional initiatives to address any new safety concerns. The UP must



commit to the initiatives and programs developed as a result of the continuing joint efforts with the FRA to assure a continued reduction of incidents.

In dealing with the western rail service problems, the UP has taken important steps that are primarily directed at improving safety. Service, however, should benefit as well, especially from such actions as the hiring of additional train and engine employees and dispatchers.

It is imperative that UP management and labor in partnership with FRA continue the effort that has led to the safety improvements achieved thus far. Even though considerable progress has been made, continued effort is needed to ensure that safety receives the highest priority on the merged UP.

#### The Effectiveness of the Original Competitive Conditions:

By Decision No. 44, F.D. No. 32760, the STB imposed a number of conditions on the UP to assure there was no loss of intramodal rail competition for those shippers affected by the merger. The key competitive condition ordered was an unprecedented grant of almost 4,000 miles of trackage rights to the Burlington Northern Santa Fe Railway (BNSF) on the merged UP/SP system. As part of that decision, the STB ordered a 5-year oversight to monitor the effectiveness of these conditions in preserving competition and to consider any modification of those conditions where appropriate. The DOT has participated in this oversight proceeding and supports its continuation.

The unprecedented service difficulties on the UP system have made it very difficult to reach any firm long-term conclusions on the efficacy of the original grant of trackage rights and related conditions. There has simply been no uninterrupted period of more normalized operations on which to base a valid assessment of the competitive impact of the merger and the associated conditions.

The initial comments of several parties emphasize, not surprisingly, that the unforeseen but widespread post-merger service congestion on the UP has substantially and adversely affected the ability of the BNSF to provide competition. BNSF-7 at 7, AFPA-2 at 3, Cemex USA at 2. It seems intuitively clear that the effect of any UP service problems on the BNSF would have been much less significant if BNSF had operated on its own track rather than as a "tenant" on the UP. By the same token,



shippers likely would not have suffered to the same degree if alternative "landlord" carriers had been available. However, it is not clear that the UP service problems have resulted from reduced competition.

BNSF cites instances where its "ability to provide shippers with reliable, dependable and consistent service over the UP/SP lines to which it gained access is continuing to be thwarted by certain 'structural deficiencies' in the rights BNSF received in the UP/SP merger proceeding as well as by certain UP operating practices which have, on numerous occasions, led to UP's trains being favored over BNSF's trains." BNSF-7 at 2. The implication of BNSF's comments appears to be that UP's actions on these occasions were designed to prevent BNSF from providing the level of effective competition that these conditions were intended to permit. Although it is plain that BNSF service has been adversely affected by UP congestion, the record is not complete (UP has not yet submitted rebuttal evidence) and thus DOT cannot now conclude that UP has consistently discriminated against BNSF trains. In any event, UP, in its July 1, 1998 report, provides substantial evidence that BNSF has been able to provide competitive service over the trackage rights that were granted, despite the service problems. UP/SP-344 at 74-78.

The Department continues to have reservations about the ability of a carrier operating over extensive trackage rights to provide competition for shippers where access to two independent competing railroads was lost. However, UP's service problems have made a fair assessment of the competitive impacts of the merger impossible. A period of "normal" operations is necessary, in DOT's view, to determine the true impact of the conditions. The Board's recent conclusion that UP's congestion difficulties are abating offers the possibility that it may be soon possible to fairly assess the conditions. STB Service Order No. 1518 (Sub-No. 1), Decision Served July 31, 1998.

The American Forest and Paper Association cites the service problems its members have endured and advocates eliminating the "paper" barriers that preclude shortline carriers from serving railroads other than the parent road that spun them off originally. AFPA-2 at 4-5. Clearly, this would improve service and competition for those shippers served by such shortlines, but it is not clear that this would solve the service problem, nor are these problems the result of the merger, since such "paper"

barriers are generally imposed at the time of the creation of the shortlines. Therefore, the relationship of the proposal to the subject of the instant proceeding is unclear. The competitive access concerns raised here are better considered by the Board in Ex Parte No. 575, which has already embraced this issue.

DOT joins the general support of most parties for continued scrutiny of UP's performance. An accurate assessment of the competitive effects of the merger can only be made once service on the UP has returned to normal levels. Therefore the reporting requirements currently in effect should be continued.

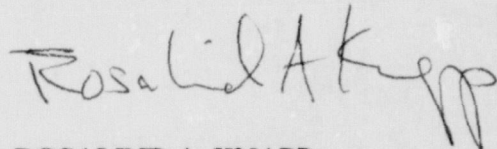
The National Industrial Transportation League ("NITL") has asked the Board to order UP to make public certain information including data on key terminals and routes. The DOT supports the NITL in this request. In view of the past problems on UP, there is certainly a need for continued and more specific information on UP performance, both to better assess impacts of competitive conditions and to inform shippers of emerging problems so that they can better anticipate and plan for changes in service levels. The STB should require adequate reporting, including the regional reporting NITL requests, until service is restored to a more normal level.

#### Conclusion

Approximately one year ago the Department considered it premature to reach any conclusive views on the efficacy of the conditions imposed by the STB to preserve intramodal rail competition otherwise lost as a result of the UP/SP merger. Since UP has yet to restore service to levels expected at the time of the merger, the ultimate competitive performance of UP and BNSF is still impossible to determine. Continued oversight is necessary until such time as a more accurate assessment of the effectiveness of competition is possible. Until that time, reporting must be required to provide shippers and others with needed information.

The Department also considers that, through the cooperation and trust engendered by the efforts of UP labor and management, much has been accomplished to advance safety on the railroad and much more will be achieved as this process continues.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Rosalind A. Knapp". The signature is fluid and cursive, with the first name "Rosalind" written in a larger, more prominent script than the last name "Knapp".

ROSALIND A. KNAPP  
Deputy General Counsel

September 1, 1998



## **ATTACHMENT 1**

### **SIGNIFICANT ACHIEVEMENTS BY CATEGORY**

#### **Corporate Culture**

- Six SACP safety committees, which include representatives from labor, management and FRA, and numerous local safety committees have been formed to address safety and health issues. Team activities include safety audits, training, and communication of safety awareness information.
- UP has enhanced its commitment to safety by implementing a policy that empowers employees to act unilaterally in matters of personal safety.
- Staffing levels have been analyzed and workforce goals necessary for safe operation have been developed. UP has invited both FRA and its rail labor organizations to review its staffing analysis and goals. UP has projected hiring 5,750 new employees during 1998. Of that total, 3,584 have already been brought on board. UP's total hiring projected for the year represents an increase of 2,835 employees above attrition.

#### **Dispatcher/Crew Utilization and Fatigue**

- UP has identified an appropriate staffing level to address attrition for Crew Management Services. A schedule to ensure sufficient staffing levels has been developed to fulfill safety support goals. UP has met its initial goal of hiring 126 new crew dispatchers in 1998 and is in the process of bringing on an additional 39. These new crew dispatcher positions are essential to improve crew utilization and reduce excessive deadhead and travel time for train crews.
- The number of vans and drivers has been increased to provide a more reliable mechanism to return crews to their rest facility. This has made a major contribution to the goal of the elimination crew fatigue and poor morale.
- A guaranteed rest period policy has been implemented, giving employees the right to rest one day after working seven days. UP is the only major railroad in the country to implement a guaranteed time off policy.
- A pilot program was implemented July 1, 1998 to ascertain the safety benefits to be derived from the application of circadian rest periods during duty periods.

- Dispatcher workloads have been realigned to assure acceptable working conditions. As a result, the workload on ten positions has been redistributed. In addition, the hiring goal for 1998 has been increased from 65 to 80 positions. When all hiring and training have been completed, UP will have 5 people for each of its 75 dispatching positions plus an additional 15 positions as an added margin of safety. Training classes for 17 new dispatchers have been completed and classes for 16 new dispatchers are scheduled. Dispatcher training has been enhanced and now includes 27 weeks of instruction. UP has tripled the number of dispatcher managers, from 4 to 12.
- UP has identified appropriate supervisory and managerial staffing levels. By the end of 1997, UP had filled 285 positions, for a 51% increase. An additional 300 employees are anticipated by the end of 1998. This hiring effort will ensure an effective level of supervision to provide guidance as well as to ensure compliance.

### **Operational Compliance and Training**

- To ensure that all operating employees are familiar with the rules that govern operations, the railroad has doubled the number of annual operating rules classes.
- The UP is providing training necessary for employees to safely operate each piece of equipment that they are expected to use. The railroad has dedicated 160 operations managers and eight managers of operating technology to this effort.
- The UP is developing a program to ensure compliance with FRA requirements for locomotive engineer certification, operational observations, and testing. This program includes a matrix of engineer certification requirements and internal accountability, including supervising and testing, and is currently under review by FRA.
- Engineers are now required to take familiarization trips prior to working specific rail lines and train crews must receive sufficient qualifying runs over unfamiliar territory.

### **Mechanical Inspections**

- A quality control program has been implemented to monitor testing, inspection, and maintenance of freight equipment. To accomplish this goal, the existing program has been enhanced to emphasize training, auditing, and effective response to safety factors related to equipment.
- The current mechanical training program is being assessed by the SACP working group to determine its effectiveness.



### **Harassment and Intimidation**

- In addition to the policy that empowers employees to act unilaterally in matters of personal safety, the railroad has established protest procedures that address accident reporting, accidents, injuries, and illness, as well as intimidation and harassment and other corporate culture issues identified by the SACP process.
- Where possible, counseling and education/training are now used in lieu of punitive actions. These changes have resulted in a 53% reduction in punishment cases.

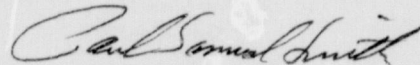
### **Control of Alcohol and Drug Use**

- Through updated training, guide documents, and manuals, the railroad has elevated the priority of post-accident drug and alcohol testing. The program is being monitored in concert with FRA on an on going basis to ensure consistent testing of covered service employees.
- The UP has developed a plan to ensure that all covered employees are tested as required.
- The UP is currently revising the random selection process to remove any appearance of bias. This effort is ongoing and the effectiveness of the program is determined through listening sessions with and local interviews of employees. The railroad is preparing an action plan to include all elements contained in the FRA random program criteria.



**CERTIFICATE OF SERVICE**

I hereby certify that on this date I have caused a copy of the foregoing 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.

A handwritten signature in cursive script, appearing to read "Paul Samuel Smith".

Paul Samuel Smith

September 1, 1998

STB FD 32760 (Sub 21) 8-14-98 D 190545

190545

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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*



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AUG 17 1998

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Public Record

COMMENTS  
OF  
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The National Industrial Transportation League ("League") hereby submits its comments in response to the Applicant's July 1, 1998 Second Annual Report on Merger and Condition Implementation ("July 1 Report"), filed by applicants Union Pacific Corporation, Union Pacific Railroad Company, and Southern Pacific Rail Corporation (together referred to as "UP"). The UP's July 1 Report was required by the Surface Transportation Board ("STB") as part of the five-year oversight condition that it imposed in *Union Pacific Corp., Union Pacific R.R. Co., and Missouri Pacific R.R. Co. – Control and Merger – Southern Pacific Rail Corp., Southern Pacific Transportation Co., St. Louis Southwestern Ry. Co., and The Denver and Rio Grande Western R.R. Co.*, Finance Docket No. 32760, Decision No. 44 (served Aug. 12, 1996) ("*UP/SP Merger Decision*").

The League would note that the Board has commenced a separate oversight proceeding in Finance Docket No. 32760 (Sub-No. 26) and related proceedings in order to examine the need for additional remedial conditions in the Houston, Texas/Gulf Coast region. The League has already submitted comments



in that proceeding, and will be examining the filings made and to be made by other parties in evaluating the content of any further comments regarding the situation in that important region. The purpose of this proceeding, in contrast, is to continue to oversee the implementation of the transaction more generally. The League wishes to bring to the attention of the Board a few comments and concerns in this more general context.

#### IDENTITY AND INTEREST OF THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The National Industrial Transportation League is a voluntary organization of shippers and groups and associations of shippers conducting industrial and/or commercial enterprises in all States of the Union and internationally. It was formed in 1907. Its members include industrial and commercial enterprises both large and small, as well as commercial, trade and transportation organizations representing shippers. Many members of the League are substantial users of rail transportation. The League is the only nationwide organization representing shippers of all sizes and commodities, using all modes of transportation, to move their goods in interstate, intrastate, and international commerce. Many members of the League have been affected by the service crisis in the western United States, and by the implementation of the merger of the Union Pacific and Southern Pacific Railroads generally. Accordingly, the members of the League have a strong interest in this proceeding.

#### THERE IS STILL A STRONG NEED FOR CONTINUED AND VIGILANT OVERSIGHT OF THE UP/SP MERGER

The League believes that the Board should continue to carefully monitor the implementation of the merger of the UP and SP. Although the Board has recently found in STB Service Order No. 1518 (Sub-No. 1), *Joint Petition for A Further Service Order*, and consolidated cases, served July 31, 1998, that there is no longer a "service emergency" under the terms of 49 U.S.C. § 11123 in the Houston area,

the operations of the UP system as a whole appear to be fragile, and the system continues to experience service difficulties.

These service difficulties appear to have been centered on the Central Corridor, and in recent weeks on the Sunset Route, which runs from El Paso to Colton, California, and in the Los Angeles Basin. The League understands that the UP is attempting to address this situation through various reroutes, as well as increasing crew availability and maximizing train size. The League also understands that some shippers have been told by UP officials to use other carriers if possible. This situation is particularly worrisome given the fact that the nation's rail carriers will be soon entering into what has traditionally been the busiest shipping season, and there are continued concerns about the shipment of what may amount to more than one year's grain harvest.

Shippers have yet to see the significant improvements in rail service promised by the UP in its merger application. Indeed, for nearly a year and a half, the focus of the merger implementation oversight has been on past, continuing and possible future service problems, rather than the extent to which the promised service improvements have occurred. This in itself strongly indicates that the Board needs to continue to monitor the situation closely.

#### THE BOARD SHOULD CONSIDER FURTHER REVISIONS TO ITS REPORTING REQUIREMENTS

In its recent decision in STB Service Order No. 1518 (Sub-No. 1), *Joint Petition for A Further Service Order*, and consolidated cases, served July 31, 1998, the Board revised its reporting requirements for the UP to reduce the reporting frequency to bi-weekly; to eliminate the requirement that copies of the reports be served on all parties to the service order proceeding; to revise the individual reports to eliminate superfluous information; and other steps.

However, the League is concerned that the revised information requested by the Board does not sufficiently focus on information in particular locomotives and



corridors, and instead relies primarily on systemwide information. Thus, there is basically little information that would reveal the nature and extent of problems in impacted locations, routes and corridors.

From the point of view of the shipping public, the Board's order is particularly troublesome since the most "locationally" focused piece of information ordered to be provided by the Board in its July 31 decision -- the terminal processing report, which is to contain information on cars on hand, switched and dwell time -- is to be filed confidentially with the Board alone. Thus, the shipping public cannot even determine the status of key terminals on the UP system. Moreover, it is not clear that this information is even available to outside counsel and consultants who agree to protect the confidentiality of the information, as has been the case throughout the merger proceeding and the oversight. For months, UP has been publicly submitting weekly a "Major Terminal Condition Report" which has listed "Cars on Hand" and "Trains Held,"; as well as a confidential Major Terminal Processing Report which has listed "Switch Car Dwell," and which has been at least available to outside counsel and consultants who agree to protect the confidentiality of the information

In its decision in STB Finance Docket No. 33388, *CSX Corporation et al -- Control and Operating Leases/Agreements -- Conrail Inc. and Consolidated Rail Corporation*, served July 23, 1998 ["*CSX/NS/Conrail Transaction*"] ("Decision No. 89"), the Board ordered public reports to be filed weekly for each of the Shared Asset Areas. These reports are to include information on: (1) fluid yard capacity; (2) cars on hand loaded and empty; (3) cars handled per day; (4) average daily dwell time for cars handled; and, (5) daily train origination information, as measured against current schedules for trains originating in the respective SAAs; as well as other information. The Board ordered this public information because, the Board said, the SAA's present unique situations "requiring close scrutiny." Decision No. 89, p. 163-164. The Board ordered the CSX and NS to submit non-



public information on other yards and terminals, that is, on yards and terminals outside of the SAAs.

The League submits that, in the case of the UP, where there have been very serious past problems and some current service problems, the Board's approach should be more akin to its approach with respect to the SAA's in the *CSX/NS/Conrail Transaction*. After all, the UP situation is not a case where there has never been a problem at all, as it is with NS and CSX yards and terminals outside of the SAAs. In the case of UP, serious service problems have already occurred, which have cost the shipping public hundreds of millions of dollars. Where there have been such serious service problems, and where significant problems still apparently exist (such as along the sunset route), the Board should also require "close scrutiny," a scrutiny which the Board correctly afforded the public in the case of the operations within the SAAs in the *CSX/NS/Conrail Transaction*, and which should be afforded the shipping public here.

Accordingly, the Board should require the UP to submit information on key terminals and routes. This should include such information, made available to the shipping public, as average weekly terminal volume and dwell at key terminals, both for an appropriate base period prior to the UP's service problems and prior to the merger. This should also include such information as the number of locomotives in various locations on the UP's system, as well as information on transit times from key origin and destination areas along key routes to key gateways.

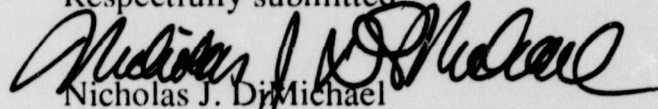
In connection with transit time information, the League would note that the Board relied on information furnished by the UP itself that "transit times . . . from the Houston/Gulf area to midcontinent gateways have been reduced by 50% and are near or better than pre-emergency levels" in deciding to lift the emergency service order. See *Joint Petition For A Further Service Order*, served July 31, 1998, slip op. at 5. Thus, the UP can hardly claim that transit time information is

not significant when it submitted and argued its importance to the Board, and when the Board itself credited the information in a key recent decision. Certain of this information was also submitted to the Board and to every party in the UP/SP merger proceeding in UP's cover letter to the Board of June 29, 1998, at p. 2. Since UP clearly has this information, there would appear to be little or no additional burden in submitting it to the Board.

Without more detailed and corridor-specific information, the Board and the shipping public will only be able to rely on anecdotal evidence and news reports of problems in particular areas of the country. The League believes that additional information to the Board and the shipping public would assist all parties in evaluating service problems and service improvements, and provide a systematic way to test the claims of any party.

**WHEREFORE,** THE National Industrial Transportation League asks that the Board implement the comments set forth herein.

Respectfully submitted



Nicholas J. DiMichael  
Frederic L. Wood  
Donelan, Cleary, Wood & Maser, P.C.  
1100 New York Avenue, N.W., Suite 750  
Washington, D.C. 20005-3934  
(202) 371-9500

*Attorneys for The National Industrial  
Transportation League*

August 14, 1998



### **CERTIFICATE OF SERVICE**

I hereby certify that I have on this 14th day of August, 1998 served copies of the foregoing *Comments of The National Industrial Transportation League* by first-class mail, postage prepaid, on all parties of record in the above captioned proceeding.

Shannon R. Harris  
Shannon R. Harris



STB FD 32760 (Sub 21) 8-14-98 D 190546



DONELAN CLEARY  
WOOD & MASER, P.C.

190546



August 14, 1998

Via Hand Delivery

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

D

Re: STB 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 referenced proceeding are the original and twenty-five (25) copies of the COMMENTS OF AMERICAN FOREST & PAPER ASSOCIATION.

Also enclosed is an extra copy of the Comments for date-stamping and return to our office and a 3.5 inch diskette containing the Comments in WordPerfect 7.0. Should you have any questions concerning the enclosed Comments, please contact the undersigned.

Sincerely,

Karyn A. Booth

Enclosure

0014-740

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ATTORNEYS AND COUNSELORS AT LAW

1100 New York Avenue, Suite 750, N.W., Washington, D.C. 20005-3934, Tel: 202-371-9500, Fax: 202-371-0900

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB 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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**COMMENTS OF  
AMERICAN FOREST & PAPER ASSOCIATION**

---

David B. Hershey  
Director, Transportation  
AMERICAN FOREST & PAPER ASSOCIATION  
1111 19th Street, N.W.  
Washington, D.C. 20036

By: John K. Maser III  
Karyn A. Booth  
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*Attorneys for  
American Forest & Paper Association*

Dated: August 14, 1998



190546

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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

*Union Pacific Corporation, et al.*  
—Control and Merger—  
*Southern Pacific Rail Corporation, et al.*

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[OVERSIGHT]

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COMMENTS OF  
AMERICAN FOREST & PAPER ASSOCIATION

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The American Forest & Paper Association ("AF&PA") hereby submits its Comments in this important proceeding concerning oversight of the merger of the Union Pacific Corporation ("UP") and Southern Pacific Rail Corporation ("SP") (collectively "UPSP"), and their affiliated rail carriers. This proceeding was instituted by the Board pursuant to Decision No. 44, served August 12, 1996 in STB Finance Docket No. 32760, in which the Board approved the common control and merger of the UP and SP, subject to the imposition of various conditions. One of the conditions imposed by the Board was a five (5) year oversight process by which the Board would evaluate the impact of the merger on competition.

In its decision served in the first phase of this oversight proceeding on October 27, 1997, the Board found that the merger has not caused substantial competitive harm. The Board, however, indicated that its findings were preliminary and that it was too

early in the process to evaluate with certainty the competitive impact of the merger. As part of the continuation of the oversight process, the Board requested interested parties to submit Comments to the Board by August 14, 1998. AF&PA submits these Comments to the Board pursuant to its request.<sup>1</sup>

### **IDENTITY AND INTEREST OF AF&PA**

AF&PA is the national trade association of the forest products and paper industry. Its membership includes both large and small forest products and paper companies, forest landowners, tree farmers and affiliated organizations. The forest products and paper industry has total annual sales of approximately \$200 billion and is among the top 10 manufacturing employers in 46 states, generating 7% of all U.S. manufacturing output. Annually, the industry generates in excess of \$17 billion in international trade.

The forest products and paper industry is the fourth largest user of rail transportation in the United States. Significantly, the industry's \$183 billion of domestic flows combined with the inland portion of its international flows makes the industry one of the largest commodity shippers in the country. Much of the industry's exports and the domestic sales are transported by rail. In fact, the forest products and paper industry moves an average of 24,000 rail carloads in any given week. The industry is responsible for 70% of all railroad boxcar traffic, including 19 million tons of recycled paper, and 95% of all centerbeam lumber car traffic. The industry also represents significant carload volumes consisting of inbound raw materials (such as logs, woodchips, coal and chemicals) and thousands of containers carrying finished goods for domestic and offshore distributions.

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<sup>1</sup> Although AF&PA did not participate in the initial phase of the Board's UPSP Merger Oversight proceeding, on August 4, 1998 it notified the Board and the parties of record in this proceeding of its intent to participate hereafter.



### COMMENTS OF AF&PA

AF&PA believes that the merger of the UP and SP, which was a significant component of the ongoing restructuring of the nation's rail system, has adversely impacted rail competition and rail service to shippers. AF&PA believes that the lack of meaningful competition between UPSP and other Class I rail carriers and short line carriers throughout much of the UPSP service territory is a significant factor that has led to the severe service melt-downs on the UPSP system in Houston, Texas and throughout the West. The inability of many shippers located on the UPSP system to obtain service from alternative rail carriers, when they are receiving inadequate and inefficient service from UPSP, should not be overlooked by the Board. Moreover, it is the view of AF&PA that the lack of viable rail alternatives has likely compounded and prolonged the UPSP's service difficulties by preventing shippers from diverting their shipments off of the UPSP system.

It is the view of AF&PA that the merger has not produced efficient and improved transportation which the carriers to this transaction had assured the Board and shippers would result from the merger. The failure of the UPSP to produce the public benefits relied upon by the Board in its approval of the merger should cause the Board to re-examine its findings made in the merger proceeding and to take measures to ensure that enhanced rail-to-rail competition exists for the nation's shippers. Indeed, AF&PA strongly believes that rail competition is critical to achieving a healthy and vibrant rail transportation industry.

AF&PA is concerned that the lack of direct rail competition to the UPSP rail system, and the continuing reduction of rail competition throughout the nation, has substantially reduced the incentive of the Class I rail carriers to improve and maintain service levels, an adequate supply of equipment, or to capitalize on expected merger



economies of scale to attract incremental business off the nation's highways. Moreover, the failure of rail carriers to be responsive to the service needs of shippers adversely impacts the ability of such shippers, including forest products shippers, to compete within their own industries and the global economy.

By any measure, the implementation of the UPSP merger has not been a success story. In fulfilling its oversight function with respect to this transaction, the Board must not ignore the dissatisfaction of the shipper community and should consider adopting pro-competitive measures that would enhance the service choices available to shippers and lead to improvements in the quality of rail service provided to shippers. The STB should strive to formulate a national rail system that ensures that all shippers, large and small, have the broadest access possible to the Class I system.

AF&PA believes that within the context of this proceeding, the Board should seek to maximize routing options by increasing the opportunities for short line rail carriers to participate in the UPSP's rail traffic. Short line railroads can provide reliable and efficient service on lower density rail lines that have been "spun-off" as a result of railroad mergers by the larger Class I carriers, such as UPSP. By operating with less costly equipment, fewer crew members, and less overhead short line railroads can offer cost-effective transportation service on rail lines that, from an operating and revenue perspective, are less attractive to the Class I carriers. By connecting smaller and often more rural communities to the interstate network of the Class I carriers, short lines provide a vital service. However, "paper barriers" instituted in line sales agreements and pricing policies of the Class I railroads can severely restrict the ability of a short line to provide competitive, efficient, and profitable service. Paper barriers can limit the ability of a short line carrier to interchange traffic with other rail carriers either directly or indirectly, by the imposition of substantial financial penalties, even where such

routings and connections may be efficient. Such anticompetitive provisions do not serve the public interest.

AF&PA believes that the Board should evaluate the degree to which "paper barriers" restrict the competitive service opportunities of the short lines that connect to the UPSP system. If such restrictions are found to be substantial the Board should undertake to eliminate some or all such restrictions in order to improve the quality of rail service and enhance the competitive alternatives available to shippers. By taking such action, shippers would obtain increased competitive options, some of the burdens on the UPSP system would be alleviated, and the short lines would have improved economic opportunities -- all of which would serve the public interest.

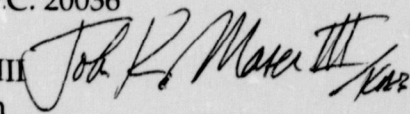


## CONCLUSION

AF&PA believes that the UPSP merger has failed to serve the public interest and that the Board should seek to increase the competitive options that are available to shippers that use the UPSP rail system. Increased competition will lead to improvements in the quality and efficiency of the rail service provided. To increase competitive options, AF&PA believes that the Board should evaluate the degree to which paper barriers restrict the effectiveness of rail service provided by short line carriers. AF&PA appreciates the opportunity to present its views to the Board in this important proceeding.

Respectfully submitted,

David B. Hershey  
Director, Transportation  
AMERICAN FOREST & PAPER ASSOCIATION  
1111 19th Street, N.W.  
Washington, D.C. 20036

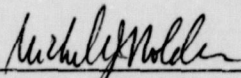
By: John K. Maser III   
Karyn A. Booth  
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Suite 750  
Washington, D.C. 20005  
(202) 371-9500  
*Attorneys for*  
*American Forest & Paper Association*

Dated: August 14, 1998



### CERTIFICATE OF SERVICE

I hereby certify that I have on this 14th day of August, 1998, served a copy of the COMMENTS OF AMERICAN FOREST & PAPER ASSOCIATION by first class mail, postage prepaid, on all parties of record.

  
\_\_\_\_\_  
Michelle J. Nolder

STB FD 32760 (Sub 21) 8-14-98 D 190539

190539

ECKERT SEAMANS CHERIN & MELLOTT, LLC

ATTORNEYS AT LAW

August 14, 1998

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Office of the Secretary  
Case Control Unit  
ATTN: STB Finance Docket No. 32760 (Sub-No. 21)  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, DC 20423-0001



Dear Sir or Madam:

Enclosed for filing please find the original and 25 copies, plus 3.5 inch IBM-compatible diskette, of Cemex USA's Comments for a Request For New Conditions to the Existing Union Pacific and Southern Pacific Merger. If you should have any questions, please call me at the telephone number listed below.

Thank you for your attention to this matter.

Very truly yours,

*Sean T. Connaughton* on behalf of

Sean T. Connaughton

Enclosures

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SEAN T. CONNAUGHTON  
202/ 659-6668



190539



**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**STB FINANCE DOCKET No. 32760 (Sub-No. 21)  
MERGER OVERSIGHT  
REQUEST FOR NEW CONDITIONS TO THE EXISTING  
UNION PACIFIC AND SOUTHERN PACIFIC MERGER**

**COMMENTS SUBMITTED BY  
CEMEX USA MANAGEMENT, INC.**

**ENTERED  
Office of the Secretary**

**AUG 17 1998**

**Part of  
Public Record**

**Eckert Seamans Cherin & Mellott, LLC  
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**Cemex USA Management, Inc.  
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Houston, Texas 77056**

**Counsel for Cemex USA Management, Inc.**

**August 14, 1998**

## **SUMMARY**

As a party of interest, Cemex USA submits this request for a new condition to the Union Pacific and Southern Pacific merger. Specifically, Cemex USA requests the Burlington Northern Santa Fe Railroad ("BNSF") be granted local service rights to all cement, stone and sand bulk facilities in Texas located along lines over which the BNSF has been granted overhead trackage rights under the Union Pacific-Southern Pacific merger. This condition is necessary to address widespread and systemic inadequacies by the Union Pacific in providing reliable service to cement, stone and sand producers in Texas since the merger was approved by the Surface Transportation Board ("STB"). If there is to be any competitive harm to the Union Pacific it will be minimal since the Union Pacific is currently unable to adequately serve these shippers. Rather, competitive benefits will result to the carrier and the shippers through increased volume of bulk shipments. It is essential for the continuation of competition in bulk shipments in Texas that this condition be granted. Additionally, this condition would ensure that BNSF can achieve sufficient traffic density to sustain use of its trackage rights.

## **BACKGROUND**

Cemex USA is one of the largest producers of cement, ready-mix and aggregate in the United States. Cemex began operations in 1906, and its U.S. operations are conducted in California, Arizona, and Texas. Cemex USA's Balcones (Dittlinger) facility in New Braunfels, Texas, includes a cement plant with a production capacity of 1.1 million tons per year. Asphalt and aggregate plants at the facility have an annual production capacity of 3.8 million tons per year. Cemex USA is headquartered in Houston, Texas.

Cemex USA is a classic example of a captive shipper. Its Balcones plant is served exclusively by the Union Pacific Railroad, which has been the case since the Union Pacific acquired the only competing rail provider, the Missouri-Pacific Railroad/Missouri-Kansas-Texas Railroad. Because of the bulk nature of Cemex USA's products, rail is the only viable mode of transportation to service its inland markets. Cemex USA is thus a captive shipper in two



regards: first, it can only ship by rail to most markets; and second, it can only ship via Union Pacific.

### **SERVICE PROBLEMS SINCE THE MERGER**

#### **1. Cemex USA has experienced Continued Service Problems since 1996.**

The recent and continued service problems being experienced by the Union Pacific have severely impacted Cemex USA and other cement and stone shippers in Texas. The rail cycle time (*i.e.*, the number of days required to deliver a full rail car to its destination and return it for refilling), particularly for shipments of aggregate (stone), continues to be excessive. (See Exhibit 1.) Nevertheless, the Union Pacific argues that there has been a substantial improvement in cycle times as compared to 1995 cycle times. This is not necessarily the case. Current cycle times have improved compared to early 1998, but much of this improvement has come from actions taken by Cemex USA to restrict its shipments to unit trains to destinations capable of receiving from 40 to 90 railcars at a time. Accordingly, Cemex USA has been forced to stop serving many previous customers. In early 1997, Cemex USA shipped stone to nearly 40 customer destinations, often in blocks of 5 to 20 railcars. Currently, Cemex USA must restrict shipments to no more than 15 destinations to avoid excessive cycle times on the Union Pacific. This service failure has caused Cemex USA irreparable harm. Cemex USA has lost customers and revenues and at one time was forced to reduce employment at its plant.

These service problems are almost predominantly the result of the Union Pacific and Southern Pacific merger. Prior to the merger, Cemex USA enjoyed satisfactory service from the Union Pacific with the carrier transporting over 2100 rail cars a month from New Braunfels, Texas. Almost immediately after the STB approved the merger in 1996, service deteriorated steadily. While Union Pacific has made "plans" and issued "goals" to rectify these problems, improvements that have occurred have proven to be inadequate and unsustainable. Exhibit 2 illustrates the pre and post merger service levels of rail shipments of aggregates from Dittlinger in New Braunfels, Texas. The service situation remains grim.



2. Other Producers are Experiencing the Same Service Problems

Cemex USA is not alone in this predicament. In a letter to the STB dated July 8, 1998, a group of cement and rock producers requested the STB to require the Union Pacific to give increased priority to rail shipments of construction materials in the State of Texas. (See Letter from Joseph W. Dorn, Counsel for North Texas Cement Co., to Chairwomen Linda Morgan and Chairman Charles R. Matthews, dated July 8, 1998.) These producers noted that prior to the Union Pacific and Southern Pacific merger, substantially all their deliveries of cement, stone and sand were made by rail. Since the merger, service became abysmal, so bad that two cement plants were forced to suspend sales to the Houston area due to the Union Pacific's inability to consistently deliver shipments, and another producer experienced a 25 percent decline in shipments. These producers note that cement shipments that used to take two days by rail to Houston increased to 12-13 days.

3. The Union Pacific's Response has been inadequate

The Union Pacific concedes that it has not yet been able to fully accommodate the number of cement or aggregate trains that Cemex USA and other bulk producers in that area want to move. (See STB Decision Ex Parte No. 573, Cemex USA, page 3.) Of note, the Union Pacific has not been able to meet its commitment to Cemex USA with respect to aggregate shipments. As Exhibit 1 indicates, prior to the merger, the Union Pacific routinely satisfied Cemex USA's 2100+ per month railcar demand. On June 12, 1998, the Union Pacific again committed to moving 1,775 aggregate cars per month, but the Union Pacific only moved 1,391 aggregate cars in July 1998.

The Union Pacific's response to the other Texas bulk producers illustrates the problem. In a letter to the STB dated July 28, 1998, the Union Pacific blames the producers for the service collapse because of their desire to transport more via the Union Pacific. The Union Pacific then admits that it lacks sufficient capacity to meet all rock demands on the Austin,

Ennis, Glidden, and Ft. Worth subdivisions. Even with the added promised capacity on the Austin subdivision, the Union Pacific admits it will remain unable to meet demand into the future. (See Letter from Arvid E. Roach II, Counsel for Union Pacific, to The Honorable Vernon A. Williams, Ex Parte No. 573/Service Order No. 1518, dated July 28, 1998.) Finally, the Union Pacific acknowledges that rock and cement trains are given, and will continue to receive, the lowest priority among its traffic. After these admissions, the Union Pacific requests the STB to deny the shippers' request for increased priority.

These contradictions in the Union Pacific's capabilities and legal position are similar to the Union Pacific's response to Cemex USA. If the Union Pacific is going to favor some shippers over others, then Cemex USA and other cement, stone and sand bulk facilities should have the ability to use another competitive carrier.

4. The Merger has Favored Particular Shippers over Others

By comparison, some of Cemex USA's competitors, not confined to the Union Pacific service, have experienced significantly less impact than Cemex USA and other producers served exclusively by the Union Pacific. At least one competitor, served by both the Union Pacific and BNSF, has avoided much of the harm Cemex USA and its customers have suffered by shifting significant portions of its traffic to BNSF after the Union Pacific's post-merger service crisis began. The merger allowed this competitor to increase its access to customers from service by 2 of 3 railroads to 2 of 2 railroads (i.e. 100 percent geographic coverage). This has created an unlevel playing field, where those served by both the Union Pacific and BNSF under the merger decision can ship unimpeded while those served by only the Union Pacific suffer.

**REQUESTED CONDITIONS**

Recently, Cemex USA Management, Inc. petitioned the STB for local service rights under the provisions set forth in 49 U.S.C. § 11123 for emergency service orders. On July 31, 1998, the STB denied Cemex USA's request for emergency service relief. Cemex USA had



requested that STB order the Union Pacific Railroad to grant local service rights to BNSF to service Cemex USA's Dittlinger Yard in New Braunfels, Texas. Evidence has now been presented to the STB that the problems being experienced by Cemex USA are also being experienced by other similarly situated cement and stone producers in Texas. The Union Pacific has admitted it does not have the ability to adequately serve these shippers' needs. This new evidence and changed circumstances warrants the STB's favorable response. Consequently, Cemex USA now requests the STB to exercise its oversight jurisdiction over the Union Pacific and Southern Pacific merger to consider new conditions to the merger as set forth herein.

1. Grant BNSF Local Service Rights

Cemex USA requests that BNSF be granted local service rights to all cement, stone and sand bulk facilities located along lines in Texas over which BNSF has been granted trackage rights under the Union Pacific-Southern Pacific merger.

2. Condition Criteria

The STB's regulations set forth in 49 CFR § 1180.1(d) state that four criteria must be met before a condition will be imposed on a merger.

i. **Condition is shown to be related to the impact of the consolidation**

Cemex USA and other cement, stone and sand bulk facilities have been adversely affected by inadequate rail service as a direct result of the Union Pacific and Southern Pacific merger. On February 20, 1998, Cemex USA submitted a report to the STB in connection with STB Service Order No. 1518 and Ex Parte proceeding No. 573. This report demonstrated that in the past year, rail shipments by Union Pacific of cement and aggregate fell substantially.



The Union Pacific claims that shippers are purposefully not using the railroad because of the increased market demand for their product. However, while the increased market demand is true, this does not change the fundamentals of transportation economics. Shippers are going to use the most cost effective and reliable method of moving their product to the market. For bulk commodities, this is normally the railroads. Shippers have been forced to use higher cost trucking not because of increased market demand, but because of the Union Pacific's unreliable service. The Union Pacific cannot "take credit" for shippers using other forms of transportation in their desperate attempt to serve their customers.

For Cemex USA, the Union Pacific cycle times remain excessively high and highly variable, resulting in extreme "bunching" of empties, insufficient train starts and large departure delays, which cause congestion and severely taxes the resources and facilities for Cemex USA. (See Exhibit 1.) Exhibit 1 shows that the Union Pacific has been unable to meet its commitment level as it did prior to the merger. In fact, prior to the merger, the Union Pacific was able to meet Cemex USA's demand of over 2100+ cars per month. The current problem simply did not exist before the merger.

The problems being experienced by Cemex USA are also being experienced by other similarly situated shippers. This is evidenced by the July 8, 1998, filing of several Texas cement and stone producers complaining of the same post-merger problems. Cemex USA believes that the quality of service it and other cement and stone producers are receiving will not improve sufficiently until another carrier such as BNSF is allowed to compete directly with the Union Pacific.

**ii. Condition is designed to enable shippers to receive adequate service**

Providing local service rights to another carrier such as BNSF will avoid much of the harm that Cemex USA and other cement and stone bulk producers have experienced since the merger. Granting BNSF local service rights to all cement, stone and sand bulk facilities in Texas along lines that the BNSF already has trackage rights will create a level playing field for all shippers by allowing all shippers to meet current market demands. Cemex USA and other shippers have been unable to compete with other aggregate producers that are not limited by the Union Pacific's lack of reliable service. For Cemex USA and similarly situated shippers, the Union Pacific's failure to provide regular and reliable rail service has resulted in layoffs, lost business and unsupplied customers. The Union Pacific has stated that stone and cement trains are given, and will continue to be given, the lowest priority among its traffic. The Union Pacific also admits it does not have the ability now or in the future to service the needs of cement and stone shippers.

Cemex USA and other cement and stone producers are not requesting that the Union Pacific favor some shippers over others. Cemex USA is merely requesting that it and other cement and stone shippers be provided with regular and reliable service sufficient to support a viable business. Cemex USA and other cement and stone producers want, at a minimum, to be returned to their pre-merger positions. The only way to this seems possible is to grant another carrier local service rights at Cemex USA's and other bulk shippers facilities.

**iii. Condition would not pose unreasonable operating or other problems for the consolidated carrier**

Granting BNSF local service rights to the rail lines that it already has trackage rights to under the Union Pacific-Southern Pacific merger will not pose



unreasonable operating or other problems for the Union Pacific. Since the BNSF already has trackage rights, it already has authority to operate trains over these lines. The only operating issue, therefore, is BNSF stopping for local service. No more stops would be required with BNSF local service than with exclusive Union Pacific service, as the number of stops is determined by the number of sites served and total volume of shipments. Investment in automated switches and in plant staging areas can be made to reduce the time required for local service.

Cemex USA has worked out a detailed plan with BNSF to provide service to its Dittlinger Yard in New Braunfels, Texas. Similar plans could be developed for other cement and stone shippers to avoid operating problems.

Other complications for the Union Pacific would be modest and manageable. The Union Pacific and BNSF routinely operate jointly on rail lines in the U.S., including the recently negotiated joint ownership of the high traffic rail line between New Orleans and Houston. The Union Pacific admits it has been unable and will not be able to pull the requisite number of shipments for Cemex USA and other cement and stone producers. This shortfall is not due entirely to increased demand but to inefficiencies in the augmented Union Pacific system and its unwillingness to prioritize bulk shipments. Granting BNSF local service rights from lines over which it already has trackage rights such as the Austin subdivision, can assist Cemex USA and other cement and stone producers in making up the service shortfall.

**iv. Condition would not frustrate the ability of the consolidated carrier to obtain the anticipated public benefits**

Granting BNSF local service rights would not frustrate the ability of the Union Pacific to obtain anticipated public benefits under the merger. To the contrary, granting BNSF local service rights would provide a benefit to the public



by increasing the flow of commerce in this region. Since the inception of the merger, Union Pacific has been unable to meet its commitment level to Cemex USA and other cement and stone shippers in Texas. (See Exhibit 3 for Cemex USA's commitment levels.) Granting BNSF local service rights will enable cement, stone and sand bulk facilities to resume business operations to pre-merger levels. Specifically, granting BNSF local service rights on the Austin subdivision will take rail volume off of the Union Pacific's line north and east of Temple, Texas, thereby reducing the Union Pacific's congestion in Ft. Worth and Houston.

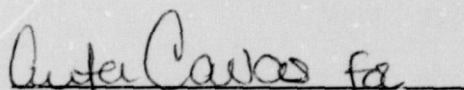
Cemex USA can successfully demonstrate that all the above criteria can be satisfied. Cemex USA requests the STB grant BNSF local service rights to all cement, stone and sand bulk facilities in Texas along lines for which it already has received trackage rights under the Union Pacific-Southern Pacific merger.

The requested condition is not without precedent. In Decision No. 44, the STB awarded access rights to BNSF to shippers located along the lines that BNSF had been given trackage rights. While Decision No. 44 deals with lines where competitive service had previously existed, the principles applicable in that decision are present here: the need to insure safe, efficient and reliable transportation, and preserving (and enhancing) competition. Such would result if the requested condition is granted.

Cemex USA appreciates the opportunity to provide comments in this oversight proceeding and possible new conditions under the Union Pacific and Southern Pacific merger. Cemex USA looks forward to working with the STB to finalize and implement them. The STB is urged to consider these new conditions quickly to assist shippers, particularly captive shippers such as Cemex USA, in moving their products to their customers.

### **CERTIFICATE OF SERVICE**

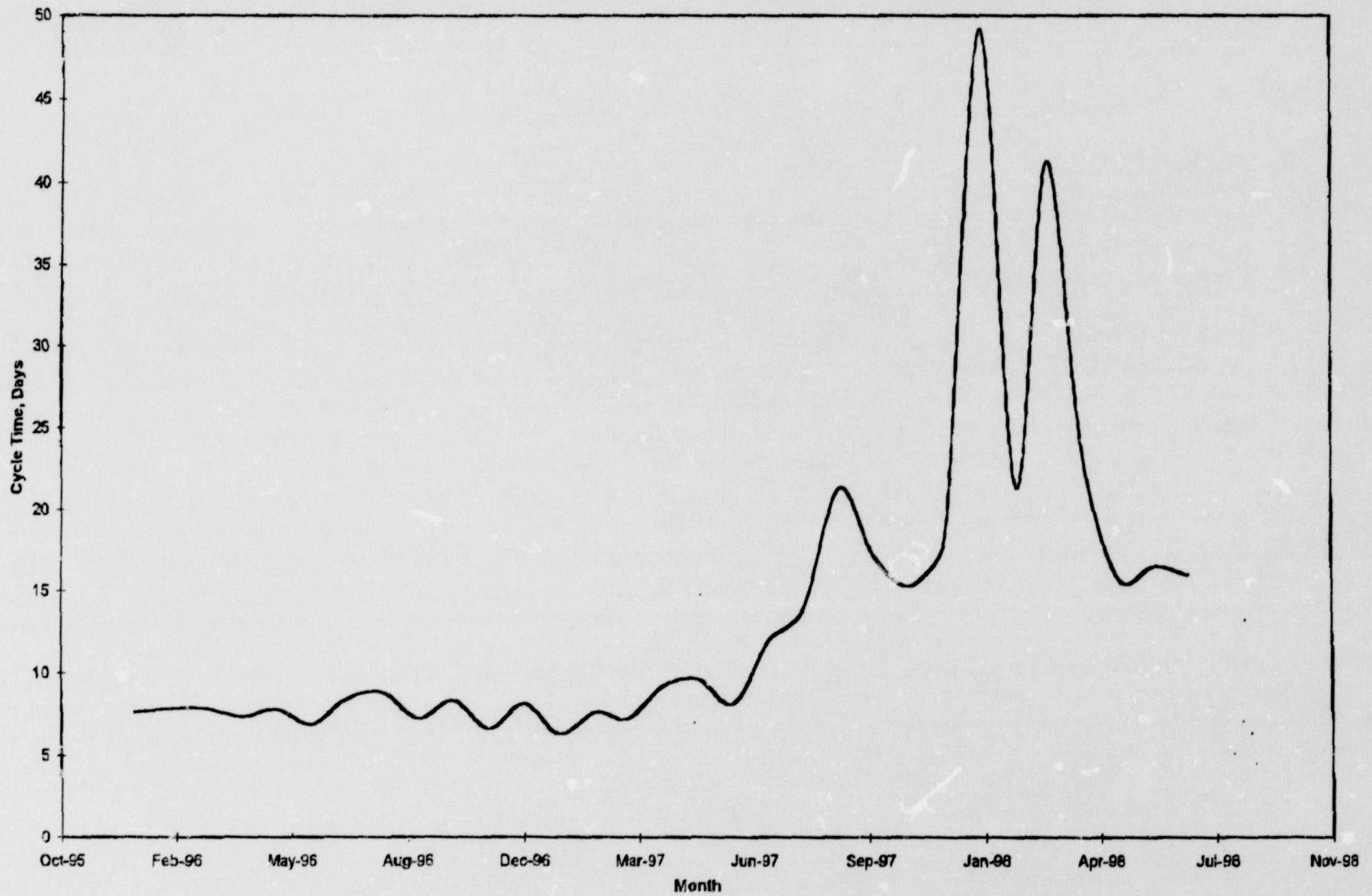
I hereby certify that a true and correct copy of the foregoing document was served on all Parties of Record by first class mail on this 14th day of August, 1998.

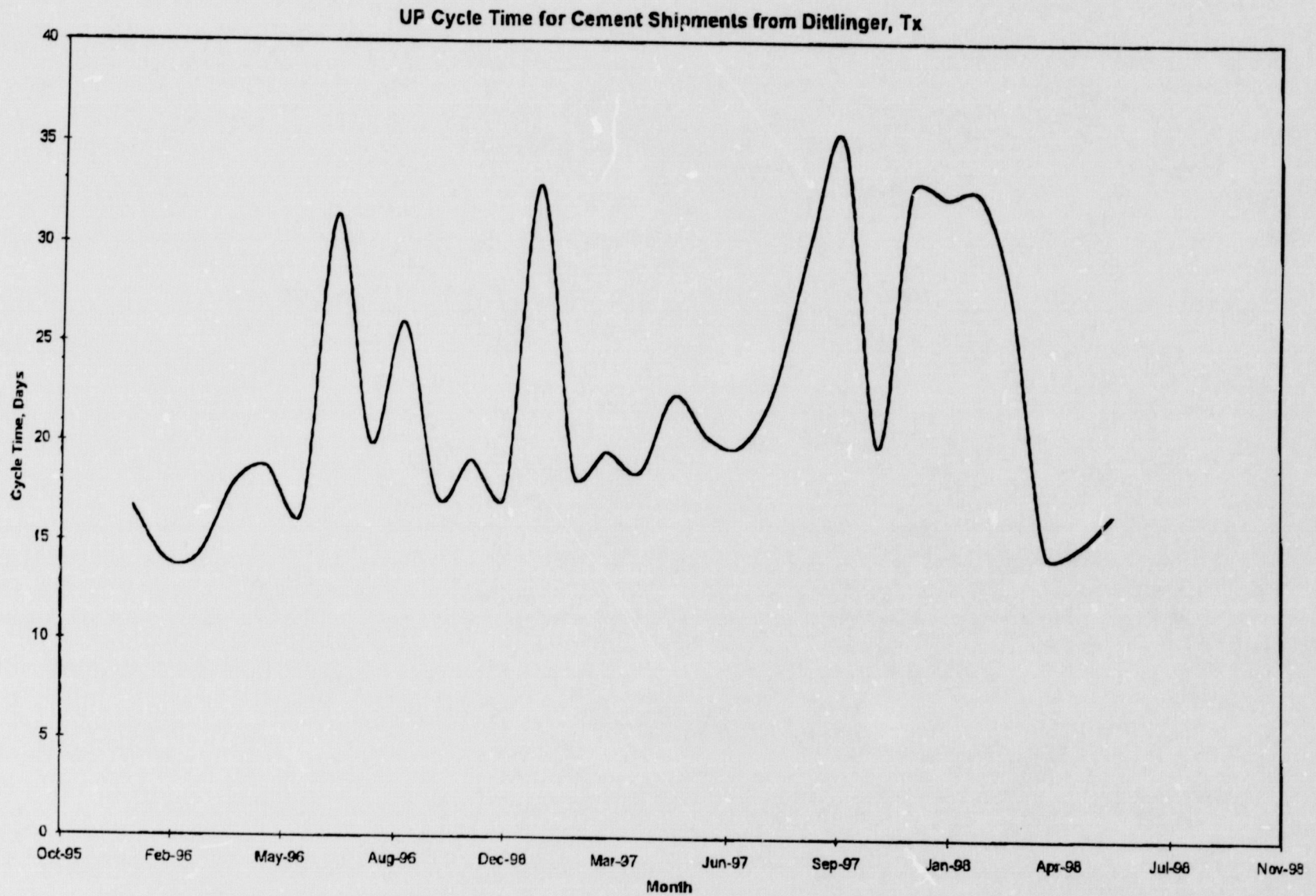
  
Sean T. Connaughton

# EXHIBIT 1



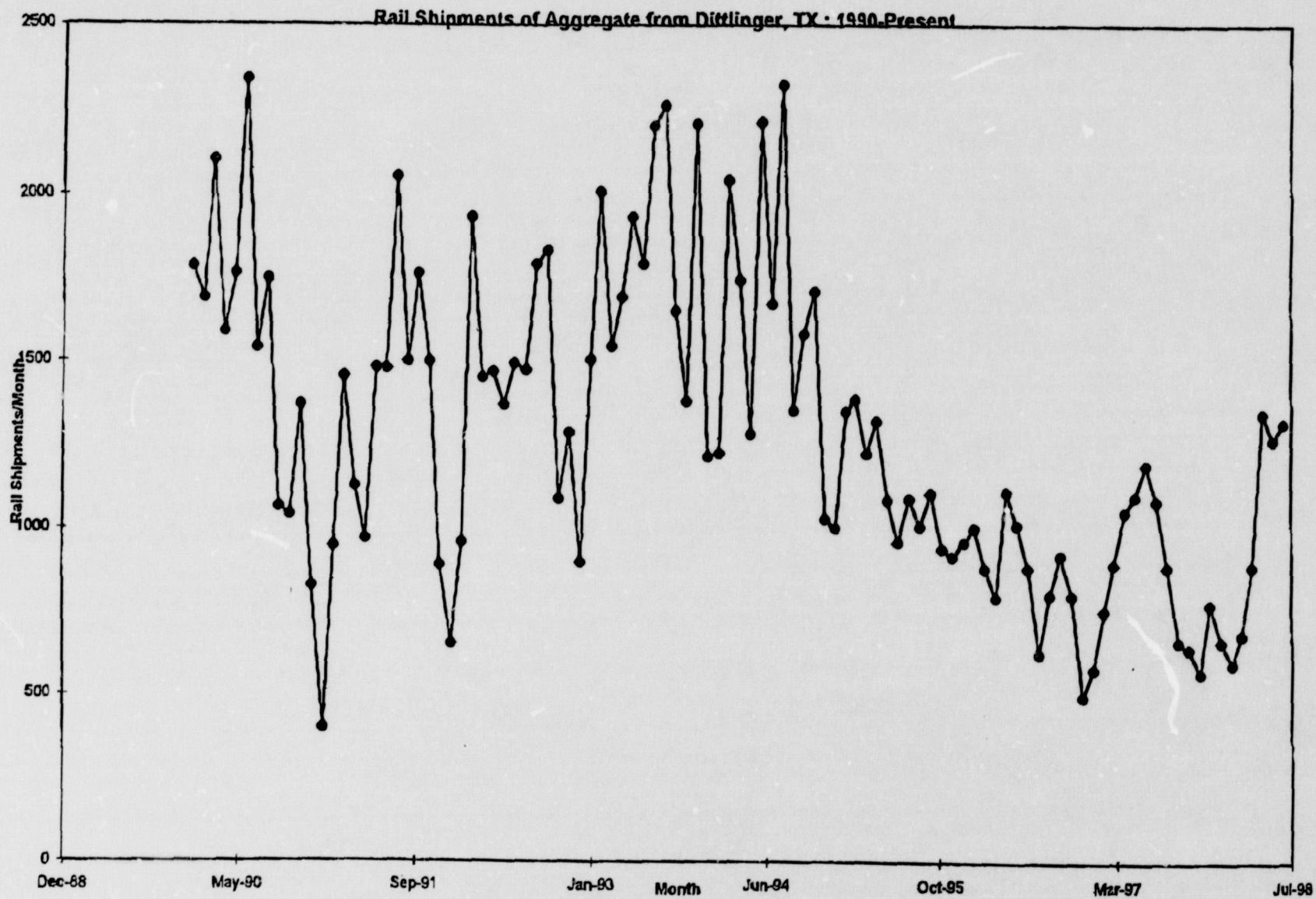
UP Cycle Time on Stone Shipments from Dittlinger, TX : 1996-Present





## EXHIBIT 2





**EXHIBIT 3**

