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UP/SP-375

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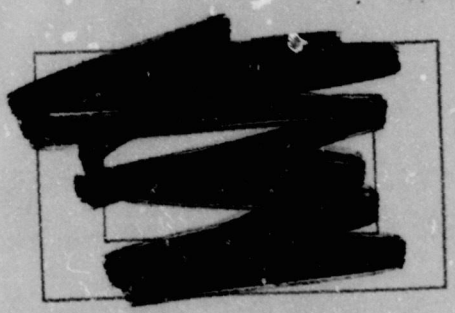
BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 32760

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

REPLY OF UNION PACIFIC RAILROAD COMPANY TO AMERENUE'S MOTION FOR LEAVE



James V. Dolan
Lawrence E. Wzorek
Beverly S. Greer
Union Pacific Railroad Company
1416 Dodge Street
Omaha, NE 68179
(402) 271-4575

J. Michael Hemmer
John M. Scheib
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-6000

Attorneys for Union Pacific Railroad Company

March 3, 2000

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INTRODUCTION

On February 23, 2000, AmerenUE ("UE") filed the "Reply of AmerenUE to Additional Issues Raised by Union Pacific in Its 'UP/SP-374' Response" ("UE Reply"). The UE Reply would constitute an unauthorized reply to a reply, but UE asked in a footnote that its reply be treated as a motion for leave to file. UE Reply, p. 1 n.1. So construing the UE Reply, UP proffers a brief response.

UP does not object to UE's motion for leave to reply, assuming the Board also accepts this further response. While we do not understand UE's assertions that UP's prior

response[1] was "non-responsive, misleading and improper" -- a contention UE never explains -- UP agrees that the Board will benefit from fuller development of disputed claims.

If the Board requires a petition for leave to file this response, we respectfully ask that this document be treated as such a petition. In at least 14 passages, the UE Reply accuses UP of misleading, misrepresenting, concealing, deceiving, manipulating, hiding and threatening UE, as well as deceiving the Board. We request the opportunity to respond to these accusations of misconduct. In addition, UE asserts several facts that we believe are inaccurate. Finally, UP should be allowed to respond to BNSF's comments supporting UE.[2] Filed as a reply, these BNSF comments would otherwise be insulated from any UP response.

DISCUSSION

A. The Issues

UE's January 19, 2000 Petition for Clarification and Enforcement of Merger Conditions ("UE Petition") presented three issues:

1. Was UE's Labadie plant a 2-to-1 shipper? UP agrees that it was, so this issue is resolved.

2. Is UE entitled to exercise Decision No. 44's contract modification condition? The UE Reply does not address this issue, so UP will not address it here.[3]

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[1] UP/SP-374, Union Pacific Railroad Company's Response to AmerenUE's Petition for Clarification and Enforcement of Merger Conditions, Feb. 8, 2000 ("UP Response").

[2] BNSF-90. Reply of the Burlington Northern and Santa Fe Railway Company to AmerenUE's Petition for Clarification and Enforcement of Merger Conditions, Feb. 8, 2000 ("BNSF Reply").

[3] The BNSF Reply discusses this issue, but it is evident that BNSF was understandably unaware of most of the pertinent facts concerning the negotiation of UE's

3. Is UE entitled to demand BNSF direct service to the Labadie plant under the BNSF Settlement Agreement, or did UE agree with UP on an alternative to replace SP service after the UP/SP merger?

The UE Reply and this response pertain to this third issue. The parties signed a settlement agreement (the "UE Settlement Agreement") under which UE agreed to replace SP service with a competitive alternative that did not involve direct BNSF service. This alternative consisted of proportional rates on UP in combination with BNSF service through the Kansas City and St. Louis gateways. UP remains ready to support that alternative. UE now contends that (a) the agreement was neither a settlement agreement nor an enforceable contract and (b) UP misled UE into signing the agreement. We respond to these contentions below.

B. UE Is Not Entitled to Demand Direct BNSF Rail Service Because It Signed a Valid Settlement Agreement That Replaced SP Service With Proportional Rates.

On March 11, 1996, following more than six months of negotiations, UE signed an agreement with UP that provided a competitive solution to UE's loss of rail competition at the Labadie plant. Under this agreement, UE agreed not to challenge the UP/SP merger and instead to support it. In exchange, UP agreed to (a) give UE proportional rates between St. Louis and Kansas City for use in connection with BNSF service via Kansas City or St. Louis; (b) waive almost $4 million in liquidated damages under a coal transportation contract between UE and SP; and (c) enter into a side agreement excusing UE from some $12 million in liquidated damages under a second coal transportation contract between UE and SP. Both parties carried out their obligations under the agreement: UE provided a verified statement supporting the merger and

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shipping contract with UP. Compare BNSF Reply, pp. 8-9, with UP Response, pp. 17-22.

telling the Board that it had arranged for "competitive service" to its Labadie plant. UE Exhibit No. 19. UP offered proportional rates to UE and gave UE almost $16 million in relief from liquidated damages.

Four years later UE contends that this agreement did not replace the competition SP had provided but instead merely gave UE a new option that it could use if it wished. Indeed, UE contends that the agreement is not an agreement at all, but a mere agreement to agree that is unenforceable under state law.

The agreement was a settlement agreement. UE's position in 2000 does not comport with the facts in 1995 and 1996. UE's own statements, including its verified statement to the Board, show that UE and UP negotiated a settlement agreement that replaced SP's "competitive service" to the Labadie plant. The parties then implemented the agreement to UE's great benefit.

During the six months of negotiations in 1995 and 1996, UE and UP understood that they were negotiating how to replace SP competition at the Labadie plant after the UP/SP merger:

1. In a detailed letter dated October 25, 1999, UE affirmed that its goal in the negotiations was **Redacted** UE expressly warned UP that UE would

UE Petition, Highly Confidential Exhibit No. 12.

2. UP's communications to UE reflected the same goal: As UP wrote on January 17, 1996, UP anticipated that **Redacted**

Redacted UP Response, Highly Confidential Exhibit No. 7.

3. Once UE signed the UE Settlement Agreement, it executed a verified statement for submission to the Board. Signed under oath, that statement provides:

> UE and UP have reached an agreement that will insure on-going competition for rail service to the Labadie Plant after the merger. Because of this agreement, the Union Pacific/Southern Pacific merger is in the best interests of Union Electric, and UE supports the merger application. UE Petition, Exhibit No. 19.

4. In its petition filed two months ago, UE continued to treat the settlement agreement as a binding agreement, even while attempting to disavow it. UE admits that the purpose of the negotiations was "to address the loss of SP access to Labadie with the UP/SP merger." UE Petition, p. 8. UE admits that the agreement it signed was just that -- an agreement: "UE believed it had reached an agreement." UE Petition, p. 13; see also id., p. 14: ("Because UE believed an agreement had already been reached . . .").

After devoting six months to hard-fought negotiations, UE now contends that the agreement did not resolve how to replace SP access to Labadie. Instead, UE contends that it can pick and choose between its rights under the UE Settlement Agreement and an entirely different replacement for the loss of SP service. UE insists it remains free to demand BNSF direct service to the Labadie plant and to disregard its agreement with UP.

UE's new interpretation of the UE Settlement Agreement is not only inconsistent with the parties' contemporaneous statements, it makes no sense. If UE believed that it had

retained a right to use BNSF direct service, as it now contends, why did it act to the contrary -- spending six months arguing with UP about the adequacy of Gateway Western, Illinois Central, and haulage arrangements as competitive alternatives? If UE believed that it remained free to demand BNSF direct servic , why did it negotiate an unnecessary alternative? If UE remained free to disregard the agreement by demanding BNSF service whenever it wished, why did UE tell the Board that it had negotiated a competitive replacement for SP service? According to UE's current theory, UE already had that. Any why would UE have any interest in such a one-sided deal?

More generally, if this agreement was not intended to resolve the parties' differences about how to replace SP competition, what was the purpose of the agreement? Nowhere in UE's filings does UE articulate a coherent purpose for this agreement that is consistent with its present position.

BNSF's position is no more credible. BNSF acknowledges that it was "agreeable" to UP "entering into an arrangement with" UE to preserve rail competition at Labadie. BNSF Reply, p. 4 & n.4. In fact, BNSF specifically agreed with UP that UP and and its customer could reach a separate agreement, even if it excluded BNSF. UP/SP-22, Rebensdorf V.S., p. 297 n.1. Having agreed that UP and UE could structure a separate agreement to replace SP's competitive presence, BNSF now argues that the UE Settlement Agreement should be disregarded. In short, BNSF refuses to stand behind its own commitment to UP. BNSF offers no reason for disregarding its agreement.

The UE Settlement Agreement has been performed and is enforceable. UE's contention that the agreement was merely an agreement to agree (UE Reply, p. 8) is wrong as

a matter of law. The parties substantially performed the agreement. An agreement that has been substantially implemented is fully enforceable. Southwestern Bell Yellow Pages, Inc. v. Robbins, 865 S.W.2d 361, 367 (Mo. App. Ct. 1993) ("Under the doctrine of substantial performance, if a party is found to have received the substantial benefit of the bargain, the contract will be enforced."). Thus, UE's citations of Missouri law regarding contracts that have not been performed are irrelevant.

The parties implemented the agreement to UE's great benefit. UE carried out its obligation under the UE Settlement Agreement by providing a verified statement supporting the UP/SP merger. UP carried out all three of its obligations:

Redacted

Highly Confidential Exhibit No. 16,

Redacted

[4] UP Reply, Highly Confidential Exhibit No. 16. As UE admits, it had paid less than half this amount by 1996. UE Reply, p. 6. Thus, UP forgave liquidated damages of up to $4 million.[5]

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[4] UE asserts without factual support that SP never invested funds to rehabilitate the line. UE Reply, p. 6. In fact, this line was in such poor condition in 1989 when UE and SP signed their contract that SP had to spend funds to rehabilitate it. UP Reply, Highly Confidential Exhibit No. 16, p. 1. Otherwise, the line could not have carried coal trains.

[5]

Redacted

Second, UP relieved UE from its commitments and obligations under UE's contract ICC-DRGW-C-1379 with SP. As UP explained in the UP Response, the parties agreed to cancel this contract in a side agreement, not as part of the express terms of the UE Settlement Agreement. UP Response, p. 10. UE does not dispute UP's recounting of these facts. UE does not dispute that it saved at least $12 million in liquidated damages or avoided an obligation to purchase Colorado coal it did not want.[6] Instead UE invokes the parole evidence rule, shielding the substance of the parties agreement behind an inapplicable technical rule of evidence.[7] The Board should accept as undisputed that UE saved $12 million or more when UP released it from this SP contract as part of the settlement negotiations.

Third, UP complied with its obligations under the Settlement Agreement by offering proportional rates for use in conjunction with BNSF service via the Kansas City and St. Louis gateways.

Accordingly, UP tendered substantial and valuable performance to UE. UE is not now free to disregard the Settlement Agreement.

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[6] **Redacted**

[7] Even in a Missouri court of law, the parole evidence rule would not bar introduction of a contemporaneous, separate agreement, such as these parties' side agreement to relieve UE of its obligations to SP. Spencer v. Union Pac. R.R., 916 S.W.2d 838, 840 (Mo. Ct. App. 1996). And, of course, UP carried out its promise to UE.

UP did not deny service under the UE Settlement Agreement. UE contends that it should be free to disregard the UE Settlement Agreement because the parties never signed a rail service contract under which UP would carry coal at the agreed proportional rates. The primary reason for this failure is that UE failed to complete the rail services contract for several years. Both parties knew in 1996 that they would need a rail service contract to govern the physical movement of trains on UP. UP Response, Klym V.S., p. 5. Shortly after consummating the UP/SP merger, UP fulfilled its obligations under the UE Settlement Agreement by tendering to UE a draft rail service contract. UP Response, Highly Confidential Exhibit Nos. 11 & 14. UE failed to respond to UP's draft for almost three years.

Despite its own failure to act for almost three years, UE now claims that UP failed to carry out the UE Settlement Agreement in three ways:

First, UE says that UP insisted on altering the terms of the UE Settlement Agreement in the draft rail service contract. E.g., UE Reply, p. 5. This allegation, made repeatedly, is inaccurate. UP did not request any change in the terms of the UE Settlement Agreement. Instead, UP merely acceded to a UE demand for a change in the rate escalation provision. Klym V.S., p. 8. UE wanted this change, not UP.

Second, UE criticizes UP for moving trains for other customers under short-term term sheets. UE Reply, p. 6 n.5. UP offered to provide a short-term arrangement for UE, but UE ignored the offer. UP Response, Highly Confidential Exhibit No. 13.

Third, UE claims that UP refused to allow UE to use the UE Settlement Agreement during the UP service crisis. UE Reply, p. 5. This is untrue. Within 24 hours of

UE's request, UP responded by asking UE to complete the rail transportation contract that had been languishing at UE for more than a year. UE Response, Highly Confidential Exhibit No. 21. Within a week, UP also offered UE an interim contract under which UE could start moving trains at once. UP Response, Highly Confidential Exhibit No. 12. UE did not use this opportunity.

The failure to conclude a rail service contract therefore did not nullify the UE Settlement Agreement. The parties had already implemented the UE Settlement Agreement to UE's great financial benefit. UP then used its best efforts to conclude a rail transportation contract. UE should not be allowed to nullify the agreement by its own failure to act in a timely manner.

C. UP Has Never "Deceived" the Board or UE

Representations to the Board. Contrary to UE's claims, UP has not misrepresented the facts or its positions to the Board. We respond to each of UE's accusations:

- UE first asserts that UP "misrepresents" to the Board that the parties' agreement was a settlement. UE Reply, p. 2. As explained above, however, UP's description of the agreement as resolving how to replace SP service is accurate, consistent with UE's own statements, and the only plausible purpose of the agreement. UE itself described the agreement to the Board as providing a satisfactory competitive replacement for SP service.
- UE next contends that UP is guilty of "hiding" from the Board "the truth" that UE received unique treatment under the BNSF Settlement Agreement. UE Reply, p. 4. UP could not have been more open. John Rebensdorf,

UP's Vice President-Strategic Planning, described UE's treatment in detail in the UP/SP application. UP/SP-22, Rebensdorf V.S., p. 297 n.1. Parties cross-examined Mr. Rebensdorf about the special treatment of the Labadie plant during his deposition.

- Finally, UE asserts that UP misled the Board by claiming that UE received a $4 million benefit when UP released it from an SP contract. As Exhibit No. 16 shows, however, UE would have owed liquidated damages had UP not released UE from the contract.

Representations to UE. In approximately a dozen passages, UE accuses UP of misleading, deceiving and manipulating it into believing that it was not entitled to direct access from BNSF under the BNSF Settlement Agreement. E.g., UE Reply, pp. 3-4. These allegations are inaccurate and intemperate in equal measure. Throughout six months of negotiations, UP accurately portrayed the BNSF Settlement Agreement to UE. UE also knew that it had a powerful legal alternative to participating with UP: It could refuse to negotiate a separate agreement with UP, oppose the UP/SP merger and obtain relief from the Board.

A sophisticated corporation represented by counsel, UE was an informed, tenacious negotiator. It was fully able to protect its own interests without depending on UP for guidance. Nevertheless, UP provided accurate information:

- As early as September 7, 1995, six months before UE signed the UE Settlement Agreement, UP stated its negotiating objective to UE. UP wanted to replicate but not expand the competition UE then enjoyed. UP's stated goal was to provide UP **Redacted** UE concedes

that it understood UP's position. UE Petition, Highly Confidential Exhibit No. 10.

Redacted

UE Petition, Highly Confidential Exhibit No. 12.

- On November 30, 1995, more than three months before UE signed the UE Settlement Agreement, UP filed the UP/SP merger application. As noted above, UP provided explicit, public testimony describing treatment of the Labadie plant under the agreement with BNSF. It explained that UP would negotiate a separate agreement with UE, possibly including service by a railroad other than BNSF. UP hid nothing from UE.
- On December 6, 1995, three months before UE signed the UE Settlement Agreement, UP delivered a copy of the BNSF Settlement Agreement to UE. UP explained to UE the unique treatment of the Labadie plant in that Agreement:

Redacted

UP Response, Highly Confidential Exhibit No. 10.

- For the next three months, UP and UE continued to negotiate under UE's threat to oppose the merger. At any time during this process, UE could have halted the negotiations and turned to the STB, as it had threatened.
- Instead, UE signed the UE Settlement Agreement in March 1996. By doing so, UE not only obtained a competitive alternative to SP service in the form of proportional rates, but also relief from two SP contracts with liquidated damages clauses.

Thus, while UE now claims deception, UE knew the stakes and knew its options.[8] It drove a hard bargain and got what it wanted, including relief from $16 million in liquidated damages. We urge the Board to discount UE's rhetoric about UP's behavior.

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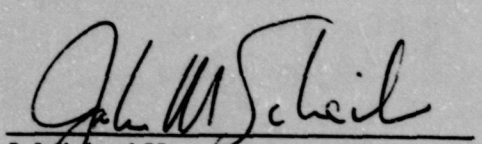
[8] UE claims that UP "deceived" UE regarding the unique status of the Labadie plant because UP issued an overly broad press release about the BNSF Settlement Agreement. UE Reply, pp. 2 & 4. This "deception" lasted exactly three days. UP admitted that it had issued an overly broad press release and corrected its position promptly. UE Petition, p. 9. In an October 25, 1996 letter, UE confirmed that UP had corrected the statement. UE Highly Confidential Exhibit No. 12, p. 2.

CONCLUSION

UP remains committed to the competitive alternative UE and UP negotiated in the UE Settlement Agreement. That alternative not only allows UE to obtain competing coal service but also was worth millions of dollars to UE. We ask the Board to encourage UE to exercise its rights under that agreement. UP stands ready to cooperate.

Respectfully submitted,

James V. Dolan
Lawrence E. Wzorek
Beverly S. Greer
Union Pacific Railroad Company
1416 Dodge Street
Omaha, NE 68179
(402) 271-4575



J. Michael Hemmer
John M. Scheib
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-6000

Attorneys for Union Pacific Railroad Company

March 3, 2000

HIGHLY CONFIDENTIAL

EXHIBIT NO. 16

THIS EXHIBIT IS

HIGHLY CONFIDENTIAL

AND HAS BEEN FILED UNDER SEAL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of March, 2000, a copy of the foregoing "Reply of Union Pacific Railroad Company to AmerenUE's Motion For Leave" was delivered by hand to:

John R. Molm
Sandra L. Brown
Troutman Sanders LLP
1300 I Street, N.W.
Suite 500 East
Washington, D.C. 20005-3314

Erika Z. Jones
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006-1101

and delivered by regular mail, postage prepaid, to all other parties of record in this proceeding.

John M. Scheib

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UNION PACIFIC RAILROAD COMPANY'S RESPONSE TO AMERENUE'S PETITION FOR CLARIFICATION AND ENFORCEMENT OF MERGER CONDITIONS

James V. Dolan
Larry E. Wzorek
Beverly S. Greer
Union Pacific Railroad Company
1416 Dodge Street
Omaha, NE 68179
(402) 271-5357

J. Michael Hemmer
John M. Scheib
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-6000

Attorneys for Union Pacific Railroad Company

February 8, 2000

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UNION PACIFIC RAILROAD COMPANY'S RESPONSE TO AMERENUE'S PETITION FOR CLARIFICATION AND ENFORCEMENT OF MERGER CONDITIONS

Union Pacific Railroad Company ("UP") offers this response to AmerenUE's ("UE") Petition for Clarification and Enforcement of Merger Conditions ("Petition"), filed January 19, 2000. UP concurs with UE's Petition in one respect, but considers the Petition misleading and inequitable in others.

SUMMARY

UE seeks three declarations. First, it wants the Board to declare that UE's electrical generating plant at Labadie, Missouri, was a "2-to-1" shipper at the time of the UP/SP merger, because it was served by UP and Southern Pacific Transportation Company ("SP") and no other railroad. Second, UE seeks a declaration that, as a "2-to-1" shipper, it is entitled to

demand direct service to the Labadie plant by Burlington Northern Santa Fe Railway Company ("BNSF") under the BNSF Settlement Agreement.[1] Third, UE wants to apply Decision No. 44's "contract modification condition" to cancel 50 percent of its commitment to ship via UP under a transportation service contract that the parties substantively revised and extended in 1999.

Although UE attempts to portray UP as a heavy-handed adversary of competition that ignores the Board's merger orders, the truth is far different. UP is in full compliance with all UP/SP merger conditions. UE is attempting to persuade the Board to release it from two arms-length agreements from which UE has already reaped millions of dollars in benefits, a fact UE did not disclose in its Petition. The Board should reject UE's Petition and instruct UE to honor its commitments.

That UE qualified as a "2-to-1" shipper at the time of the UP/SP merger is undisputed. UE is not, however, entitled to demand direct BNSF service to its Labadie plant under the BNSF Settlement Agreement. After BNSF rejected the opportunity to purchase a rail line to Labadie, BNSF and UP specifically agreed that the Labadie plant would receive unique treatment, and that UP would negotiate directly with UE to provide UE an acceptable competitive alternative to UP service. After protracted negotiations in which UE rejected numerous options, the parties signed a settlement agreement (the "UE Settlement Agreement") that provided a competitive alternative acceptable to UE. It provided proportional rates for UE's use in conjunction with BNSF coal service via Kansas City or St. Louis. The UE Settlement

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[1] The Board described the BNSF Settlement Agreement in Decision No. 44, p. 12 n.15.

Agreement also relieved UE of more than $15 million in liabilities under contracts with SP. The Board should not release UE from this voluntary and highly beneficial settlement agreement to which UP remains obligated.

UE also is not entitled to walk away from a coal transportation contract that it amended and extended less than a year ago. Under the Board's contract modification condition in Decision No. 44, "2-to-1" shippers were entitled -- after notice from UP -- to open at least 50 percent of their contract volume commitments to competitive bidding. Because of its unique treatment under the BNSF and UE Settlement Agreements, however, UE was not entitled to exercise this condition. UE behaved for more than three years consistently with that understanding. Without ever mentioning that it harbored an intent to apply the condition, UE in 1999 induced UP to agree to major retroactive changes to a coal transportation contract, including reduced rates and an extended term. A few months later, UE surprised UP by demanding to be relieved of the deal it had just made. We respectfully submit that the Board did not design its contract modification condition to reward a shipper for what appears to be sandbagging UP.

In Part I of this response, we agree with UE that the Labadie plant was a "2-to-1" shipper at the time of the UP/SP merger. In Part II, we explain UE's unique treatment under the BNSF Settlement Agreement and UE's voluntary agreement to a separate settlement with UP. In Part III, we address UE's inequitable attempt to evade a revised contract it just signed and from which it obtained valuable concessions that UP granted only because it believed UE was making a genuine commitment.

I. THE LABADIE PLANT WAS A "2-TO-1" SHIPPER WHEN SP AND UP MERGED

UP agrees that the Labadie plant was a "2-to-1" shipper at the time of the UP/SP merger. UP/SP-231, April 29, 1996, Rebuttal Verified Statement of John H. Rebensdorf, p. 7. UP transported coal, as it does today, from the Powder River Basin ("PRB") in Wyoming via North Platte and Kansas City to the Labadie plant, using the route shown on Map No. 1. As we also depict on Map No. 1, SP transported coal from Colorado to the Labadie plant via Pueblo and Kansas City. From Kansas City to St. Louis, SP trains used overhead trackage rights over UP, obtained in the UP/MP/WP merger. From St. Louis, SP operated over its own line (the "SP line"), a former Rock Island St. Louis-Kansas City segment, to Labadie.[2] Significantly, SP did not have a single-line route to transport PRB coal to the Labadie plant; that transportation would have required interline service with BNSF.[3]

II. THE BOARD SHOULD NOT ALLOW UE TO REPUDIATE A SETTLEMENT AGREEMENT THAT PRESERVED EFFECTIVE COMPETITION AND FREED UE FROM TWO EXPENSIVE CONTRACTS

UE is not entitled to BNSF service into the Labadie plant under the BNSF Settlement Agreement. In a unique understanding that UP described to the Board, BNSF and

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[2] From St. Louis to Owensville, Missouri, a distance of about 92 miles, the SP line is in service. From Owensville to Kansas City, the line has been out of service for almost 20 years.

[3] In 1995, the Labadie plant used coal from both Colorado and the PRB, although it was converting to using only PRB coal. Verified Statement of Jerry P. Klym, UP Highly Confidential Exhibit No. 1, p. 2 ("Klym V.S."). UE was trying to resell the coal from its Colorado coal supply agreements to other parties. UP Highly Confidential Exhibit No. 4. Today, the Labadie plant burns only PRB coal.

UP agreed that UP would work directly with UE to provide a competitive alternative at the Labadie plant, even if that alternative was not BNSF. UP's efforts were successful. UE and UP executed the UE Settlement Agreement, which saved UE millions of dollars and secured a competitive alternative to the Labadie plant in the form of proportional rates. UE offers no legitimate basis for voiding an agreement under which it profited handsomely.

A. BNSF and UP Agreed to Give the Labadie Plant Unique Treatment in the BNSF Settlement Agreement

When UP and SP agreed to merge in 1995, they knew that they would need to replace competition their merger would eliminate at "2-to-1" points. Leading that effort, UP's Vice President-Strategic Planning, John Rebensdorf, negotiated with several railroads to provide service to those shippers. As he explained in his verified statement in the UP/SP merger application, UP decided to negotiate a sweeping settlement agreement with BNSF, under which BNSF would provide service to all "2-to-1" shippers. UP/SP-22, Verified Statement of John H. Rebensdorf, November 30, 1995, p. 297 n.1.

UP expected BNSF to provide service directly to the Labadie plant over the SP line. During the negotiations with BNSF, UP offered to sell the SP line to BNSF, along with a number of other SP and UP line segments. Verified Statement of John H. Rebensdorf, UP Highly Confidential Exhibit No. 2, pp. 2-3 ("Rebensdorf V.S."). BNSF purchased three of the line segments, but it decided not to buy the SP line. Id., p. 3. UE's repeated assertion that UP staunchly opposed BNSF service to the Labadie plant is thus incorrect, although UE may be unaware of this history. UP invited BNSF to buy a line to the Labadie plant, but BNSF refused.

BNSF and UP then agreed to treat the Labadie plant as unique among the "2-to-1" shipping locations. Id. BNSF and UP agreed that UP would negotiate directly with UE to find a competitive option acceptable to the shipper. Id. As UP's representative John Rebensdorf testified in the UP/SP merger application, BNSF was to serve every "2-to-1" shipper save one: "The one exception is Labadie, Missouri, where we are working directly with the '2-to-1' shipper, Union Electric, to negotiate an arrangement to preserve two-railroad competition." UP/SP-22, Verified Statement of John H. Rebensdorf, November 30, 1995, p. 297 n.1. BNSF agreed with UP that the competitive solution might not involve BNSF service at all. As Mr. Rebensdorf explained in 1995. "BN/Santa Fe has agreed not to object to UP/SP seeking an arrangement, even with another railroad, to preserve rail competition for Union Electric." Id. (emphasis added). Under their "omnibus clause," BNSF and UP remained committed to ensuring that the Labadie plant would receive competitive service one way or another, but not necessarily by BNSF. Id.

Based on its recent demand letters to UP, we expect BNSF to support UE's petition for access to the Labadie plant, but BNSF's position would be untenable. Having rejected an opportunity to purchase a rail line to the Labadie plant, BNSF then agreed with UP that UP could pursue a separate negotiated settlement with UE to provide a competitive alternative to UP service, even if that alternative did not involve BNSF access to the Labadie plant. UP did precisely what the parties agreed. BNSF has no right to renege on its agreement with UP by demanding to serve the Labadie plant today.

B. UE Signed a Settlement Agreement That Preserved Competition and Saved UE Over $15 Million

As BNSF and UP negotiated their agreement, UP representatives met with UE on September 7, 1995 to discuss ways to address the post-merger loss of SP service to the Labadie plant. Klym V.S., p. 2. UP sought to replicate SP's competition to the plant, which involved service over the SP line via St. Louis.

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[4] UP's Sedalia Subdivision between St. Louis and Kansas City is 283 miles long. UP also uses its 161-mile River Subdivision for directional running in tandem with the Sedalia Subdivision.

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[5] In the BNSF Settlement Agreement, BNSF and UP used proportional rates to provide a competitive alternative at BNSF points in the Pacific Northwest. Rebensdorf V.S., p. 4.

Redacted

The parties executed the UE Settlement Agreement on March 11, 1996. UP Highly Confidential Exhibit No. 7. Although the parties recognized that they would need to execute an implementing transportation agreement to cover movement of trains on UP's line, they clearly viewed the UE Settlement Agreement as resolving UE's competitive concerns about the UP/SP merger. Klym V.S., p. 5. That is what UE told the Board. On March 25, 1996, UE informed the Board that "UE and UP have reached an agreement that will insure on-going competition for rail service to the Labadie plant after the merger. Because of this agreement, the Union Pacific/Southern Pacific merger is in the best interests of Union Electric, and UE supports the merger application." UP Exhibit No. 9.

UE argues that the UE Settlement Agreement is merely an unenforceable agreement to agree. Under governing Missouri law, however, an agreement under which UE

saved millions of dollars is fully enforceable. The need for an implementing transportation contract does not void the contract. Under Missouri law, an agreement to agree on unresolved issues, even on terms as essential as price, does not undermine the validity of a contract. Allied Disposal, Inc. v. Bob's Home Service, Inc., 595 S.W.2d 417, 421 (Mo. Ct. App. 1990). What is required is mutuality of obligation -- where one party agrees to do one thing and the other party agrees to do some other thing. Cape Motor Lodge, Inc. v. City of Cape Girardeau, 706 S.W.2d 208, 214-15 (Mo. Ct. App. 1986).

The UE Settlement Agreement is a valid contract that imposes mutual obligations on UE and UP. UP has already satisfied many of its obligations. UE agreed to support the UP/SP merger in exchange for a competitive alternative of its own choosing and

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The UE Settlement Agreement included all material terms to address UE's "2-to-1" status at the Labadie plant. UP Highly Confidential Exhibit No. 8. The UE Settlement Agreement is therefore a valid contract made for consideration, and there is no reason for the Board to abrogate it.

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UE cannot claim that it entered into the UE Settlement Agreement because it had no alternative. UE was anything but powerless in 1995 and 1996. It is a major shipper, with coal traffic worth millions of dollars annually to the railroads. UE could have terminated the negotiations at any time and asserted its rights in the UP/SP merger proceeding. As a "2-to-1"

shipper, it would have received relief. It also was fully aware of the BNSF Settlement Agreement and UP's express commitment to ensure a competitive alternative for the Ladadie plant.[6] UE decided not to litigate because it preferred the benefits of the UE Settlement Agreement. The UE Settlement Agreement provides the competitive alternative and enormous savings that UE wanted in 1996, and it should be held to its bargain.

Members of the Board have urged parties to settle their differences and avoid unnecessary litigation. Those recommendations further longstanding Board policies favoring private resolution of disputes. Granting UE's Petition would undermine those policies. It would encourage others to break settlement agreements and to resort to litigation in the first instance.

C. UP's Sale of the SP Line Has No Bearing on UE's Petition

UE claims that UP's sale of the SP line "plays into UE's '2-to-1' status," but the claim is both inaccurate and disingenuous. Petition, pp. 16-17. It is inaccurate because UP began negotiations to sell the SP line only after UP and UE had agreed to the UE Settlement Agreement. It is disingenuous because it was UE, not UP, that had blocked using the SP line as

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[6] The BNSF Settlement Agreement was made public on November 30, 1995, as an attachment to the Verified Statement of John Rebensdorf, and again on December 25, 1995, as an attachment to BN/Santa Fe's Comments on the Primary Application. UP/SP-22, Verified Statement of John H. Rebensdorf; BN/Santa Fe's Comments on the Primary Application, BN/SF-1, filed Dec. 19, 1995. On December 6, 1995, UP sent a copy of the BNSF Settlement Agreement to UE with a cover letter stating that it was for UE's use in evaluating a settlement regarding the Labadie plant. UP Exhibit No. 10. UE and UP signed the UE Settlement Agreement more than three months later.

UE asserts that UP's statements regarding the scope of the "omnibus" provision detrimentally affected UE. However, Mr. Rebensdorf's testimony explained the unique treatment of the Labadie plant under the BNSF Settlement Agreement. UE did not object.

a competitive route to the Labadie plant. UE or another railroad could have bought the SP line to provide competitive service to Labadie, but UE was not interested.

UP was unwilling to begin negotiations for sale of the SP line until after it reached an acceptable agreement with UE. Rebensdorf V.S., p. 4. UP waited because it wanted to be able to use the line as a competitive option for service to the Labadie plant if UE withdrew its opposition. After UP and UE had agreed on the UE Settlement Agreement on March 11, 1996, UP immediately opened negotiations with an interested purchaser. Id. Negotiations began two days later.

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. UE acknowledges that the purchasers were desperately short of funds. Petition, p. 16. In fact, UE had to bail the purchasers out of default on their agreement to purchase the line. Id., p. 4.

D. UP Remains Ready to Apply the UE Settlement Agreement

Frankly, neither party has always been diligent in developing the implementing transportation contract for the UE Settlement Agreement. For well over two years, UE failed to respond to numerous UP requests for information to finalize the transportation contract. UP failed to respond as quickly as it should have last fall. UP is ready to finalize an implementing

transportation contract whenever UE wants to proceed, and it is prepared to offer an interim contract -- as it did in 1998 -- under which service could begin tomorrow. Klym V.S., p. 7.

UP unsuccessfully sought UE's cooperation to implement the UE Settlement Agreement for more than two and one half years. In December 1996, UP sent UE a draft of the implementing transportation contract. UP Highly Confidential Exhibit No. 11. Despite repeated inquires, UE did not provide comments on that draft until late 1999. UP's efforts included the following:

- On April 24, 1998 UP sent UE a letter requesting UE's comments on the draft transportation agreement, which stated:

  "We sent you a draft contract in December 1996, asking for your comments, but have received none. There are still items in that draft that need to be finalized. If you have no comments and are okay with the basic draft, please let me know and we will finalize it and send you execution copies." (UE Highly Confidential Exhibit No. 21);

- On April 27, 1998, UP sent UE a Memorandum of Understanding for short term transportation of coal under the UE Settlement Agreement (UP Highly Confidential Exhibit No. 12);

- On April 29, 1998, UP sent UE another letter requesting its cooperation (UE Highly Confidential Exhibit No. 22); and

- On May 1, 1998 UP offered a five-month interim contract for coal movements to Labadie pursuant to the UE Settlement Agreement (UP Highly Confidential Exhibit No. 13).

UE could have moved coal under that interim contract for five months, which UP thought was more than enough time to finalize the implementing contract. Klym V.S., pp. 6-7. UE did not use the contract or even acknowledge its existence.

UE finally responded with comments on the implementing contract in August 1999. UP Highly Confidential Exhibit No. 14. UP studied UE's proposals and developed a revised draft that UP is prepared to discuss with UE at UE's convenience.

E. Section 8(l) of the BNSF Settlement Agreement Does Not Give UE a Right to Demand Direct BNSF Rail Service

UE argues that, because the SP line is unavailable "through no fault of UE or BNSF" (Petition, p. 22), UE is entitled to BNSF service under Section 8(l) of the BNSF Settlement Agreement. As we have shown, UE's premise is mistaken because both BNSF and UE rejected opportunities for competing service on the SP line. Even if that were not so, Section 8(l) does not apply to UE.

By its express terms, Section 8(l) is inapplicable. Under Section 8(l), UP must give BNSF an alternative when UP's lack of legal authority makes it impossible for UP to grant any "trackage rights granted under this agreement." UP did not grant BNSF any trackage rights to the Labadie plant under the BNSF Settlement Agreement. Instead, BNSF and UP agreed that UP would develop a separate settlement agreement with UE. UP and UE did so, and that agreement involved no trackage rights for BNSF. Since BNSF obtained no trackage rights to Labadie under the BNSF Settlement Agreement or the UE Settlement Agreement, the provision UE quotes is irrelevant.

III. THE BOARD SHOULD REQUIRE UE TO HONOR ITS EXTENDED AND AMENDED CONTRACT TO SHIP COAL ON UP

UE wants the Board to release UE from its obligations with respect to 50 percent of its volume commitment in contract ICC-WRPI-C-0080, under which UE promised to ship coal via UP from the PRB to the Labadie plant. UE claims that, because the parties signed the original contract before the UP/SP merger, UE is entitled to this relief under the "contract modification condition" imposed in Decision No. 44, p. 146, and defined in Decision No. 57. The condition required UP to notify shippers immediately that they were entitled to use the condition, and UP did so. The parties agree that UP did not notify UE, and to the best of UP's knowledge UE never before last month asserted a right to apply the condition to this contract.

UE is not entitled to use the contract modification condition. By their conduct, it is evident that neither UP nor UE assumed at the time of the merger that the contract modification condition applied to UE. More importantly, even if UE had been a beneficiary of the contract modification condition, it cannot apply that condition more than three years later to a contract that UP and UE modified in a number of substantive ways, many of which benefitted UE. It would be highly inequitable for the Board to allow a shipper to remain completely silent about the contract modification condition for more than three years, extract concessions and make new promises in a contract amendment years after the UP/SP merger, and then spring the condition on an unsuspecting railroad after obtaining the benefits of the amendment. Yet that is the conduct UE wants the Board to endorse.

A. The Contract Modification Condition Does Not Apply to UE

The contract modification condition does not apply to UE because UE was the only "2-to-1" shipper for which BNSF did not replace UP or SP service. Instead, UE and UP reached a separate settlement, contemplated by BNSF and UP, under which they agreed to replace competition using proportional rates **Redacted**

Both UP and UE acted in accordance with this understanding. Under the contract modification condition, UP was obligated to notify every eligible shipper about the condition immediately after consummation of the merger in September 1996. UP did so. UP did not send a notice to UE because UP did not believe that UE was entitled to exercise the condition. Klym V.S., p. 6. UP then filed a verified report, which it served on every party, describing its efforts to notify all eligible shippers. UP/SP-280, Verified Statement of Jim A. Shattuck, pp. 1-2.

UE did not protest or complain. Nor did BNSF, with its well-established proclivity for complaining about every perceived injustice. UE did not allege that it was entitled to a notice or that it was entitled to cancel its contract, even after UP's report. Klym V.S., p. 6.

Of even greater significance, when the Board issued Decision No. 57, the Board recited that all shippers had been notified, and it directed UP to send out another notice to all eligible shippers. Decision No. 57, p. 13. Again, UP did not send a notice to UE, and again UE did not object. If UE believed that it was entitled to be released from 50 percent of its shipping commitment under contract ICC-WRPI-C-0080, it had an obligation to speak up after the Board's order. It chose instead to remain silent, reflecting its own understanding that the condition did not apply and causing UP to act on that understanding.

Applying the contract modification condition to the UE contract would not have served any of the purposes for which the Board imposed the condition. The Board imposed the condition in response to concerns that UP and SP had "locked up so much 2-to-1 traffic in long-term contracts" that BNSF would not have enough traffic on its new trackage rights "in the short run." Decision No. 57, p. 5. Had UE been able to shift half of its coal traffic to BNSF, however, none of that coal would have moved over BNSF trackage rights on UP. Instead, the coal would have moved on BNSF mainlines between the Powder River Basin and either Kansas City or St. Louis. Klym V.S., p. 6. Those routes were carrying so much traffic that BNSF was at the time spending large sums of capital to expand capacity. It did not need to jump-start its business on those tracks.

Releasing UE from its obligations under the UP contract would be even less sensible now. The Labadie coal would not run over any BNSF trackage rights on UP. Moreover, as the Board said in Decision No. 57, its concern was about "the short run." More than three years after the merger, we are far beyond "the short run." Only last month, BNSF applauded itself for exceeding its own expectations of the amount of traffic it would obtain for its UP/SP trackage rights. BNSF Quarterly Progress Report, BNSF-PR-14, Jan. 18, 2000, p. 2. As BNSF justly bragged, its trackage rights revenues are now twice those of a Class I railroad. Id. at 29.

B. UE Is Not Entitled to Reopen a Contract That the Parties Recently Modified and Extended

Even if the contract modification condition had been applicable to contract ICC-WRPI-C-0080, it no longer is. To be sure, a shipper eligible to use the contract modification

condition is entitled to do so for the duration of that contract. Decision No. 57, Guideline No. 5. However, UE and UP last year performed major surgery on this contact.

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UE should not be allowed to create a substantively different contract, accept the benefits of the amendments and then walk away from its commitments. UE's proposed conduct is especially inequitable in light of its failure, for more than three years, to disclose that it believed (if that was the case) it was entitled to exercise the condition.

UP entered into negotiations to modify the contract only because it believed UE would honor the contract -- all of it. Klym V.S., p. 7. UP would not have agreed to the contract amendments we describe below had it known that UE harbored an intent to cancel half of its commitments. Id. UP thus relied on UE's silence in the face of at least an ethical duty to speak.

If the Board were to look to Missouri law, which governs ICC-WRPI-C-0080, it would treat the amended contract as a new contract. Under Missouri law, substantial modifications of a contract create a new contract.[7] Goldstein & Price L.C. v. Tonkin & Mondl, L.C., 974 S.W.2d 543,551 (Mo. Ct. App. 1998); E.A.U., Inc. v. R. Webbe Corp., 794 S.W.2d 679, 686 (Mo. Ct. App. 1990). On that basis, the contract modification condition no longer applies.

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[7] Addendum Three states that "nothing herein contained shall be construed as amending or modifying [the contract] except as herein provided." (Emphasis added). UE claims that that statement means Addendum Three did not create a new contract. Petition at 21. To the contrary, this statement demonstrated that Addendum Three modified the contract as required under Missouri law to create a new contract.

The condition should also be inapplicable because the extent of the amendments and their benefits to UE. The parties' 1999 amendments, embodied in Addendum Three, modified the contract in numerous ways:

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Although UE would like the Board to believe that the 1995-96 negotiations between two sophisticated companies yielded an agreement that only benefitted UP, UE benefitted enormously from the modifications in Addendum Three.

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UE will argue that the language of Guideline No. 8 in Decision No. 57, permitting contracting parties to "modify any term of any contract subject to the contract modification condition," means that the condition is unaffected by subsequent substantive amendments. The history of this language shows a different purpose. In a September 3, 1996 petition, BNSF argued that UP must open for competitive bidding any contract that UP proposes to amend. BN/SF-65, p. 9. The Board rejected this petition, allowing the parties to a contract to amend it without opening the contract to competitive bidding. Decision No. 57, p. 11 n.40. Thus, the Board did not address the question presented here: whether a substantive amendment three years later of a contract that the parties had treated as not subject to the condition can be reopened by the shipper.

UP urges the Board not to apply the contract modification condition in a situation where the parties originally understood it to be inapplicable, where it would not serve the condition's purpose, and where subsequent conduct would render it inequitable. UE behaved as though the contract modification condition did not encompass the Labadie plant and did

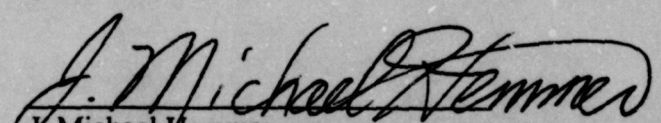
not complain when UP provided multiple notices of the condition. The Board should not countenance UE's conduct of negotiating favorable contract modifications and then repudiating its agreement.

IV. CONCLUSION

UE is not entitled to evade the agreements it voluntarily signed -- the UE Settlement Agreement that gave UE a competitive alternative after the UP/SP merger, and the revised contract created by Addendum Three. UE benefitted from these contracts, and UP relied upon them, relieving UE of significant liabilities. Accordingly, UP respectfully requests that the Board deny UE's Petition.

Respectfully submitted,

James V. Dolan
Larry E. Wzorek
Beverly S. Greer
Union Pacific Railroad Company
1416 Dodge Street
Omaha, NE 68179
(402) 271-5357



J. Michael Hemmer
John M. Scheib
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-6000

Attorneys for Union Pacific Railroad Company

February 8, 2000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of February 2000, a copy of the foregoing "Union Pacific Railroad Company's Response to AmerenUE's Petition for Clarification and Enforcement of Merger Conditions" was delivered by hand to:

John R. Molm
Sandra L. Brown
Troutman Sanders LLP
1300 I Street, N.W.
Suite 500 East
Washington, D.C. 20005-3314

Erika Z. Jones
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006-1101

and delivered by regular mail, postage prepaid, to all other parties of record in this proceeding.

J. Michael Hemmer

US OFFICE PRODUCTS

VERIFIED STATEMENT OF

OF

JERRY P. KLYM

My name is Jerry P. Klym. I am Business Director-Energy for Union Pacific Railroad Company ("UP"). I have worked in the Marketing and Sales Department at UP since 1974, holding various sales positions between 1974 and 1987. Since 1987, I have worked in the Energy Business Unit, where I am responsible for UP's commercial relationships with specific major coal burning utility customers. I became National Account Manager-Energy in 1987 and Market Manager-Energy in 1995. In my present position, which I received in 1996, I am responsible for marketing and contract negotiations for several of UP's major utility customers, including AmerenUE ("UE").

I have been involved with managing the UE account since September 1995, and I am familiar with the negotiations with UE that resulted in a settlement agreement ("UE Settlement Agreement"), which we called the Conceptual Framework.

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In this statement, I will discuss the UE Settlement Agreement, including aspects of the Agreement that UE does not mention. I will also explain why UP did not notify UE of the contract modification condition included in the Surface Transportation Board Decision No. 44, which approved the merger of UP with Southern Pacific Transportation Company ("SP"). Then I will describe UP's frustrated efforts to implement the UE Settlement Agreement. Finally, I will

discuss Addendum Three to UP's long-term rail transportation contract (ICC-WRPI-C-0080) covering shipments of coal from the PRB to the Labadie plant. This addendum was executed by UP and UE in 1999, but applied retroactively to 1997.

A. The UE Settlement Agreement

When UP and SP announced their merger plans on August 4, 1995, UE's Labadie plant qualified as a "2-to-1" shipper because UP and SP served it. UP transported coal via North Platte and Kansas City to the Labadie plant, as shown on Map No. 1. SP transported Colorado coal from West Elk, Colorado, via Pueblo and Kansas City to St. Louis, using trackage rights over UP from Pueblo, Colorado, to St. Louis. Id. From St. Louis, SP moved the coal back west from St. Louis to the Labadie plant over its former Rock Island line (the "SP line"). Id.

As merger partners, UP and SP sought to preserve rail competition for the Labadie plant in a form comparable to UE's pre-merger options. As John H. Rebensdorf describes in his verified statement, UP originally offered to sell the SP line to BNSF, which would have enhanced UE's pre-merger competitive options by allowing BNSF to provide direct service to the Labadie plant from the PRB. BNSF turned down that offer. We worked with UE to identify another competitive alternative.

UP and UE began negotiating on September 7, 1995, long before UP and SP filed their merger application.

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On November 7, 1995, UP presented UE with a draft of the UE Settlement Agreement.

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. We then sent UE a revised draft on December 12, 1995

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On January 17 and February 27, 1996, UP gave UE additional drafts of the UE Settlement Agreement.

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On March 8, 1996, UP sent a final version of the UE Settlement Agreement. UP and UE executed this agreement, which was dated March 11, 1996. UP and UE knew that we still needed to agree on an implementing contract to provide for the UP transportation under the proportional rates.

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But we agreed that we had a settlement agreement. On March 29, 1996, UE filed with the Board, expressing its approval of the merger and acknowledging that its competitive concerns had been satisfied.

UP signed the UE Settlement Agreement only because we understood that UP and UE had resolved the "2-to-1" shipper issue on the basis of that agreement. We would not have signed this agreement without that understanding.

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B. Notice of the Right to Modify Contracts

The Board's Decision No. 44 approving the UP/SP merger permitted "2-to-1" shippers under the BNSF Settlement Agreement to open 50 percent of their contract

commitments to UP or SP to competitive bidding between UP and BNSF. As required by Decision No. 44, UP promptly sent notices to all qualified "2-to-1" shippers informing them of the contract modification condition.

UP did not notify UE of this option because the contract re-opening provision did not apply to UE. BNSF does not directly serve UE under the BNSF Settlement Agreement. UP and UE agreed to a different competitive option,

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To the best of our recollection, UE never complained to UP about not receiving a notice of contract modification, and it never asked for one. In more than three years since Decision No. 44, UE never once suggested that it had the right to reopen its contracts with UP until last month.

UE is mistaken about the scope of service it could have received if the re-opener provision had applied to the Labadie plant. BNSF would not have moved any coal over any BNSF trackage rights on UP. BNSF could have moved coal over its mainline between the PRB and either Kansas City or St. Louis.

C. UP's Efforts to Implement the Settlement Agreement

In December 1996 UP sent UE a draft transportation contract that implemented the UE Settlement Agreement. UE did not respond. UP asked UE several times in 1997 and 1998 for its comments but received none. On April 24, 1998, UP sent UE a letter requesting comments on the 1996 draft. We sent a Memorandum of Understanding three days later. On May 1, 1998, UP suggested a short term contract so that trains could move to Labadie pursuant to

Redacted the UE Settlement Agreement. This short term contract extended from May 1, 1998

through September 30, 1998. UE could have shipped coal by BNSF to Kansas City or St. Louis during these five months, which UP thought was ample time to finalize the implementing agreement with UE. UE never responded to any of these UP initiatives. In February 1999, after UE management had changed, UP again asked about the implementing contract, along with other unrelated matters between the two companies. UE resolved the other matters, but did not address the implementing contract.

Finally, in late August 1999, UE presented UP with comments on UP's three-year-old draft implementing contract. UP received these comments and developed a revised draft that it is prepared to discuss with UE at UE's convenience. UP remains prepared to provide UE with competitive rail alternatives as the parties agreed in 1996. UP also is prepared to provide UE with a short term contract so that it can begin shipping tomorrow under the UE Settlement Agreement's proportional rates.

D. Addendum Three to ICC-WRPI-C-0080

In 1990, UE and UP executed Addendum Three to their long-term contract between UP and UE for the transportation of coal from the PRB to the Labadie plant, ICC-WRPI-C-0080. This contract had been in effect when the merger was approved.

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E. Conclusion

UP and UE resolved the "2-to-1" shipper issue for the Labadie plant by negotiating and executing the UE Settlement Agreement,

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Because of the UE Settlement Agreement, the Labadie plant did not qualify for the contract modification condition and UP did not provide UE notice of that condition. UE behaved as though it shared our understanding.

UP worked to implement the UE Settlement Agreement. Implementing the UE Settlement Agreement has not been a priority for UE, however, and UE did not respond to UP's

efforts for almost three years. Nevertheless, UP continues to be willing to implement the UE Settlement Agreement today.

Finally, UP and UE signed Addendum Three to their coal transportation contract three years after the UP/SP merger. UE benefitted in many ways from this Addendum. UE should be held to the agreements it made — the UE Settlement Agreement and Addendum Three.

VERIFICATION

STATE OF NEBRASKA)
) SS:
COUNTY OF DOUGLAS)

Jerry P. Klym, being duly sworn, deposes and states that he has read the foregoing statement, knows the contents thereof, and that the same is true and correct as stated to the best of his knowledge and belief.

Jerry P. Klym

Jerry P. Klym

Subscribed and Sworn to
Before Me, a Notary Public
This 7th Day of February, 2000.

Mary R. Holewinski
NOTARY PUBLIC

GENERAL NOTARY-State of Nebraska
MARY R. HOLEWINSKI
My Comm. Exp. Oct. 15, 2000

US OFFICE PRODUCTS

VERIFIED STATEMENT

OF

JOHN H. REBENSDORF

My name is John H. Rebensdorf. I am Vice President-Network & Service Planning for Union Pacific Railroad Company ("UP"). I hold a Bachelor's Degree in Civil Engineering from the University of Nebraska and a Master's Degree in Business Administration from Harvard University. Before coming to UP, I was employed as a management consultant by Temple, Barker and Sloane. I previously worked in the Mechanical Department of Chicago, Burlington & Quincy Railroad and in the Operating and Engineering Department of Chicago, Rock Island and Pacific Railroad. I joined UP in 1971 as Manager of Budget Research. I became Assistant Controller in 1976, Assistant Vice President-Planning & Analysis in 1980, Assistant Vice-President-Finance in 1984 and Vice President-Strategic Planning in 1987. I was appointed to my present position in 1998. I was the principal negotiator for UP of the agreement among Burlington Northern Santa Fe Railroad Company ("BNSF"), UP and Southern Pacific Transportation Company ("SP") (the agreement is known as the "BNSF Settlement Agreement"), which preserved rail competition that would otherwise have been lost as a result of the UP/SP merger.

In this statement I will explain that UP did not refuse to allow BNSF to serve the Labadie plant, as AmerenUE ("UE") now claims. UP tried to sell an SP rail line to BNSF, which would have enabled BNSF to serve the Labadie plant, but BNSF declined to buy it.

I will also explain that, because of BNSF's refusal to buy the SP line, that plant became unique. BNSF, SP and UP negotiators all understood that UP intended to negotiate

directly with other parties to provide UE with a competitive alternative for the Labadie plant. As I testified in the UP/SP merger proceedings, UP was then negotiating this separate settlement agreement (the "UE Settlement Agreement"), which UE and UP later signed.

I will conclude this statement with a brief description of our eventual sale of the SP line to an entity called GRC Holdings ("GRCH").

BNSF's Rejection of the SP Line

Shortly after the August 4, 1995, announcement that UP and SP would merge, UP's senior management asked me to negotiate agreements that would preserve rail competition for all rail customers who were then served by both UP and SP and no other railroad ("2-to-1" shippers). Over the next several weeks, I met with eleven railroads, including BNSF, to explore their interest in providing competing service and suitability as a competitive alternative. Although we negotiated in good faith with a number of carriers, BNSF emerged as the leading candidate because it had the geographic reach and financial resources to ensure effective competition.

During the protracted negotiations with BNSF, we identified all geographic points where both UP and SP but no other railroad provided service to customers ("2-to-1" locations). We then negotiated trackage rights and line sales with BNSF that would provide replacement competition at each of the points. We also created an "omnibus clause" to ensure that BNSF could serve shippers at smaller 2-to-1 locations through haulage arrangements, trackage rights or ratemaking authority to be identified later.

UE says that UP tried to prevent BNSF from serving the Labadie plant, but that is not true. UP offered BNSF the opportunity to buy numerous rail lines. One of the lines UP

offered to sell BNSF was SP's former Rock Island line from the St. Louis area to Owensville, Missouri, which accessed the Labadie plant. By buying this line, BNSF could have delivered coal originating in the Powder River Basin, Illinois or other coal mining areas via St. Louis.

On September 23, 1995, BNSF informed UP that it would purchase several lines, but it did not purchase all the lines UP had offered. BNSF chose only three lines: (1) the SP line from Avondale to Iowa Junction, Louisiana; (2) the SP line from Dallas to Waxahachie, Texas; and (3) the UP line form Beiber to Keddie, California. BNSF rejected our offer to sell the SP line to the Labadie plant.

The Labadie Plant's Exclusion from the BNSF Settlement Agreement

All of the negotiators of the BNSF Settlement Agreement, including BNSF's lead negotiator Carl Ice, recognized and discussed the fact that the Labadie plant would receive unique treatment. I explained to BNSF that UP was working to provide another competitive alternative. BNSF agreed. We assumed that if UP could not reach agreement with UE, we would find another way to fill the void. In my verified statement in the UP/SP merger application, I explained the special treatment of UE's Labadie facility.

I recognized that UP may have caused some confusion when it issued an overly broad press release that treated the BNSF Settlement Agreement as providing BNSF competition for every 2-to-1 shipper. The negotiators of the BNSF Settlement Agreement understood the Labadie plant's unique situation. I understand that we clarified our intent in a subsequent communication with UE.

BNSF's decision not to buy the SP line left UP without a competitive solution for the Labadie plant. As Jerry P. Klym explains in his verified statement, UP then negotiated the

UE Settlement Agreement with UE that gave UE a competitive option satisfactory to the shipper.

Redacted

UP's Sale of the SP Line

With the UE Settlement Agreement in place, UP was free to sell the SP line. We had not wanted to sell the SP line before reaching an agreement with UE, because we believed we might need to use the line to provide competition at the Labadie plant. I handled discussions with several other parties. Our efforts to sell this line included marathon discussions with a group of former railroad employees that originally called itself General Rail Corporation ("GRC"). They wanted to create a new shortline railroad called the Missouri Central Railroad ("MCRR"), which would acquire not only the St. Louis-Owensville segment but also the inactive Rock Island track from Owensville all the way across Missouri to Kansas City.

I first met with GRC on March 13, 1996, after UP had agreed with UE on the terms of the UE Settlement Agreement. After extended negotiations, UP signed a term sheet with GRC on November 3, 1997, for sale of the line.

GRC defaulted several times under this commitment, apparently because it was unable to obtain the financing it claimed to have. Nevertheless, UP continued to work with the

purchasers until they obtained financing from UE. MCRR operates the line between St. Louis and Owensville.

Redacted

. UP did not need to create a third competitive alternative to the Labadie plant, in addition to UP service and the proportional rate alternative under the UE Settlement Agreement.

Redacted

In conclusion, UP always recognized that it needed to preserve a competitive option for UE's Labadie plant. UP offered the SP line to BNSF, which would have given BNSF direct access to the Labadie plant, but BNSF declined to buy it. As a result, the Labadie plant was not included in the BNSF Settlement Agreement. UP then negotiated the UE Settlement Agreement with UE to give UE a competitive alternative that it considered satisfactory. Our later sale of the SP line to GRCH had no impact on the competitive arrangement we had made with UE.

VERIFICATION

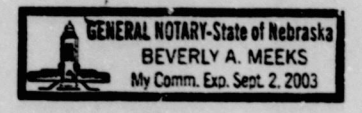
STATE OF NEBRASKA)
) SS:
COUNTY OF DOUGLAS)

John H. Rebensdorf, being duly sworn, deposes and states that he has read the foregoing statement, knows the contents thereof, and that the same is true and correct as stated to the best of his knowledge and belief.

John H. Rebensdorf

Subscribed and Sworn to
Before Me, a Notary Public
This 7th Day of February, 2000.

Beverly A. Meeks
NOTARY PUBLIC



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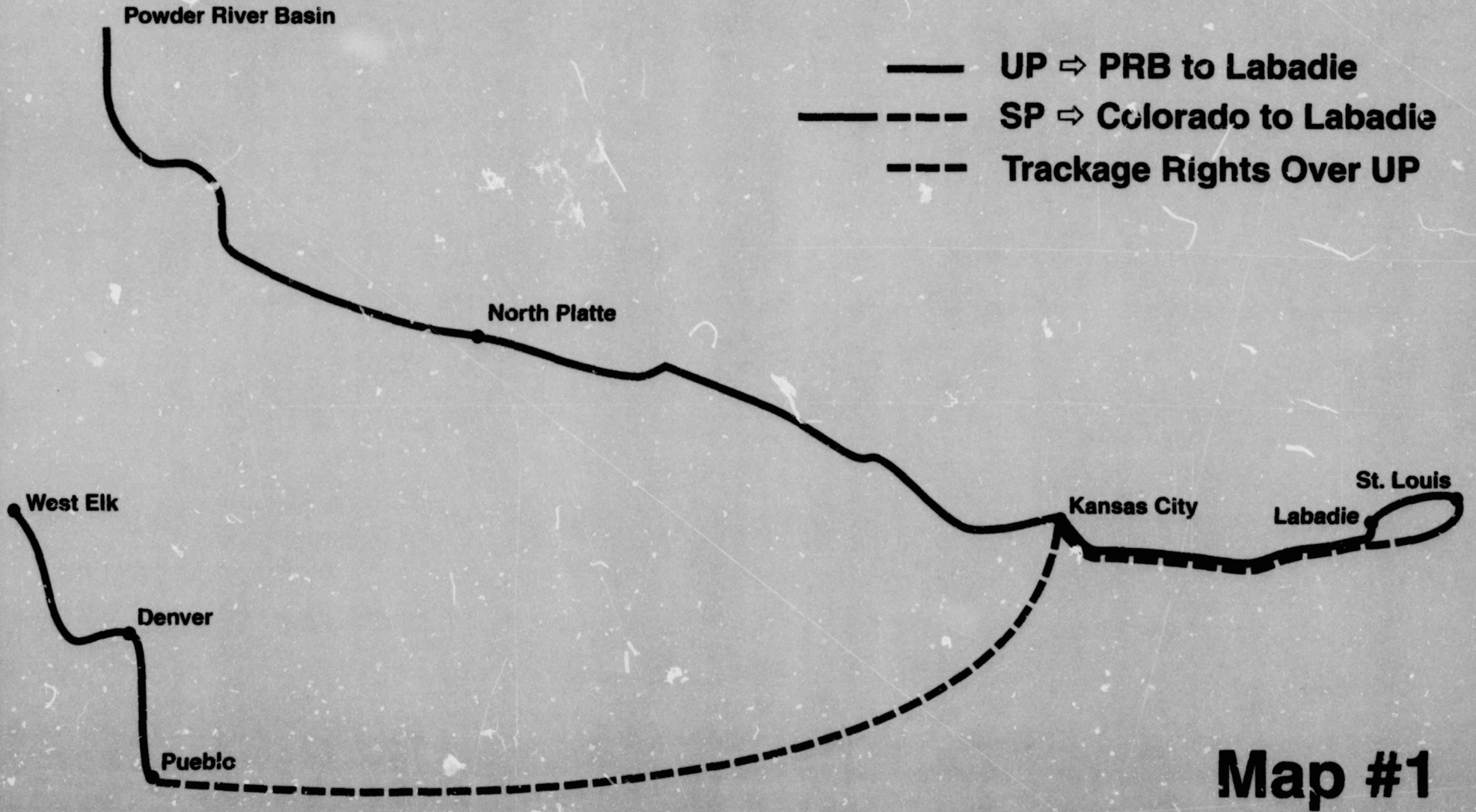
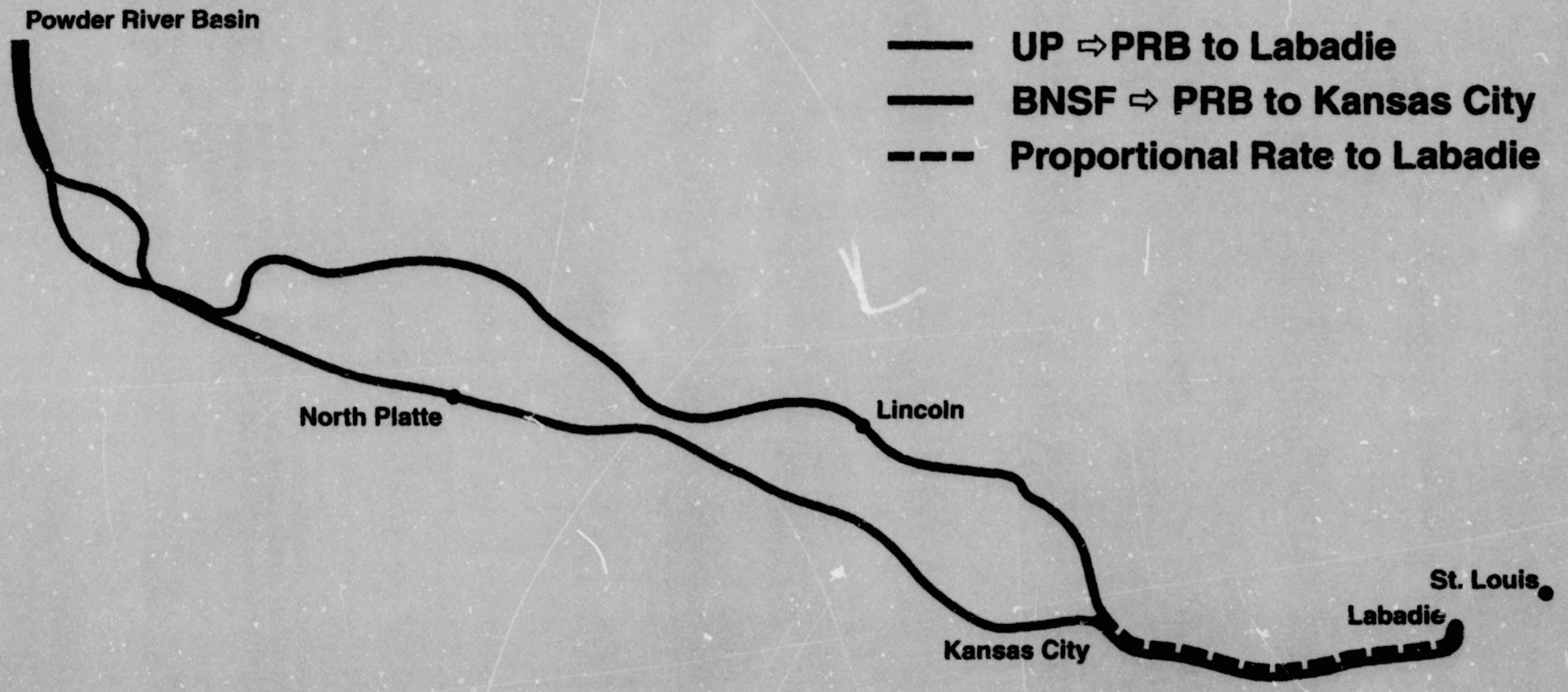
Coal Routes To UE's Labadie Plant
Pre-Merger



Map #1

Coal Routes To UE's Labadie Plant
Post-Merger



Map #2

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

COMMENTS OF GOVERNORS, SHIPPERS AND
OTHERS IN SUPPORT OF THE PRIMARY APPLICATION

CANNON Y. HARVEY
LOUIS P. WARCHOT
CAROL A. HARRIS
Southern Pacific
Transportation Company
One Market Plaza
San Francisco, California 94105
(415) 541-1000

PAUL A. CUNNINGHAM
RICHARD B. HERZOG
JAMES M. GUINIVAN
Harkins Cunningham
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 973-7601

Attorneys for Southern
Pacific Rail Corporation,
Southern Pacific Transportation
Company, St. Louis Southwestern
Railway Company, SPCSL Corp. and
The Denver and Rio Grande
Western Railroad Company

CARL W. VON BERNUTH
RICHARD J. RESSLER
Union Pacific Corporation
Martin Tower
Eighth and Eaton Avenues
Bethlehem, Pennsylvania 18018
(610) 861-3290

JAMES V. DOLAN
PAUL A. CONLEY, JR.
LOUISE A. RINN
Law Department
Union Pacific Railroad Company
Missouri Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-5000

ARVID E. ROACH II
J. MICHAEL HEMMER
MICHAEL L. ROSENTHAL
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044-7566
(202) 662-5388

Attorneys for Union Pacific
Corporation, Union Pacific
Railroad Company and Missouri
Pacific Railroad Company

March 29, 1996

VERIFIED STATEMENT OF

UDO A. HEINZE

MANAGER, FOSSIL FUEL
on behalf of
UNION ELECTRIC COMPANY

My name is Udo A. Heinze. I am the Manager of Fossil Fuels at Union Electric Company ("UE"). I have held this position for eight years. Prior to that time, I was a Senior Buyer of coal and rail services for UE. Union Electric Company, headquartered in St. Louis, Missouri supplies energy services to a 24,500 square mile service territory in Missouri and Illinois.

UE's total generating capacity is approximately 8,000 MW, of which approximately 68% is from coal-fired steam generating units. In 1995 UE received over 12 million tons of coal at its four coal-fired plants. Over 96% of this coal was delivered by rail. The Union Pacific ("UP"), Southern Pacific ("SP"), Illinois Central ("IC") and Burlington Northern ("BN") are the railroads utilized by Union Electric for the delivery of coal.

In 1995, 6,926,000 tons of coal were delivered to UE's Labadie Power Plant - all by rail. The Labadie Plant has been served by the Union Pacific and Southern Pacific separately. The merger of UP and SP would result in the Labadie Plant being served by only one railroad instead of the current two.

Because of this proposed reduction from two railroads to one provider of rail service to Labadie, UE and UP have met to discuss the future of rail service to this plant.

UE and UP have reached an agreement that will insure on-going competition for rail service to the Labadie Plant after the merger. Because of this agreement, the Union Pacific/Southern Pacific merger is in the best interests of Union Electric, and UE supports the merger application.

Udo A. Heinze

Dated: March 25, 1996

VERIFICATION

STATE OF MISSOURI)
) ss
CITY OF ST. LOUIS)

Udo A. Heinze, 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.

Udo A. Heinze

Subscribed and sworn to before me this 25th day of March 1996.

Notary Public

DEBORAH L. ANZALONE
NOTARY PUBLIC—STATE OF MISSOURI
ST. LOUIS COUNTY
MY COMMISSION EXPIRES APR. 18, 1998

DEBORAH L. ANZALONE
NOTARY SEAL
NOTARY PUBLIC
STATE OF MISSOURI

US OFFICE PRODUCTS

Bob - Toy

ROBERT M. TOY
NATIONAL ACCOUNT MANAGER-
ENERGY

UNION PACIFIC RAILROAD COMPANY

1416 DODGE STREET
OMAHA, NEBRASKA 68179
(402) 271-3907
FAX: 271-3378

December 6, 1995

Mr. Udo Heinze
Manager - Fossil Fuel
Union Electric Company
1901 Chouteau Avenue
P.O. Box 149
St. Louis, MO 63166

1 ~~SPK~~
2 ~~Sty~~
Surprise!

Dear Udo,

Enclosed is the agreement and supplemental agreement between Union Pacific/Southern Pacific and Burlington Northern Santa Fe regarding trackage rights and line sales upon the effectiveness of the UP/SP merger.

Post 12/8

We have described previously how Union Electric and Labadie are not specifically referred to in the sections concerning the omnibus provision. This is because our expectations have been that we would find an alternative for Labadie that does not require implementation of the provision there.

As we discussed yesterday, while we will not require you to sign a confidentiality agreement, we request that you only use these agreements for evaluation of the Labadie situation. You may share them with your outside counsel upon the stipulation that information contained is confidential and must not be applied to other business situations. If you have any questions, please let me know.

~~Bob~~ - These agreements are totally public. They are in the merger application. UE can do whatever it pleases with them now! PAC

Sincerely,

P. A. C.
DEC 1995

cc: Paul Conley - [redacted]
Jerry Klym
Steve Meidl

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cc: KHW
4 1/16
orig: KAD

To:	Udo_A_Heinze @ ue.com @ internet,Kevin_A_Deschler @ ue.com @ Internet
cc:	
From:	Jerry P. Klym
Date:	12/19/96 09:20:31 AM
Subject:	Prop contract to Labadie

I am sending to you overnight our draft contract to cover the prop rates from KC and St. Louis to Labadie. There are a couple items still needing finalization. After you have had some time to go through it we will need to get together and talk through your questions and suggested changes.

A couple items to be thinking about -

Redacted

I will be out until Jan. 6, but will be checking my phonemail if you want to talk. Enjoy the Holidays.

Jerry

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UNION PACIFIC RAILROAD COMPANY

J. P. KLYM
BUSINESS DIRECTOR
ENERGY

1416 DODGE STREET
OMAHA, NEBRASKA 68179
(402) 271-5000
FAX (402) 271-3378
EMAIL: JPKLYM@notes.up.com

via fax and overnight mail

May 1, 1998

Mr. Kevin Deschler
Fossil Fuel
AmerenUE
P. O. Box 66149
St. Louis, MO 63166-6149

Dear Kevin:

Attached is Union Pacific's Stort Term Contract (UPCQ 76600.003) which we have issued to cover the movement of trains on the current proportional rates contained in the Conceptual Framework of March 11, 1996. We have issued this contract in order to facilitate the immediate movement of trains while we continue to finalize the details in the long term transportation services contract. Redacted

The contract will become effective when you begin shipping trains at any time on or after May 1, 1998 and thus AmerenUE's signature on the Memorandum of Understanding sent April 27, 1998 will not be required before any movement can occur. Please let myself or Craig Foy know if you should have any questions.

Sincerely,

cc: Bev Greer
Craig Foy

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ID- 195885

19885

UP/SP-372

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

D

UP'S REPLY TO BNSF'S REPLY SUPPORTING
ENGERGY'S PETITION FOR ENFORCEMENT OF MERGER CONDITION

Applicants UPC, UPRR and SPR[1] hereby respond to BNSF's reply supporting Entergy's petition for an order modifying the trackage rights that BNSF received in the UP/SP merger proceeding in connection with Entergy's proposed build-out from its White Bluff plant. UP has already submitted an extensive reply demonstrating that Entergy's petition should be denied because it improperly seeks to place BNSF in a more favored position to participate in the proposed build-out than SP occupied prior to the merger. We do not repeat those arguments here, but instead show why BNSF's separate arguments for relief are equally meritless.

In its petition, Entergy argued that it was entitled to use trackage rights over UP's Pine Bluff-Little Rock line in order to reach the remains of the former SP Arsenal Lead as part of a proposed build-out. In its reply, UP showed that, prior to the UP/SP merger, SP had no right to

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[1] Acronyms used herein are the same as those in Appendix B of Decision No. 44. For simplicity, we generally refer to the combined UP/SP rail system herein as "UP."

use UP's Pine Bluff-Little Rock line to reach the Arsenal Lead as part of a build-out to Entergy. UP showed that, as part of the Memorandum of Understanding ("MOU") entered into in connection with the Pine Bluff Railroad Demonstration Project, UP granted SP only the limited right to use UP's Pine Bluff-Little Rock line to serve existing shippers that SP would otherwise have been unable to serve as a result of the Pine Bluff project and SP's decision not to reconnect its Arsenal Lead to its mainline in Pine Bluff.

Unlike Entergy, BNSF does not take issue with UP's interpretation of the MOU. Instead, BNSF wrongly argues that SP would have had the pre-merger right to use UP's Pine Bluff-Little Rock line to participate in Entergy's proposed build-out because any limitation on SP's ability to serve new facilities on the Arsenal Lead would have been void as contrary to public policy. BNSF, allegedly standing in SP's competitive shoes, asserts the right to use the Pine Bluff-Little Rock line to serve an Entergy build-out. There are two distinct flaws in this argument.

A. Even if SP Had Unlawfully Agreed in the MOU to Forgo Its Right to Serve New Facilities on the Arsenal Lead, UP Would Not Have Been Required to Provide SP With Trackage Rights to Serve New Arsenal-Lead Facilities

Even if, as BNSF claims (p. 7), "SP could not lawfully agree in the MOU to forego its right to serve new facilities on the Arsenal Lead,"[2/] it does not follow that UP would

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2/ Contrary to BNSF's argument, UP has never claimed that SP surrendered its right to serve new facilities on the Arsenal Lead as part of the MOU. As UP explained in its reply to Entergy's petition, after the Pine Bluff project, SP could have served new shippers on the Arsenal Lead either by reconnecting the Lead with its mainline in Pine Bluff or by negotiating a new trackage rights agreement with UP that would fully compensate UP for what it would be giving up. UP Reply, p. 18. UP also showed that, even if SP declined to provide service to new

(continued...)

have been required to allow SP to use UP's Pine Bluff-Little Rock line had a shipper sought SP service at a new facility on the Arsenal Lead. There would be no justification for requiring UP to bear the costs of SP's improper attempt to evade its common carrier obligation. Indeed, such a requirement would be patently inconsistent with clear precedent establishing that the Board has no authority to force a carrier to grant another carrier trackage rights across over its lines. See, e.g., Docket No. 41987, Western Fuels Service Corp. v. Burlington Northern & Santa Fe Ry., Decision served July 28, 1997; Rio Grande Industries, Inc. — Purchase & Trackage Rights — Chicago, Missouri & Western Ry. Line Between St. Louis, MO & Chicago, IL, 5 I.C.C.2d 952, 978 (1989); City of Hialeah v. Florida East Coast Ry., 317 I.C.C. 34, 36 (1962); Baltimore & Ohio R.R. Operation, 261 I.C.C. 535, 545 (1945); Construction of Extension by Alabama, Tennessee & Northern R.R., 124 I.C.C. 114, 115 (1927); Magner-O'Hara Scenic Ry. v. ICC, 692 F.2d 441, 445 (6th Cir. 1982).

Prior to the MOU, SP had no right at all to use UP's Pine Bluff-Little Rock line to access the Arsenal Lead. In the MOU, UP granted SP a limited right to use that line. In fact, Richard K. Davidson, who signed the MOU on behalf of UP, testified that he would not have signed any agreement that gave SP unlimited access to UP's Pine Bluff-Little Rock line. And UP could not have been compelled to grant SP any trackage rights over its Pine Bluff-Little Rock

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[2](...continued)
facilities on the Arsenal Lead following the Pine Bluff project, SP would not have violated its common carrier obligation. Id., pp. 18-19. Finally, UP showed that SP's duty to provide service to an Entergy build-out would have been governed by the switch connections and tracks provision found at 49 U.S.C. § 11103, not the common carrier provision found at 49 U.S.C. § 11101(a). Id., pp. 16-17.

line. See, e.g., Western Fuels, p. 8 ("We have no general authority to compel an unwilling carrier to grant trackage rights to another carrier."); Rio Grande Industries, 5 I.C.C.2d at 978 ("We have no authority to compel a carrier to grant trackage rights over its line to another carrier."); City of Hialeah, 317 I.C.C. at 36 ("it has consistently been held that this Commission is without power to compel a carrier to grant trackage rights over its lines to another carrier"); Baltimore & Ohio R.R., 261 I.C.C. at 545 ("we are without power to compel [a railroad] to grant trackage rights over its line"); Magner-O'Hara Scenic Ry., 692 F.2d at 445 ("nor can the Commission compel one carrier to grant trackage rights to another").

If a new shipper on the Arsenal Lead had sought common carrier service from SP, and if the Board had found that SP had a common carrier obligation to provide that service, the appropriate remedy would have been an order requiring SP to provide the requested service. SP could have complied by reconnecting its Arsenal Lead to its mainline in Pine Bluff (which Entergy said could be done, see Petition, p. 29, & McClanahan V.S., pp. 2, 12), or by negotiating a new agreement with UP that would allow it to fulfill its common carrier duty.[3/] But there would be no basis for requiring UP to provide SP with unrestricted trackage rights on the Pine Bluff-Little Rock line — and thus BNSF is not entitled to any such rights under either the general or the Entergy-specific build-out conditions imposed in the UP/SP proceeding.

[3/] Either of these solutions would have been fair to SP, since it benefitted from its decision not to reconnect the Arsenal Lead to its mainline by avoiding the costs for reconnecting, maintaining and operating the Lead, while paying no trackage rights fee to UP for using the Pine Bluff-Little Rock line to access the Arsenal Lead, and by recovering the salvage value of Arsenal Lead track that it removed. See UP Reply, Davidson V.S., p. 7 & n.1.

Neither of the two cases that BNSF cites provides any authority for requiring UP to grant SP unrestricted trackage rights if SP were found to have violated its common carrier obligation. BNSF quotes from the Board's decision in Finance Docket No. 32248, Hanson Natural Resources Co. — Non-Common Carrier Status — Petition for a Declaratory Order, Decision served Dec. 5, 1994, but the quoted language simply provides that the Board will void an agreement in which a railroad unlawfully attempts to restrict its own ability to provide common carrier service. Nothing in Hanson Natural Resources suggests that anyone other than the railroad that agreed to the unlawful restriction would be required to bear the costs of providing common carrier service that the railroad is later required to provide. BNSF also cites United States v. Baltimore & Ohio R.R., 333 U.S. 169 (1948), in which the Supreme Court held that a railroad could not justify its discrimination against a shipper on the basis of a restrictive term imposed by the owner of a segment of track that the railroad had to traverse in order to serve that shipper. But again, nothing in Baltimore & Ohio suggested that the appropriate remedy was to compel the owner of the track to allow the railroad full access to the shipper in question, and the Court explicitly left open and undecided the alternative of the owner's canceling entirely the railroad's contract to use the track. Id. at 177. In sum, neither of the cases that BNSF cites stands for the proposition that a grantee must broaden a limited grant of access if it is determined that the recipient had a duty to provide a shipper with broader access than the recipient was able to provide under the grant. These holdings are consistent with the Board's repeated recognition that it cannot force one railroad to grant trackage rights over its line to another railroad.

B. BNSF Itself Has Enforced Similar Restrictions in Trackage Rights Agreements

When it was in its own self-interest, BNSF successfully argued that railroads may enter into agreements that limit their ability to serve build-outs. In State of Minnesota by Burlington Northern R.R. v. Big Stone-Grant Industrial Development & Transportation, L.L.C., 990 F. Supp. 731 (D. Minn.), aff'd, 121 F.3d 144 (8th Cir. 1997), BNSF prevailed on its claim that Big Stone's proposed construction of a new track that would create two-railroad service to a new industrial park, as well as to the BNSF-exclusive OtterTail Power Plant, would unlawfully induce the Twin Cities & Western Railroad Company ("TCW") to violate restrictions contained in a trackage rights agreement it had with BNSF.

Big Stone involved a proposal by the Big Stone-Grant firm to build new track to connect two spurs — the OtterTail Power Spur and the Cannery Spur — that were located along a BNSF line that extended from Appleton, Minnesota, to Milbank, South Dakota. The OtterTail Spur (which was owned by the OtterTail Power Plant) was located on the South Dakota segment of the line, which BNSF acquired in 1980. TCW had trackage rights over the South Dakota segment under which it could not "originate or terminate any freight upon any segment of the [South Dakota segment], or serve any industry, team or house tracks now connected to or which may in the future be connected to the [South Dakota segment]." The Cannery Spur was located on the Minnesota segment of the line, which BNSF acquired in 1992. TCW had trackage rights over the Minnesota segment, including "the right to serve or switch any industries, now located upon the [Minnesota segment], team or house tracks now connected to or which may in the future be connected to the [Minnesota segment]." Big Stone, 990 F. Supp. at 732-33.

In Big Stone, BNSF argued, and the courts agreed, that the restrictions in TCW's trackage rights over the South Dakota segment prevented TCW from serving any shippers that would be connected to the South Dakota segment, even if TCW would actually serve those shippers using its trackage rights over the Minnesota segment. Id. at 736. Thus, because Big Stone's proposed line would connect not only with the Cannery Spur, but also with the OtterTail Power Spur, which was in turn connected to the South Dakota segment, TCW could not serve any new shippers that would locate along the proposed new track.

BNSF's position in Big Stone was indeed more restrictive of tenants' rights than is UP's position in this case. Whereas in this case UP is seeking to enforce a restriction that would prevent Entergy from moving build-out traffic over the very line that is the subject of the restrictive agreement, in Big Stone, BNSF relied on a restrictive trackage rights agreement governing one line segment to prevent TCW from moving build-out traffic over another line that was not the subject of the restrictive agreement.

Thus, BNSF's position in the instant case amounts to a claim that BNSF, but not UP, is allowed to grant trackage rights that contain restrictions on a tenant's ability to serve new build-outs. It should be rejected.

* * *

With its usual hyperbole, BNSF claims that UP is asserting a position in this proceeding that "threatens to undercut the effectiveness" (p. 2) of the build-out condition imposed by the Board in the UP/SP merger decision "in direct contravention of UP's professed willingness to accept full and vigorous competition from BNSF" (p. 10). Nothing could be

further from the truth. UP has made clear that its dispute with Entergy is not about whether Entergy may construct a build-out from its White Bluff plant in order to receive alternative service from BNSF. Entergy is already allowed to do so through a build-out to SP's Pine Bluff-Memphis line. UP Reply, pp. 2, 24. Rather, the issue in this proceeding is whether additional build-out rights should be granted over a less expensive route that was not available to SP before the merger. If granted, these rights would place BNSF in a more favored position to serve Entergy than SP occupied prior to the merger. Entergy may construct a build-out, but there is no justification for thus enhancing Entergy's pre-merger competitive options.

Respectfully submitted,

CARL W. VON BERNUTH
Union Pacific Corporation
Room 1230
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-6304

JAMES V. DOLAN
LAWRENCE E. WZOREK
Law Department
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-5000

ARVID E. ROACH II
J. MICHAEL HEMMER
MICHAEL L. ROSENTHAL
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044-7566
(202) 662-5388

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

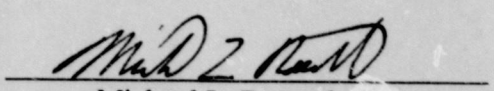
October 15, 1999

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that on this 15th day of October 1999, 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, and on

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

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



Michael L. Rosenthal

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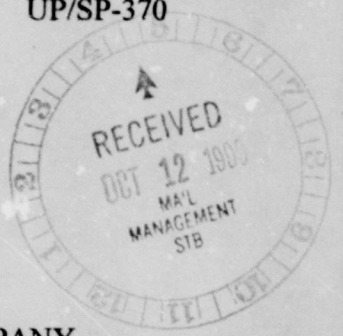
UP/SP-370



BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

UP'S REPLY TO ENTERGY'S PETITION
FOR ENFORCEMENT OF MERGER CONDITION

Applicants UPC, UPRR and SPR[1] hereby respond to Entergy's petition for an order "modifying the trackage rights that BNSF received" in the UP/SP merger proceeding to allow Entergy to obtain alternative rail service from BNSF to its UP-exclusive White Bluff plant by constructing a build-out to an 1,100-foot island of former SP track in Pine Bluff, Arkansas. The petition is the latest in a series of ill-founded attempts by Entergy to expand its rights under the UP/SP merger decision in order to obtain BNSF service to its White Bluff plant. Under the build-out condition imposed by the Board in UP/SP, Entergy may obtain BNSF service only if BNSF would be replicating a competitive build-out option that SP provided before the merger. Entergy's petition fails that test. It asks the Board to place BNSF in a more favored position than SP occupied prior to the merger, and therefore it must be denied.

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[1] Acronyms used herein are the same as those in Appendix B of Decision No. 44. For simplicity, we generally refer to the combined UP/SP rail system herein as "UP."

Applicants wish to make clear that the instant dispute is not about whether Entergy may construct a build-out from its White Bluff plant in order to receive alternative service from BNSF. Entergy clearly has that right under the general build-out condition imposed in the UP/SP merger proceeding and under the more specific condition that the Board granted in response to Entergy's request. UP/SP, Decision No. 44, pp. 146, 185. This dispute is about whether, as Entergy candidly states (p. 3), the Board should "modify[] the trackage rights that BNSF received in the merger proceeding" in order to provide Entergy with a build-out opportunity that is more favorable to Entergy than the conditions the Board granted in the merger proceeding. The Board preserved Entergy's pre-merger competitive options through those conditions, and there is no justification for enhancing those options.

I. BACKGROUND

In a petition filed July 30, 1999 in Finance Docket No. 33782, Petition for an Exemption from 49 U.S.C. § 10901 to Construct and Operate a Rail Line Between White Bluff and Pine Bluff, Arkansas, Entergy requested an exemption to construct and operate a build-out line in order to obtain alternative service from BNSF to its White Bluff plant. Under Entergy's proposal, BNSF coal trains would move over the former SP line to Pine Bluff, where they would move onto UP's Pine Bluff-Little Rock line and proceed for more than four miles to a new crossover that Entergy would construct. The crossover would be used to exit UP's line and move onto an 1,100-foot island of former SP-owned track — the remains of the former SP Arsenal Lead — which is used to serve the U.S. Army's Pine Bluff Arsenal and a small number of shippers on an industrial track known as the Gaylord Spur. BNSF trains would then use the

Arsenal's track, which Entergy would rehabilitate as part of the build-out, to reach a section of newly constructed track leading to Entergy's White Bluff plant. (A map showing the tracks at issue is attached hereto as Exhibit A.)

On August 31, 1999, UP filed its Opposition to Entergy's exemption petition. UP showed that the Board should deny the petition because Entergy could not have obtained SP service via its proposed build-out prior to the UP/SP merger. UP explained that SP could not have provided the proposed service because it entailed SP's using UP's Pine Bluff-Little Rock line, together with the remains of the former SP Arsenal Lead, in ways that SP had no right to use those track segments prior to the merger. UP showed that, as part of a project involving the relocation of SP's mainline in Pine Bluff, which severed the Arsenal Lead from SP's mainline, UP and SP entered into an agreement that permitted SP to use UP's Pine Bluff-Little Rock line to reach the remains of its Arsenal Lead, but only in order to serve those shippers that SP had been able to serve before it severed the Arsenal Lead from its mainline, not to serve new shippers or for build-out or interchange operations.[2/]

UP's Opposition anticipated most of the arguments that Entergy now raises in this proceeding, and in an effort to avoid undue repetition, we incorporate herein the entirety of UP's Opposition. It is necessary, however, to review portions of the background information

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2/ UP also showed that it would be inappropriate for the Board to grant Entergy's exemption petition until the underlying issue of Entergy's right to obtain BNSF service via its build-out proposal had been resolved. When Entergy filed its petition in this proceeding, it simultaneously filed a response to UP's Opposition in which it continues to argue that the underlying issue of Entergy's right to obtain BNSF service via its proposed build-out need not first be resolved before the exemption request is ruled upon. However, Entergy's filing a petition seeking to resolve the underlying issue concedes this point.

contained in UP's Opposition in order to respond to two arguments that Entergy raises for the first time in the instant petition.

First, Entergy's exemption petition did not address the agreement that prevented SP from using UP's Pine Bluff-Little Rock to serve an Entergy build-out to the Arsenal Lead. In an effort to overcome that agreement, Entergy now argues that the Board should ignore its plain meaning. We show that the evidence demonstrates overwhelmingly that, prior to the UP/SP merger, SP had no right to use UP's Pine Bluff-Little Rock line to reach the Arsenal Lead as part of a build-out to Entergy.

Second, as a fall-back option to circumvent the evidence that SP had no right to use UP's Pine Bluff-Little Rock line to reach the remains of the Arsenal Lead as part of a build-out to Entergy, Entergy jettisons the proposal for which it sought an exemption and instead argues that UP should be required to rebuild and reconnect the former SP Arsenal Lead to a point on the former SP mainline between Pine Bluff and West Memphis so that Entergy can receive BNSF service without using trackage rights over UP's Pine Bluff-Little Rock line. This new proposal — even if it had been fully explained and shown to be feasible, which it has not — violates the requirement of the UP/SP build-out condition that BNSF step into SP's shoes if it wants to participate in a build-out. BNSF (or Entergy) would have to bear the costs of reconstructing the former SP Arsenal Lead if the Board were to approve Entergy's new proposal. The suggestion that UP should bear these costs, and subsidize competition from BNSF, is simply outrageous.

II. ENTERGY HAS NO RIGHT TO OBTAIN BNSF SERVICE USING UP'S PINE BLUFF-LITTLE ROCK LINE TO REACH THE FORMER SP ARSENAL LEAD

Under the build-out condition imposed in the UP/SP merger proceeding, Entergy's right to obtain BNSF service via Entergy's proposed build-out turns on whether SP could have provided service via the build-out prior to the UP/SP merger. As we explain below, SP could not have provided such service under the proposal described in Entergy's exemption petition because it would have required the use of UP track, together with a small, isolated remnant of SP's Arsenal Lead, in a way that SP had no right to use them prior to the merger.

A. Entergy Can Obtain BNSF Service Via Its Proposed Build-Out Only If the Proposal Would Have Allowed SP to Serve White Bluff Before the Merger

In approving the UP/SP merger, the Board required UP to make available to all shippers the build-out procedure established in the CMA agreement, as modified by the Board. The build-out condition, as modified, applies to any shipper that

> "(a) has a facility that was, prior to the consummation of the UP/SP merger, solely served by UP, and seeks, in order to obtain two-railroad service, the right to build out from that facility to (or the right for [BNSF] to build in to that facility from) a point on the former SP (the 'Build-In Point') and the associated grant to [BNSF] of any trackage rights that may be necessary for [BNSF] to reach the Build-In Point, or
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> (b) has a facility that was, prior to the consummation of the UP/SP merger, solely served by SP, and seeks, in order to obtain two-railroad service, the right to build out from that facility to (or the right for [BNSF] to build in to that facility from) a point on the former UP ('the Build-In Point') and the associated grant to [BNSF] of any trackage rights that may be necessary for [BNSF] to reach the Build-In Point."

CMA Agreement § 13.

The Board also granted Entergy's more specific request that BNSF be allowed to transport coal to White Bluff via a future build-out line that connects with the former SP line between Pine Bluff and West Memphis, Arkansas. UP/SP, Decision No. 44, pp. 55, 185. The build-out described in Entergy's exemption petition does not involve this condition, because Entergy does not seek to connect with the Pine Bluff-Memphis line, but instead seeks to build out to a small island of former SP track located between Pine Bluff and Little Rock. Thus, as Entergy acknowledges (p. 4), in order to obtain the relief it seeks, Entergy must show that its proposed build-out qualifies under the CMA agreement build-out condition.

As the Board explained, the CMA build-out condition was structured to allow BNSF to "replicate the competitive [build-out] options [that were] provided by the independent operations of UP and SP." UP/SP, Decision No. 44, p. 146. Entergy acknowledges that the test of its ability to obtain BNSF service via its proposed build-out is whether its proposal would have allowed Entergy to receive alternative service from SP prior to the merger of UP and SP. Petition, p. 17; Exemption Petition, pp. 5-6. Entergy's ability to obtain BNSF service using its proposed build-out thus depends on whether its proposal would allow BNSF to "replicate the competitive options . . . provided by . . . SP" before the merger. As we show below, Entergy's proposal would not allow BNSF to replicate the competitive options provided by SP — rather, it would allow BNSF to provide a competitive option that SP could not have provided.

B. SP Could Not Have Served Entergy's White Bluff Plant Via the Proposed Build-Out Before the Merger

Entergy's build-out proposal as described in its exemption petition would not have allowed Entergy to obtain service from SP prior to the UP/SP merger. Entergy's proposal

requires the use of **UP** track to allow coal trains to reach the 1,100-foot island which is all that remains of the former SP Arsenal Lead, and then to connect, via upgraded Arsenal trackage, with the proposed build-out line. However, SP never had the right to use UP's track or the remains of the Arsenal Lead in this manner. Entergy's argument is contrary to the plain language of the Memorandum of Understanding ("MOU") that UP and SP signed in connection with the Pine Bluff Railroad Demonstration Project, which governed SP's rights to access the Arsenal Lead.[3/]

1. The Arsenal Lead

Before the Pine Bluff Railroad Demonstration Project, UP and SP each had its own lines in Pine Bluff to serve the Pine Bluff Arsenal. In the early 1940s, UP established service to the Arsenal by constructing a connection to the Arsenal's track from a siding located on UP's Pine Bluff-Little Rock line. SP also established service to the Arsenal in the 1940s by constructing a lead from its mainline in Pine Bluff to the Arsenal's track on a government-owned right-of-way over which SP was granted an easement. This lead that SP built is known as the Arsenal Lead.

In the 1950s, in response to a request from a company that had constructed facilities in the area, UP and SP jointly constructed the Gaylord Spur. The Gaylord Spur was built off the Arsenal Lead, and a crossover was constructed from UP's Pine Bluff-Little Rock line to the Arsenal Lead so that UP could also serve Gaylord Spur shippers. UP and SP entered

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[3/] The railroad parties to the MOU were actually MPRR, which has since merged with UP, and SSW, which was part of the SP family of railroads. We will refer to UP and SP, unless there is a particular reason to refer to their respective predecessors, MPRR and SSW.

into a switching agreement under which UP and SP alternated switching of Gaylord Spur shippers on an annual basis. UP and SP did not alternate switching of the Arsenal.

2. The Pine Bluff Railroad Demonstration Project and the MOU

In 1984, in response to legislation encouraging the relocation of railroad lines to promote rail and highway safety, UP, SP and Arkansas state and local governmental bodies entered into an MOU regarding the Pine Bluff Railroad Demonstration Project. The project involved the relocation of SP's mainline in Pine Bluff to run along the same corridor as UP's mainline. As part of the relocation project, SP's Arsenal Lead was severed from SP's mainline running through Pine Bluff.

The MOU, which is attached hereto as Exhibit B, recognized that the relocation project would sever connections between SP and certain shippers it served in and around Pine Bluff, including the Arsenal. It therefore explicitly provided that SP would be allowed to use UP's track, but only to serve SP's existing Pine Bluff shippers. The MOU stated:

> "The [SP] will have the right to provide rail service to their existing shippers and receivers of railway carloads of freight by use of rail connections as provided by the project and/or in agreement with [UP] operations."

Exhibit B, p. 3 (emphasis added). The MOU also identified the Pine Bluff Arsenal specifically as one of the affected existing shippers:

> "The [SP] lead to the Pine Bluff arsenal will be removed . . . and the [SP] will have the right to operate in bridge movements only, over the tracks of [UP] for access to the Pine Bluff Arsenal."

Id.

At the time of the relocation project, not only was the connection between SP's mainline and the Arsenal Lead severed, but SP also removed approximately 1.25 miles of the Arsenal Lead track, beginning at the former connection between the Arsenal Lead and SP's mainline in Pine Bluff. SP salvaged the track and retained all of the money associated with the salvage process. See Exhibit C hereto. In December 1992, SP sold its interest in most of the remaining portion of the Arsenal Lead (approximately 3.2 miles) to Entergy witness Peter J. Smykla's Mid-State Corporation. SP retained only the portion of the Arsenal Lead beginning at the Pine Bluff Arsenal and ending at a point a few hundred feet beyond the switch to the Gaylord Spur, which allowed it to maintain service to the Arsenal and to Gaylord Spur shippers.

The plain language of the MOU provides that, as part of the Pine Bluff relocation project, UP agreed that SP could use UP's lines, but only to serve its existing customers, including the Pine Bluff Arsenal.[4/] The MOU is clear that UP did not give SP any rights that would have allowed SP to move any trains over UP's tracks to any other shippers. And the MOU is also clear that SP received the right to serve only SP's existing shippers, and not

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4/ In its response to UP's Opposition, but not in the petition filed in this proceeding, Entergy incorrectly argues that the Board should ignore the above-quoted language because it appears in a section of the MOU titled "recitals," rather than in what it describes as "operative clauses" of the MOU. A quick reading of both provisions establishes that what Entergy describes as the "operative clauses" simply recite what the parties have agreed to do — they are no more "operative" than the section titled "recitals." Moreover, what Entergy describes as the "operative clauses" actually do reflect the above-quoted language. See Exhibit B, p. 8, § 1 (SP will file applications necessary "to operate over [MPRR] tracks for access to the Pine Bluff Arsenal") (emphasis added).

existing UP-exclusive shippers such as Entergy. Thus, nothing in the MOU permitted SP to use UP's tracks in connection with movements of coal trains between Entergy's UP-exclusive White Bluff plant and SP's isolated island trackage that remained after the Arsenal Lead was severed.

3. UP's and SP's Understanding of the MOU

The language of the MOU that UP and SP signed in connection with the Pine Bluff relocation project clearly provides that SP's rights to use UP's Pine Bluff-Little Rock track were limited to the right to continue to serve the Arsenal and other existing SP shippers. Moreover, in its Opposition to Entergy's exemption petition, UP presented testimony showing that both UP and SP personnel who were in Pine Bluff when the MOU was signed in 1984 and involved in the relocation project understood that SP's rights were limited to serving existing shippers. UP also presented testimony showing that the limitation placed on SP's rights was similar to limitations found in many other joint facilities agreements and is also consistent with longstanding industry practice. UP's witnesses included:

- Carl Bradley, SP's District Superintendent in Pine Bluff at the time of the relocation project. Mr. Bradley testified that SP viewed the situation as a trade off: SP's rights were limited, but SP avoided the costs of reconnecting, operating and maintaining the Arsenal Lead in the future.

- William F. Somervell, MPRR's Director of Contracts & Real Estate at the time of the relocation project. Mr. Somervell testified that UP insisted that SP's right to use UP's track be limited to serving SP's existing shippers, because UP was unwilling to give SP the unwarranted competitive advantage of avoiding the costs associated with reconnecting and maintaining its own lines while using UP's track to serve new customers.

- Jerry S. Wilmoth, UP's Director-Joint Facilities. Mr. Wilmoth testified that limitations such as the one placed on SP's use of UP's track are routinely agreed to in similar circumstances, and that any departure from this practice would have unfairly allowed the tenant (SP) to reduce

investment and maintenance costs while taking business away from the landlord (UP).

The testimony provided by Messrs. Bradley, Somervell and Wilmoth is confirmed and reinforced by the verified statement of Richard K. Davidson, Chairman and Chief Executive Officer of UPC and Chairman of UP, which is attached hereto as Exhibit D.[5/] Mr. Davidson signed the MOU on MPRR's behalf in 1984 when he was MPRR's Vice President-Operations. Mr. Davidson explains that he was involved in all aspects of the Pine Bluff relocation project. Mr. Davidson also notes that he was particularly familiar with the issues presented by the relocation project because he had previously served as MPRR's General Manager in Little Rock, where he had responsibilities that included the Pine Bluff area.

Mr. Davidson explains that the MOU provided SP with the right to use MPRR's track to serve only SP's existing shippers. That is what it plainly states, and Mr. Davidson further explains that it was MPRR's intent that SP's rights would be limited to serving its existing shippers, and that he believes it was SP's intent as well. Mr. Davidson explains that he would not have signed an agreement that allowed SP to put MPRR at a competitive disadvantage by using MPRR's tracks to capture existing UP customers or any potential new customers that located on these lines.

Mr. Davidson also responds to the flawed arguments that Entergy has advanced for ignoring the MOU's clear language. Entergy's mistaken arguments and Mr. Davidson's responses are discussed in the next section.

5/ For the Board's convenience, we attach the verified statements of Messrs. Wilmoth, Bradley, and Somervell as Exhibits E, F, and G, respectively.

C. Entergy's Mistaken Arguments

In an attempt to respond to the showing contained in UP's Opposition that SP's rights to use UP's Pine Bluff-Little Rock line were strictly limited by the plain language of the MOU, as well as by the parties' intent, Entergy presents the testimony of a single witness, Robert McClanahan, who claims that SP did not intend to give up, through the MOU, its right to serve new shippers on the Arsenal Lead. None of the reasons offered by Entergy for ignoring the plain meaning of the MOU has any validity.

1. The MOU Limits SP's Right to Use UP's Tracks

Entergy and its witness are wrong to suggest that the MOU's language did not act as a limitation on SP's ability to serve shippers in the Pine Bluff area. The MOU clearly provides that the rights SP obtained in agreement with MPRR would give SP "the right to provide rail service to their existing shippers and receivers of railway carloads of freight." Nothing in the MOU grants SP the right to use UP's tracks for any other purpose, and SP's right to use UP's tracks in the Pine Bluff area are derived solely from the MOU.[6/]

The verified statements of Messrs. Davidson, Bradley, Somervell, and Wilmoth regarding the intent of the parties and the reasons for such a restriction reinforce the plain meaning of the MOU. As each of these witnesses explains, the situation involved a trade-off in

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6/ SP did have the right to use UP's Pine Bluff-Little Rock line for overhead traffic between Pine Bluff and Little Rock. See Finance Docket No. 30767, St. Louis Southwestern Ry. — Trackage Rights — Missouri Pacific R.R., Decision served Jan. 28, 1986. However, as UP noted in its Opposition (p. 5 n.3), these rights have no bearing on the present dispute. Entergy does not dispute this point.

which SP avoided certain costs and UP was willing to cooperate with the relocation project so long as SP did not achieve a competitive advantage from using UP's tracks.

2. The "Bridge Movements Only" Language Is an Additional Restriction

Entergy and its witness are also wrong when they claim that language in the MOU providing SP with the right to operate "in bridge movements only" over UP's Pine Bluff-Little Rock track in order to access the Pine Bluff Arsenal only limits SP's ability to serve shippers located directly on UP's Pine Bluff-Little Rock track. The portion of the MOU that contains the "bridge" language does not purport to replace the "existing shipper" limitation. Indeed, when one reads the full sentence that contains the "bridge" language, provision, one sees that it actually reflects the "existing shipper" limitation by providing that SP received access to UP's Pine Bluff-Little Rock line "for access to the Pine Bluff Arsenal"; it does not purport to allow SP to use UP's Pine Bluff-Little Rock line more broadly to access SP's entire Arsenal Lead and any shippers that may build out to it.

The "bridge movements only" language serves a separate purpose from the MOU's "existing shipper" limitation. The "bridge" language makes clear that SP could not use its trackage rights along UP's Pine Bluff-Little Rock line to serve any shippers located along that line or to construct any build-outs from that line. In other words, the "bridge movements only" language was intended to protect UP from any negative repercussions of granting SP trackage rights over a line not directly involved in the relocation project. It is thus an addition to, and not a replacement for, the strict limitation that allowed SP to serve only its existing shippers.

3. The "Existing Shipper" Limitation Was Not Confined to Downtown Pine Bluff

Entergy and its witness are also wrong when they claim that the "existing shipper" limitation applies only to industries in downtown Pine Bluff. Entergy bases this argument on a portion of the MOU in which UP and SP agreed to "promptly enter into negotiations . . . governing the joint operations . . . to serve existing industries in the downtown area," but this provision merely reflects the railroads' obligation to formalize the restrictive access agreements set forth in the MOU. This provision does not purport to alter the MOU's clear "existing shipper" limitation, which appears in a separate section of the MOU. And as Mr. Davidson explains (p. 6), it was not intended to have such an effect.

Moreover, as Mr. Davidson points out (p. 6), if one were to accept Entergy's logic — that no restrictions apply to the Arsenal Lead because only the "downtown" area was mentioned in the later section — one would have to conclude that UP had no obligation to provide SP with access to the Arsenal Lead at all, because (by Entergy's logic) UP and SP never agreed to "enter into negotiations" specifically with regard to the Arsenal Lead, and no document other than the MOU purports to give SP the trackage rights necessary to serve the Arsenal Lead. As Mr. Davidson explains, the "downtown" language reflects that the parties were primarily focused on the effects of the relocation project on downtown Pine Bluff. It was not meant to modify the "existing shipper" limitation that applied to SP's rights to use UP's lines.

4. The "Contemporaneous" Interpretation of Entergy's Witness Is Irrelevant

Entergy and its witness are also wrong when they suggest that advice purportedly given by Mr. McClanahan to the Pine Bluff Industrial Foundation supports Entergy's request in

this case. The advice Mr. McClanahan claims to have given would have been directly contrary to the plain language of the MOU. Moreover, it is difficult to know what to make of Mr. McClanahan's claim, as he does not specify when he allegedly provided the advice in question, identify the specific person who allegedly received it, clearly describe what his advice was, or provide any documentation to support his claim. Mr. McClanahan's views as to SP's intent at the time it entered into the MOU appear to be based on no more than his personal notion of what SP should or should not have agreed to. They are not only contrary to the plain language of the MOU, but also contrary to the recollections of Messrs. Davidson, Bradley and Somervell, all of whom were also involved in the Pine Bluff relocation project and familiar with the access issues that the project created.

If Mr. McClanahan advised the Pine Bluff Industrial Foundation that SP could, after the relocation project, serve a new shipper located on the Arsenal Lead using trackage rights over UP's Pine Bluff-Little Rock line, he was wrong. Mr. Davidson confirms that if SP had located a new customer on the Arsenal Lead and attempted to serve that customer via trackage rights over UP, SP would have been violating the access provisions in the MOU. And, in fact, SP never located or attempted to locate any new shippers on the Arsenal Lead after the relocation project. Thus, the parties' subsequent conduct under the agreement confirms their understanding of the MOU's plain language.

5. Entergy's Common Carrier Argument Is Without Merit

The final argument that Entergy and its witness advance in their attempt to convince the Board to ignore the MOU's plain language is that any restriction on SP's right to

access the Arsenal Lead would violate SP's common carrier obligation. This argument is also without merit.

(a) Section 11103, and Not the Common Carrier Provision, Would Be Applicable, and SP Would Not Have Been Required to Provide a Switch Connection Under Section 11103

First, the common carrier obligation simply does not govern whether SP would have been required to serve an Entergy build-out to the Arsenal Lead prior to the UP/SP merger. Rather, whether SP was required to establish a connection from its Arsenal Lead to serve an Entergy-constructed line would have been governed by the "switch connections and tracks" provision found at 49 U.S.C. § 11103 (formerly § 11104). See Finance Docket No. 30858, K&K Warehouse — Exemption From 49 U.S.C. 11104 & 10901(d), Decision served Apr. 23, 1987, p. 3; Finance Docket No. 32058, Battaglia Distributing Co. v. Burlington Northern R.R., Decision served Dec. 11, 1998, p. 3.

Moreover, in K&K Warehouse, a decision squarely on point, the ICC made clear that Section 11103 provides no basis for overriding the terms of a trackage rights agreement between two railroads and requiring one of the railroads to install a switch to establish competitive service to a shipper where that railroad was a party to a trackage rights agreement in which it had agreed not to serve new shippers located within a defined area. The ICC explained:

> "The intent of [the trackage rights] agreement was to benefit MILW by enabling it to abandon its parallel line and operate on CNW's line. As part of that agreement, MILW agreed to refrain from serving any shippers south of the CNW line. This condition appears to have been central to the trackage rights agreement, and this record provides no basis for finding that removal of it is necessary to the public interest. Retroactive decisionmaking can cause considerable disruption to the reasonable expectations of the parties who willingly entered into the agreement in the

> past. Accordingly, it is not favored absent a strong showing that it would be in the public interest. K&K here has merely expressed a desire for the services of a second carrier. This showing is inadequate to warrant our reopening of [an earlier] proceeding to strike down the territorial restriction."

K&K Warehouse, p. 4.

The parallels to the present situation are remarkable: SP severed the connection between its mainline and the Arsenal Lead and entered into an agreement that allowed it to operate on UP's Pine Bluff-Little Rock line. As part of that agreement, SP agreed to refrain from using its rights over UP to reach the Arsenal Lead to serve any shippers except its existing shippers (and benefitted from that agreement by saving the costs associated with maintaining and operating the Arsenal Lead). As UP's witnesses testify, that condition was central to UP's agreement to grant SP the rights in question. Thus, if a shipper such as Entergy had filed a petition seeking to require SP to establish a switch to connect its build-out to the Arsenal Lead in order to obtain service from a second carrier, the petition would have been denied because "such a use of section [11103] in this situation is beyond the purpose and intended reach of that statute." Id., p. 3.[2/]

2/ See also Finance Docket No. 32645, Big Stone-Grant Industrial Development & Transportation, L.L.C. — Construction Exemption — Ortonville, MN & Big Stone City, SD, Decision served June 9, 1998 (allowing withdrawal of a construction exemption after a district court ruled in State of Minnesota by Burlington Northern R.R. v. Big Stone-Grant Industrial Development & Transportation, L.L.C., 990 F. Supp. 731 (D. Minn.), aff'd, 131 F.3d 144 (8th Cir. 1997), that a railroad could not establish competitive service to shippers located along the proposed build-out line, which would have connected to its own line, because of restrictive terms contained in a trackage rights agreement governing the railroad's use of a different line that its predecessor had entered into with the railroad already serving those shippers).

(b) Even If the Common Carrier Provision Were Applicable, It Would Not Have Overridden the MOU Restriction

Even if the common carrier provision, 49 U.S.C. § 11101(a), were applicable, SP would not have had a common carrier obligation to serve a shipper that decided to locate along the Arsenal Lead after the lead was severed from SP's mainline. As the Board has recognized, "requests for rail transportation must be specific and reasonable." Docket No. AB-52 (Sub-No. 71X), Atchison, Topeka & Santa Fe Ry. — Abandonment Exemption — In Lyon County, KS, Decision served June 17, 1991, p. 6 (emphasis added); see also Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 325 (1981) (the common carrier requirement "extracts only what is reasonable of the railroads under the existing circumstances"). Where the Board has found violations of the common carrier obligation, "the shippers located on the line requesting service were those who previously had used the carrier's service." Id. (emphasis added); see also Docket No. AB-405 (Sub-No. 1X) & Finance Docket No. 32541, LI Acquisition Corp. d/b/a Upper Merion & Plymouth R.R. — Abandonment Exemption — In Montgomery County, PA; Feeder Line Application of S.T. Dvorak, Decision served Aug. 23, 1994, p. 9. SP thus would not have violated its common carrier obligation had it declined to provide service to a new shipper locating on the Arsenal Lead after SP had severed the Lead and entered into an agreement that restricted its ability to serve shippers on the Lead.

Furthermore, if SP did have a common carrier obligation to provide service to an Entergy or BNSF build-out to the Arsenal Lead, it could have discharged this obligation by reconnecting the Arsenal Lead to the Pine Bluff mainline (see, e.g., Atchison, Topeka & Santa Fe Ry., p. 4; Finance Docket Nos. 31271 & 31230, City of Colorado Springs & Metex Metropolitan

District — Petition for Declaratory Order — Abandonment Determination; Denver & Rio Grande Western R.R. — Petition for Declaratory Order — Spur Track Determination, Decision served Mar. 31, 1989, p. 8), or by entering into a trackage rights agreement with UP (see, e.g., Finance Docket No. 32195, Southern Electric P.R. — Construction Exemption — Effingham County, GA, Decision served Feb. 13, 1995, App. p. 2 n.2).

Both of these options were available to SP. Entergy and its witness specifically claim that SP would have reconnected its Arsenal Lead to its Pine Bluff mainline in order to provide service to Entergy. Petition, p. 29, & McClanahan V.S., pp. 2, 12. As for the trackage rights option, Mr. Davidson explains that UP and SP could have agreed on trackage rights expanding SP's right to use UP's line to access the Arsenal Lead, though if such trackage rights were to allow SP to access Entergy, the price would have had to reflect UP's lost business.

Entergy and its witness claim that SP had no incentive to take any steps that might have undercut its ability to serve new shippers on the Arsenal Lead, but that is clearly not the case. As UP's witnesses explain, SP benefitted by saving the expenses associated with operating and maintaining the Arsenal Lead. SP also benefitted by saving the expenses associated with reconnecting the Arsenal Lead to the relocated mainline. Finally, SP benefitted from the sale of the 1.25-mile portion of the Arsenal Lead track that it removed.[8/]

[8/] In UP's Opposition, UP's witnesses stated that SP would have been required to bear the costs of reconnecting the Arsenal Lead to the relocated SP mainline. Entergy's witness disagrees, pointing to language in the MOU that obligated SP to "provide written approval of engineering details, plans, and specifications, when satisfactory from [SP's] standpoint." But that language does not provide an answer. As Mr. Davidson notes, the MOU makes clear that SP's made the decision to remove 1.25 miles of the Arsenal Lead and not to reconnect the Lead

(continued...)

III. ENTERGY HAS NO RIGHT TO REQUIRE UP TO RECONNECT THE ARSENAL LEAD TO THE FORMER SP MAINLINE IN PINE BLUFF

Entergy's fall-back request — that the Board order UP to reconnect the Arsenal Lead with the former SP mainline in Pine Bluff at UP's expense and allow BNSF to operate over the Arsenal Lead (Petition, p. 6) — can only be described as outrageous. This request is clearly contrary to the CMA build-out condition, which requires that BNSF (or the shipper) bear the costs of constructing a build-out when it stands in the shoes of SP. See, e.g., UP/SP, Decision No. 68, p. 4 ("Both CMA Paragraph 13 and our build-in/build-out condition . . . require that a build-in/build-out line actually be built, either by the shipper or by BNSF, or by any entity other than UP/SP.").[9] Entergy does not, and could not, cite any legal authority or precedent for requiring UP to subsidize BNSF competition in this manner. Requiring UP to pay the costs of reconnecting the Arsenal Lead would place BNSF in a far superior position to the position SP

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[8] (...continued)
independently of the relocation project. While the MOU provided that track materials recovered as part of the relocation project were to be credited to the project (see Exhibit B, p. 9), UP's records show that SP received all of the proceeds from the sale of the track that was salvaged when the Arsenal Lead was severed and sold. See Exhibit C (noting that all salvageable material from the Arsenal Branch was to be credited to SP, but that for other salvaged material, one-third was to be credited to SP and two-thirds were credited to the project). Because SP's actions with respect to the Arsenal Lead were for its own benefit, SP would have had to bear the costs of its choice to remove Lead trackage. Davidson V.S., p. 7 n.1.

[9] As Entergy acknowledges (pp. 30-31), its fall-back request does not involve the Entergy-specific condition granted by the Board, because Entergy is not seeking to construct a 21-mile build-out to the former SP mainline in Pine Bluff, but instead seeks to use U.S. Army track and the former SP Arsenal Lead for almost the entire distance. Moreover, the Entergy-specific condition clearly provides that BNSF or the shipper must bear the costs of constructing the build-out line. UP/SP, Decision No. 44, p. 185 (Entergy will have access to the build-out line "if and when the line is ever constructed by any entity other than [UP]") (emphasis added).

occupied before the merger — it would be able to obtain access to Entergy without bearing the costs that SP would have had to bear to establish service. This is completely contrary to both the language and purpose of the build-out conditions.

Furthermore, even if Entergy or BNSF were willing to pay the costs of reconnecting the Arsenal Lead to the former SP mainline, there is no basis on the present record for granting an exemption with respect to such a radically altered construction proposal.

Before Entergy proposed the build-out that is the subject of its exemption petition and its primary request for relief in this case, it engaged an engineering firm to perform a "detailed . . . examination" of its "construction options." Petition, p. 4 n.6, & Jewell V.S., p 10. It is not clear whether that examination of Entergy's "options" included an examination of the fall-back proposal it now advances. If it did, one is forced to wonder what problems Entergy discovered that led to its decision not to present the same level of analysis for the fall-back proposal as it has for the proposal that is the subject of its pending construction exemption. If Entergy has not fully examined its fall-back proposal, Entergy does not yet know whether its request is practical. Would it involve construction through developed commercial or residential areas, or city parkland? Could it be squared with SP's sale of its interest in the Arsenal Lead to Mid-State Corporation in 1992? Would the particular alignment to be used (which Entergy does not reveal) violate the settled rights of the parties to the Pine Bluff relocation project? Entergy unquestionably has the right, under the condition it sought and received in the UP/SP proceeding, to build out from the White Bluff plant to Pine Bluff. But, that being recognized, we submit that

the Board should not rule on Entergy's fall-back request in its present vague and unsupported posture.

IV. ENTERGY CONTINUES TO MISLEAD THE BOARD WITH ITS COMPLAINTS ABOUT UP SERVICE

In its Opposition to Entergy's exemption petition, UP showed how Entergy was attempting to use its complaints about UP service to escape from the obligations of its long-term contract with UP and expand its rights under the UP/SP merger decision to obtain BNSF service. Entergy continues to use these tactics in the instant petition.

UP's Opposition showed that Entergy's complaints were without merit. UP showed that Entergy's complaints about UP service from 1993 through 1995 involved factors beyond UP's control, such as the Midwestern floods of 1993 and 1994 and a surge in demand for PRB coal. UP also showed that Entergy's problems during UP's service crisis were exacerbated by Entergy's mismanagement of an inventory reduction program and its gamesmanship in refusing to allow Distributed Power operations and failing to take advantage of alternative service arrangements. Finally, UP showed that Entergy is now complaining that UP delivering too much coal. See UP Opposition, pp. 18-20, & Gough V.S., pp. 4-8.

Rather than rebut the factual showing in UP's Opposition, Entergy instead asserts that if the Board had reviewed the evidence and contracts in the parties' federal court contract litigation, it "would have seen, as the Court has, that UP's service levels violated Entergy's rail transportation agreement." Petition, p. 33. The Court, however, has not endorsed Entergy's view of the facts or made any findings regarding UP's "service levels." The Court has simply made a narrow, legal finding of breach based on facts that UP has never disputed: that during the service

crisis UP did not consistently deliver all of the required "make up" tonnage during its allowed "make up" periods. Jewell V.S., Ex. CWJ-1, p. 17. The parties remain in sharp disagreement as to the amount of make up tonnage not timely delivered, an issue not addressed by the Court. Trial is over a year away, the parties have not yet joined issue on whether UP's breach was "material," and discovery on that question remains at an early stage. Moreover, Entergy and the Court only recently received UP's four-count Counterclaim, which describes how Entergy breached its contract obligations by (1) failing to give timely notice of tonnage to be transported, (2) failing to cooperate in maximizing the coal carried in each train, (3) intentionally miscalculating the amount of deficit tonnage not made up by UP, and (4) insisting on loading trains at mines experiencing extensive delays.

The Board should also take note of Entergy's failure to offer any new evidence to contradict the Board's previous finding that "unlike other utilities, Entergy has apparently refused to support operational changes to minimize congestion or pursue other UP-suggested alternatives that would have improved its coal deliveries."[10/] Indeed, Entergy admits that when the Board reached this conclusion, it had already reviewed "extensive factual evidence" on this very subject from Entergy. Petition, p. 32. Instead of challenging the Board's well-supported finding, Entergy now tries to avoid it, by declaring that the "issues that UP has raised as to Entergy's responsibility for not assisting UP in connection with its breaches o the service standard are issues that are currently pending before the Court." Jewell V.S., p. 7. UP obviously

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[10/] Service Order No. 1518 (Sub-No. 1), Joint Petition for a Further Service Order, Decision served July 31, 1998, p. 7.

is not seeking any rulings in this proceeding concerning Entergy's conduct. But Entergy should not expect UP to remain silent when Entergy paints a distorted picture of UP's service, the parties' contract litigation, and Entergy's own level of cooperation under the parties' rail transportation agreement.

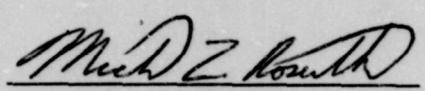
V. CONCLUSION

Under the Board's UP/SP merger decision, Entergy has the right to construct a build-out in order to obtain BNSF service. In the instant petition, however, Entergy is seeking rights above and beyond those granted as part of the general build-out condition that applies to all shippers (including Entergy), and the specific build-out condition that Entergy requested and received. The Board should deny Entergy's petition because in both its primary and its fall-back requests, Entergy is seeking an order that would place Entergy in a better position to construct a build-out than it occupied prior to the UP/SP merger.

Respectfully submitted,

CARL W. VON BERNUTH
Union Pacific Corporation
1416 Dodge Street
Room 1230
Omaha, Nebraska 68179
(402) 271-5777

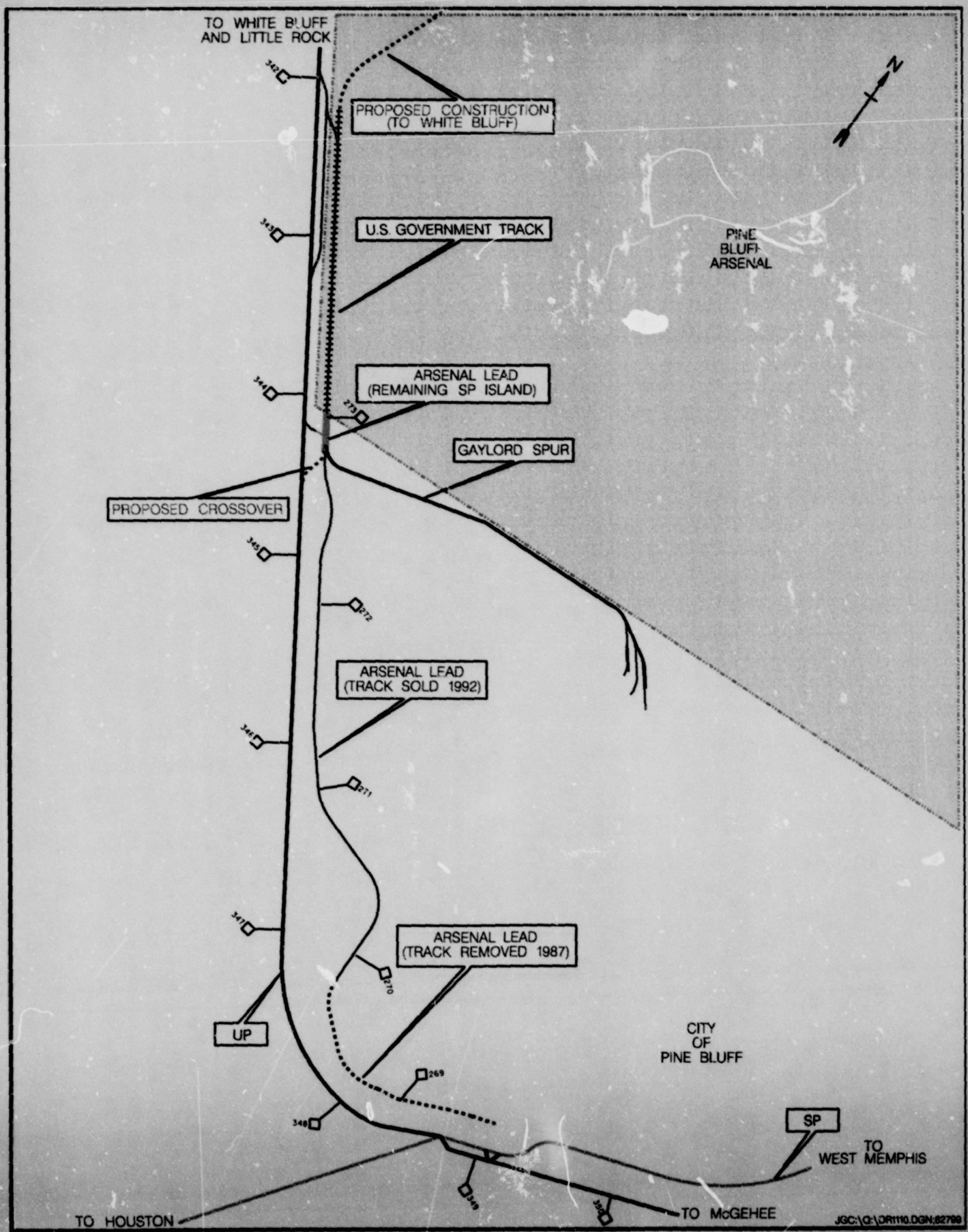
JAMES V. DOLAN
LAWRENCE E. WZOREK
Law Department
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-5000



ARVID E. ROACH II
J. MICHAEL HEMMER
MICHAEL L. ROSENTHAL
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044-7566
(202) 662-5388

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

October 12, 1999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AND LITTLE ROCK
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(REMAINING SP ISLAND)
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(TRACK SOLD 1992)
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(TRACK REMOVED 1987)
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US OFFICE PRODUCTS

MEMORANDUM

OF

UNDERSTANDING

FOR THE IMPLEMENTATION

OF A

RAILROAD - HIGHWAY DEMONSTRATION PROJECT

Pine Bluff, Arkansas

FAP RR-8380(15)

March 1984 Update

MEMORANDUM OF UNDERSTANDING

Pine Bluff, Arkansas

Railroad Demonstration Project

···RECITALS···

The Congress of the United States of America by enactment of the 1973 Federal Aid Highway Act (Sec. 163) encouraged, among other things, rail and highway safety by providing for railroad relocation demonstration projects. Section 140 of the Federal Aid Highway Act of 1976 amended Sec. 163 of the 1973 Act by directing the Secretary of Transportation to enter into such arrangements as necessary to carry out a demonstration project in Pine Bluff, Arkansas for the relocation of railroad lines for the purpose of eliminating highway railroad grade crossings.

The parties to this Memorandum of Understanding are:

1. Arkansas State Highway and Transportation Department (AHTD)
2. Missouri Pacific Railroad Company (MP)
3. St. Louis Southwestern Railway Company (SSW)
4. City of Pine Bluff, Arkansas (PB)
5. Jefferson County, Arkansas (JC)

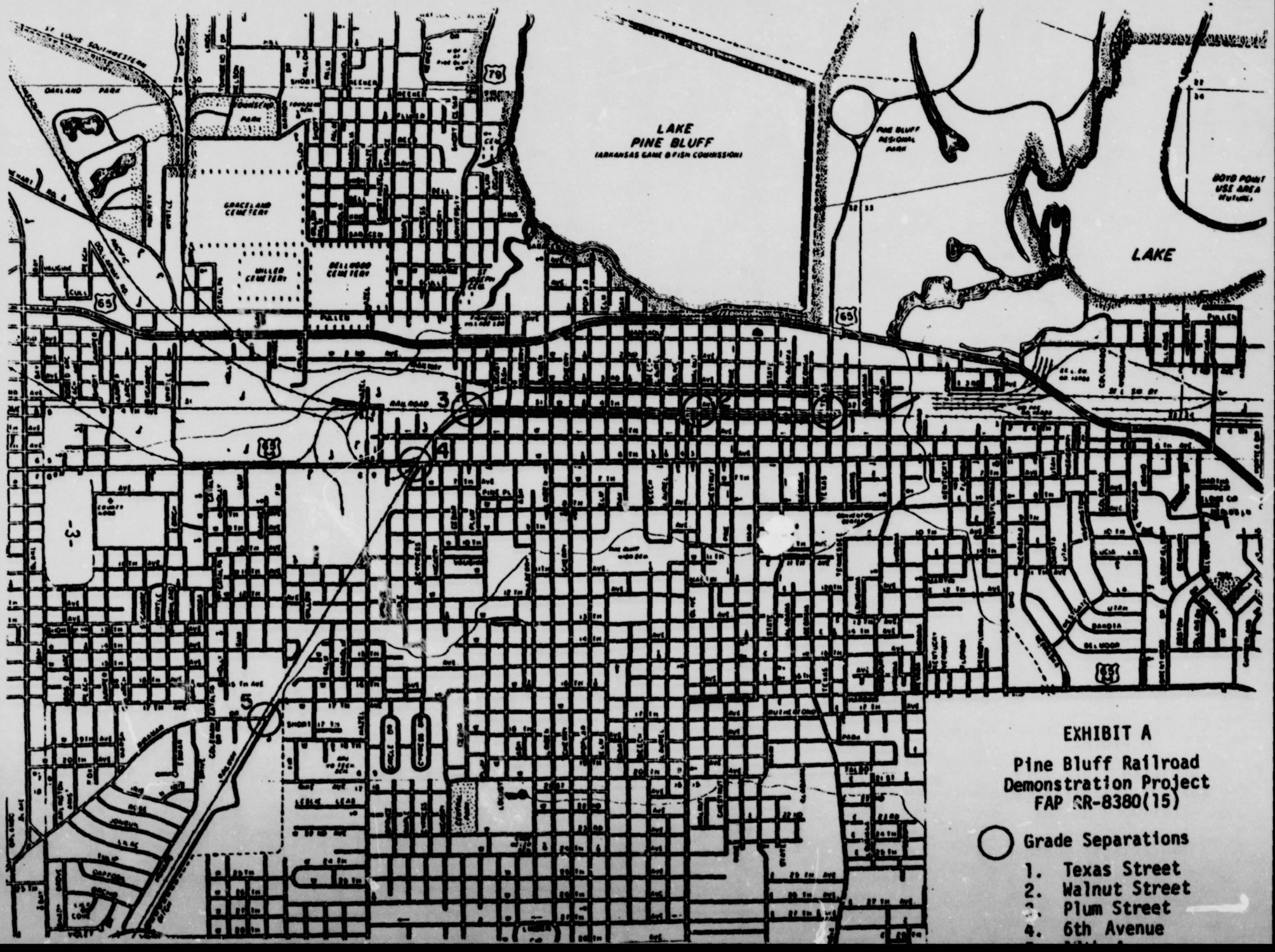
These are the parties which will have primary responsibility for design, construction, operation and maintenance of the project.

Various alternates for implementing a demonstration project have been investigated in coordination with the Pine Bluff Railroad Steering Committee. Subsequent to the F.Y. 1981 Federal Allocation Plan, limited

build, usable segments, were proposed and accepted for preliminary engineering and design. The limited build project consists of five (5) proposed grade separations at Texas, Walnut and Plum Streets and Sixth and Seventeenth Avenues. Attached as Exhibit "A", and made a part of this Memorandum by reference, is a map showing the locations of the proposed grade separations.

A basic feature of the project is the consolidation of the operations of the MP and the SSW in a common corridor along Fourth Avenue within the Pine Bluff central city area. The main line track of the SSW will be relocated from the 3rd Avenue to the 4th Avenue corridor, generally paralleling the existing MP tracks. The SSW operation will make a transition from its existing main line on 3rd Avenue, beginning near Florida Street, and enter the 4th Avenue corridor near Louisiana Street, then make a transition to return to its existing main line between Locust and Fifth Avenue. Right-of-way within the 4th Avenue corridor needed for the consolidated rail operations will be provided by the City of Pine Bluff. The SSW will have the right to provide rail service to their existing shippers and receivers of railway carloads of freight by use of rail connections as provided by the project and/or as in agreement with MP operations.

The SSW lead to the Pine Bluff arsenal will be removed beginning at a location west of Ash Street, and the SSW will have the right to operate in bridge movements only, over tracks of MP for access to the Pine Bluff Arsenal.


LAKE
PINE BLUFF
(ARKANSAS GAME & FISH COMMISSION)
LAKE
GRACELAND CEMETERY
OAKLAND PARK
PINE BLUFF REGIONAL PARK
BOYD POINT USE AREA (Future)
EXHIBIT A
Pine Bluff Railroad
Demonstration Project
FAP SR-8380(15)
Grade Separations
1. Texas Street
2. Walnut Street
3. Plum Street
4. 6th Avenue

(1) This entire agreement is conditioned and contingent upon 95% or more of the eligible cost being funded by Federal funds. The remaining five percent of the funding of eligible costs will be arranged and/or made by JC and PB, except that the AHTD will provide the local five percent matching amount for designated highway grade separations on State Highway facilities.

(2) As specified in FHWA Memorandum dated January 4, 1974, pertaining to Implementation Procedures - (Section 163(a) - (k), Federal-Aid Highway Act of 1973, Demonstration Project - Railroad Highway Crossings), the procedures to be followed for advancing and completing these projects are to be in accordance with the standard procedures employed on regular Federal-Aid railroad-highway improvement projects in cooperation with the state highway departments. Therefore, all project work shall be in accordance with applicable federal, state, county or city laws, statutes, ordinances, rules, regulations, policies or procedures.

(3) The eligible costs under the terms of this agreement are those costs incurred to effect the consolidation of the MP and SSW rail operations in the central PB area, including appropriate switching and signalization items, construct the limited build alternatives, and rehabilitate the portion of Third Avenue where tracks have been removed. The Third Avenue rehabilitation will consist of approximately 6,000 feet of improvements from Missouri to Mulberry Streets, including removing excess rock from the old track bed, partially removing rises at street

intersections, preparing and compacting the roadbed, and an ACHM overlay. The estimated contract price for this segment is $250,000.

A preliminary cost for the total project has been estimated at [redacted] $19 million. Any upgrading costs required to meet federal government design standards are considered eligible costs.

(4) With the exception of JC, PB and the AHTD as described in item (1) above, no party hereto shall be required to finance or fund any eligible portion of the new trackage or grade separations. However, other parties may participate in portions of the project in funds or in-kind services as voluntarily and mutually agreed among the parties. Responsibility for funding and financing shall be limited to the local amount of the eligible cost of the new trackage, grade separations and street rehabilitation, for which the United States has provided the actual funds for the Federal-Aid percent of each project.

(5) All work performed or to be performed on the project is subject to the availability of Federal funding.

SPECIFIC AGREEMENTS OF
THE ARKANSAS STATE HIGHWAY AND TRANSPORTATION DEPARTMENT

The Arkansas State Highway and Transportation Department agrees it will:

(1) At project expense administer and/or perform the design, prepare or have prepared plans and specifications, handle eligible utility adjustments, construct or arrange for the construction of the facilities shown on Exhibit "A", together with the eligible appurtenances thereto.

(2) Appraise and acquire at project expense any and all additional rights-of-way outside the 4th Avenue Corridor necessary to construct the project.

(3) Participate in the local five percent matching amount by providing matching funds to construct grade separations for state highway facilities only, according to project plans and specifications.

(4) After grade separations have been designed and constructed according to project plans and specifications, maintain at its cost and expense such facilities on the State Highway System.

(5) Work with PB and JC concerning continued public information and involvement during project implementation.

SPECIFIC AGREEMENTS OF THE MISSOURI PACIFIC RAILROAD COMPANY

Missouri Pacific Railroad Company hereby specifically agrees that:

(1) It will not oppose or protest any applications filed by the SSW with the Transportation Commission of Arkansas or the Interstate Commerce Commission or other relevant government authorities which are required in order for tracks to be built and for operations of the MP and the SSW to be consolidated in the common corridor along 4th Avenue, provided such applications are in accordance with this Memorandum of Understanding.

(2) It will promptly enter into negotiations with the SSW to formulate agreement(s) governing the joint operations by the MP and SSW in the Fourth Avenue common corridor and to serve the existing industries in the downtown area. The agreement(s) will be completed and executed before the consolidation of operations of the MP and the SSW is begun; or if agreement(s) has not been reached by a time appointed by the AHTD, the MP and SSW will by mutual agreement submit the matter to arbitration for a period of no longer than 30 days and in such event the decision of the arbitrator will be binding upon both parties.

(3) It will provide written approval of engineering details, plans, and specifications, when satisfactory from a railroad (MP) standpoint, prior to project implementation.

SPECIFIC AGREEMENTS OF THE MP (Cont'd)

(4) In the event a street underpass is selected, it will maintain the tracks and bridge structure, excluding abutments and foundations, which will be maintained by the public agency having jurisdiction over the subject street or roadway.

SPECIFIC AGREEMENTS OF
THE ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

St. Louis Southwestern Railway Company hereby specifically agrees that:

(1) It will promptly file and prosecute any and all applications necessary for it to secure authority from either the Transportation Commission of Arkansas or the Interstate Commerce Commission or other relevant government authorities for construction of tracks to connect its main line on 3rd Avenue to its newly constructed line on 4th Avenue, to conduct operations over the common corridor and to operate over MP tracks for access to the Pine Bluff Arsenal.

(2) It will not oppose or protest any applications filed by the MP with the Transportation Commission of Arkansas or the Interstate Commerce Commission or other relevant government authorities which are required in order for operations of the MP and the SSW to be consolidated in the 4th Avenue Corridor, provided such applications are in accordance with this Memorandum of Understanding.

(3) It will promptly enter into negotiations with the MP to formulate agreement(s) governing the joint operations by the MP and SSW in the Fourth Avenue common corridor and to serve the existing industries in the downtown area. The agreement(s) will be completed and executed before the consolidation of operations of the SSW and the MP is begun; or if agreement(s) has not been

reached by a time appointed by the AHTD, the MP and SSW will by mutual agreement submit the matter to arbitration for a period of no longer than 30 days and in such event the decision of the arbitrator will be binding upon both parties.

(4) It will execute procedures for abandonment on the section of spur track along 6th Avenue to accommodate the planned 6th Avenue grade separation. Rail service for the area will be continued according to item (3) above, and the right-of-way for this abandoned section will be disposed of according to item (7). The removal of track materials on the abandoned section is project expense.

(5) Upon completion of the new consolidated portion along Fourth Avenue, the SSW shall commence operations over the system and immediately commence procedures for abandonment on the unused paralleling section on Third Avenue and, at project expense, arrange for removal of this rail segment.

(6) All track materials recovered from the abandoned section(s) that are accepted by SSW and returned to stock shall be credited to the project at current secondhand prices of such used material. Material recovered and not accepted for reuse by SSW shall, following an opportunity for AHTD inspection, be sold by SSW to the highest bidder; or if SSW practices a system of periodic disposal by sale, credit to the project shall be at the going prices supported by the records of SSW. The cost of removing, salvaging, transporting, and handling all recovered materials, including rails and cross ties, shall not exceed the value of those materials recovered.

SPECIFIC AGREEMENTS OF THE SSW (Cont'd)

(7) It will enter into agreement with PB to convey by appropriate instruments, abandoned track rights-of-way along Third Avenue and for the spur track right-of-way along 6th Avenue, free of any cost to PB, for use in current or future transportation plans or for other public purposes.

(8) It will provide written approval of engineering details, plans, and specifications, when satisfactory from a railroad (SSW) standpoint, prior to project implementation.

(9) In the event a street underpass is selected, it will maintain the tracks and bridge structure, excluding abutments and foundations, which will be maintained by the public agency having jurisdiction over the subject street or roadway.

SPECIFIC AGREEMENTS OF
THE CITY OF PINE BLUFF, ARKANSAS

The City of Pine Bluff agrees to:

(1) Cooperate with each other party of this Memorandum of Understanding and use their best effort to cause this project to be constructed as expeditiously as possible.

(2) Enter into written agreement or agreements with JC to provide one-half of the five percent local matching funds for the project, except for those highway grade separations on state highway facilities where the local match will be provided by AHTD.

(3) Enter into agreement with SSW to receive by appropriate instruments, any property abandoned under the project lying within the corporate limits of PB at the time of conveyance to be used in current or future transportation plans or for other public purposes. In the event PB chooses to dispose of the property, they will provide AHTD a monetary amount equal to the appraised estimate of just compensation to be credited to the project.

(4) Review and update as necessary, existing city ordinances pertaining to railroad operations remaining in the inner city.

(5) Maintain at its cost and expense, such city street facilities constructed as a part or result of this project.

(6) Work with JC and the AHTD concerning continued public information and involvement during project implementation.

(7) Convey by appropriate instrument(s) the additional right-of-way requirements needed for accomplishing consolidation of the operations of the MP and the SSW within the Public Common along Fourth Avenue.

(8) Maintain or arrange to have maintained, at its cost and expense, the grade separations not on the State Highway System, after such facilities have been designed and constructed according to project plans and specifications.

SPECIFIC AGREEMENTS OF JEFFERSON COUNTY, ARKANSAS

Jefferson County, Arkansas agrees to:

(1) Cooperate with each other party of this Memorandum of Understanding and use their best effort to cause this project to be constructed as expeditiously as possible.

(2) Enter into written agreement or agreements with PB to provide one-half of the five percent local matching funds for the project, except for those highway grade separations on state highway facilities where the local match will be provided by AHTD.

(3) Work with PB and the AHTD concerning continued public information and involvement during project implementation.

GENERAL AGREEMENTS

All parties hereto agree:

(1) They will each cooperate with the other and use their best efforts to cause the project to be constructed as expeditiously as possible. All work contemplated in this agreement shall be performed in a good and workmanlike manner in accordance with the approved plans and specifications which are to be developed to the satisfaction of the parties, and as a part of the Area Transportation Study.

(2) The books, papers, records, and accounts of the parties, so far as they relate to the items of expense for labor and materials, or are in any way connected with the work herein contemplated, shall, at all times, be open to inspection and audit by the authorized representatives of the parties and the Federal Highway Administration.

(3) The parties agree, as between themselves, that each will be solely responsible for any actions, costs, fees and damages, and liability resulting from injury, death and/or property damage which is caused by an act or omission of their respective agents or employees working in the course and within the scope of this project. The provisions of this section are for the exclusive benefit of the parties hereto and not for the benefit of any other party.

(4) The parties hereto agree and understand that all work contemplated by this agreement will be in compliance with the

regulations of the Department of Transportation, Title 49, Code of Federal Regulations, Part 21, issued in implementation of Title VI of the Civil Rights Act of 1964, as amended, unless such regulations are superceded by more pertinent regulations applicable to specific parties, e.g., MP and SSW.

(5) That all applicable regulations of the Federal Highway Administration Federal-aid Program Manual, Vol. 6, Chapter 6, Section 2, Sub-section 1, are incorporated herein by reference.

(6) In connection with the performance of work under this agreement, the parties agree not to discriminate against any employee or applicant for employment because of race, religion, color, national origin, sex or age. Such agreement shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.

(7) This agreement shall inure to the benefits of and be binding upon the successors and assigns of the MP, the SSW, JC, PB, and the AHTD.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed by their officers duly authorized as of the day and year herein written,

APPROVED AS TO FORM:

Thomas B. Keys
General Council, AHTD
May 17, 1984
Date

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

BY L. J. Dulon

TITLE: Assistant Vice President-Contracts

APRIL 25, 1984
Date

MISSOURI PACIFIC RAILROAD COMPANY

BY R. D. Saunders

TITLE: Vice President-Operation

May 2, 1984
Date

CITY OF PINE BLUFF

BY Dave Collins

TITLE: Mayor

May 14 1984
Date

JEFFERSON COUNTY, ARKANSAS

BY Earl Chadick

TITLE: County Judge

May 14th 1984
Date

ARKANSAS STATE HIGHWAY AND TRANSPORTATION DEPARTMENT

Director of Highways and Transportation

5/17/84
Date

APPROVED:

R. G. Fairbrother
Division Administrator
FEDERAL HIGHWAY ADMINISTRATION

6/7/84
Date

US OFFICE PRODUCTS

SSW 081/230-1

E 081/349(PB)
February 19, 1987

Mr. W. C. Hoenig:
Attn: Mr. R. P. Albracht

SUBJECT: Pine Bluff Relocation Demonstration Project

This is in regard to Mr. W. J. Lacy's letter of February 5, copy attached.

Enclosed are specifications covering material removal through 3rd Street Project from MP 267.243 to MP 268.876 and sale of 1.25 TM Arsenal Branch at Pine Bluff.

In advertising bids we request separate quotes as 3rd Street will be two-thirds salvage credit to project and one-third to SSW.

Arsenal Branch salvageable materials to be sold are credited to SSW.

Buyer to furnish bond and insurance as stated in specifications with a starting date near March 23rd.

S. L. MURDOCK
For BHD

Attch.
cc: Mr. W. J. Lacy (SSW 081/230-1)
Mr. L. C. Yarberry (Property Accts.)
Mr. R. D. Bredenberg, Houston (510.3 P)
Mr. R. R. McClanahan, Pine Bluff (340 PB)
Mr. L. F. Furlow
Mr. R. A. Futrell

1 3 5

VERIFIED STATEMENT

OF

RICHARD K. DAVIDSON

My name is Richard K. Davidson. I am Chairman and Chief Executive Officer of UPC and Chairman of UP. I began my railroad career as a brakeman/conductor with MPRR in 1960. Thereafter, I rose through the ranks of the MPRR Operating Department, becoming Vice President-Operations in 1976. In 1986, four years after the UP/MP/WP consolidation, I was promoted to Vice President-Operations of UP, and in 1989 I became Executive Vice President-Operations of UP. In 1991 I became Chairman and Chief Executive Officer of UP, and in 1994 assumed additional responsibilities as President of UPC. In 1995, I became Chief Operating Officer of UPC. In 1997 I relinquished the position of Chief Operating Officer, and I became Chairman and Chief Executive Officer of UPC.

I am submitting this statement in response to the petition filed by Entergy seeking the right to obtain rail service from BNSF via a build-out from Entergy's White Bluff plant.

I understand that the central issue raised by Entergy's petition is whether SP could have participated in Entergy's proposed build-out prior to the UP/SP merger by using trackage rights over MPRR's Pine Bluff-Little Rock line to reach the remains of a former SP line known as the Arsenal Lead.

In this statement, I describe the nature of SP's rights to access the Arsenal Lead prior to the UP/SP merger based on my personal knowledge as the MPRR officer who signed the Pine Bluff Railroad Demonstration Project Memorandum of Understanding ("MOU"), which established the scope of SP's rights to access the Arsenal Lead. The MOU is attached as Exhibit

B to this filing. As someone closely involved in the Pine Bluff project, and as the person who signed the MOU on behalf of MPRR, I can definitely state that SP did not have the right to use MPRR's Pine Bluff-Little Rock line as contemplated by Entergy's build-out proposal.

In 1984 when I signed the MOU, I was MPRR's Vice President-Operations. As Vice President-Operations, I was involved in various aspects of the Pine Bluff project. I attended several planning meetings with representatives of the state and local bodies that participated in the project, and as Vice President-Operations, I was responsible for MPRR's implementation of the project. In addition, because I previously served as MPRR's General Manager in Little Rock, where I had responsibilities that included the Pine Bluff area, I was particularly familiar with the lines and the business involved.

The Pine Bluff project involved relocating SP's mainline through Pine Bluff to run along the same corridor as MPRR's mainline. As part of the relocation project, SP's Arsenal Lead, which was used to serve the Pine Bluff Arsenal and several shippers located along an industrial track known as the Gaylord Spur, was severed from the SP mainline through Pine Bluff.

In planning the relocation project, the parties realized that the project would sever connections between SP and several of its existing shippers in the Pine Bluff area, including the Pine Bluff Arsenal. In recognition of this problem, MPRR and SP agreed that SP would be allowed to use MPRR track as necessary to reach its existing shippers. The MOU embodied this agreement. It provides:

> "The [SP] will have the right to provide rail service to their existing shippers and receivers of railway carloads of freight by use of rail

> connections as provided by the project and/or as in agreement with [MPRR] operations."

Ex. B, p. 3 (emphasis added).

The MOU also identified the Pine Bluff Arsenal as one of the affected shippers, and specially provided that SP would be allowed to use MPRR's Pine Bluff-Little Rock line to reach the remains of the Arsenal Lead in order to serve the Pine Bluff Arsenal:

> "The [SP] lead to the Pine Bluff arsenal will be removed . . . and the [SP] will have the right to operate in bridge movements only, over the tracks of [MPRR] for access to the Pine Bluff Arsenal."

Id. (emphasis added). This second provision did not specifically mention existing shippers located along the Gaylord Spur, but SP's right to access those shippers was secured by the MOU's general provision preserving access to existing shippers, and it was understood that Gaylord Spur shippers would be served using the rights that SP obtained to serve the Pine Bluff Arsenal.

The final form of the relocation project was a compromise. Many of the alternative plans for rerouting SP's mainline through Pine Bluff would have been very costly to accomplish. MPRR was willing, in order to satisfy government interests in implementing the relocation project at a reasonable cost, to allow SP to use certain MPRR tracks to maintain its existing service in the Pine Bluff area. However, MPRR made it abundantly clear that it was not willing to grant SP rights that would allow SP to use MPRR's tracks in order to compete for MPRR's customers. This clear intent was incorporated into the plain language of the MOU.

The plain language of the MOU makes clear that, as part of the Pine Bluff relocation project, MPRR agreed that SP could use MPRR's lines, but only to serve SP's existing

shippers, including the Pine Bluff Arsenal. The MOU does not grant SP any additional rights to use MPRR's lines. Moreover, as the person who signed the MOU on behalf of MPRR, I can state that MPRR understood and intended the agreement to contain this strict limitation.

I note that my reading of the MOU's language and my understanding of the parties' intent are shared by others who are knowledgeable about the events surrounding the Pine Bluff relocation project. I have reviewed UP's Opposition to Entergy's petition to exempt the construction and operation of the proposed build-out line, and I agree wholeheartedly with the testimony contained in the verified statements of Messrs. Wilmoth, Bradley and Somervell.

I recognize that Entergy has submitted a verified statement from Robert R. McClanahan, a former Division Superintendent of SP's Pine Bluff Division, in which Mr. McClanahan claims that SP's rights to use MPRR's Pine Bluff-Little Rock track to access the Arsenal Lead were not limited to the right to serve existing shippers. I completely disagree. The MOU's language makes clear that SP's rights to use any "connections as provided by . . . agreement with [MPRR]" were strictly limited to the right to serve "existing shippers and receivers." When I signed the MOU on behalf of MPRR, I clearly understood, and I believe that SP also clearly understood, that SP's rights would be limited to serving its existing shippers.

None of the reasons Mr. McClanahan offers in urging the Board to ignore the plain meaning of the MOU has any validity.

First, Mr. McClanahan is wrong when he claims that the MOU's language did not act as a limitation on SP's ability to serve shippers in the Pine Bluff area. The MOU provides that the rights SP obtained would give SP "the right to provide service to their existing shippers." Nothing in the MOU grants SP any other rights to use MPRR's tracks for any other purpose.

There is no question in my mind that the MOU language was intended as a strict limitation on SP's rights to use MPRR's track. The relocation project severed connections between SP and some of its existing customers, and MPRR was willing to allow SP to access those shippers using MPRR's tracks in order to further the relocation project. At the same time, MPRR wanted to insure that SP would not be able to use its rights to place MPRR at a competitive disadvantage by using MPRR's tracks to capture MPRR's existing business or potential new customers. MPRR was able to accomplish its objectives by including the "existing" shipper language in the MOU. I would not have signed any agreement that did not contain that restriction.

Second, Mr. McClanahan is wrong when he claims that language in the MOU providing SP with the right to operate in "bridge movements only" over MPRR's Pine Bluff-Little Rock line to access the Pine Bluff Arsenal provided the only limitation on SP's right to use the Pine Bluff-Little Rock line. The "bridge" language did not replace the "existing shipper" limitation. Instead, it was intended to make clear that SP could not use its trackage rights over MPRR's Pine Bluff-Little Rock line — a line not otherwise involved in the relocation project — to serve shippers located along that line or to construct build-outs from that line. Indeed, when one reads the full sentence that contains the "bridge" language, it becomes clear it actually incorporates the "existing shipper" limitation by providing that SP's rights to use the Pine Bluff-Little Rock line were limited to "access to the Pine Bluff Arsenal" — an existing SP shipper.

Third, Mr. McClanahan is wrong when he claims that the "existing shipper" limitation applied only to shippers in downtown Pine Bluff and not to future shippers or build-outs to the Arsenal Lead. Mr. McClanahan points to a portion of the MOU in which MPRR and

SP agree to "promptly enter into negotiations . . . governing the joint operations . . . to serve the existing industries in the downtown area," but this provision merely reflects the railroads' obligation to formalize the restrictive access agreements described elsewhere in the MOU. It was not intended to alter the specific restriction on SP's rights to use MPRR tracks, which appears in a separate section of the MOU.

If one were to accept Mr. McClanahan's logic — that no restrictions apply to the Arsenal Lead because only the "downtown" area was mentioned in this later section — one would also have to conclude that MPRR had no obligation to allow SP to access the Arsenal Lead, because MPRR and SP never agreed to "promptly enter into negotiations" specifically with regard to the Arsenal Lead, and no document other than the MOU purports to give SP the rights necessary to serve the Arsenal Lead. The wording of the provision that Mr. McClanahan highlights merely reflects the fact that the parties were primarily focused on the effects of the relocation project in downtown Pine Bluff; it was never meant to exclude any shippers affected by the relocation project or to modify the "existing shipper" limitation that applied to all of SP's rights to use MPRR's lines.

Fourth, Mr. McClanahan is wrong when he claims that his alleged advice to the Pine Bluff Industrial Foundation provides support for his view that the "existing shipper" limitation did not apply to the Arsenal Lead. I have no knowledge of any discussions between Mr. McClanahan and the Pine Bluff Industrial Foundation, and whatever discussions occurred apparently did not amount to anything, but I can say that had SP attempted to locate a customer on the Arsenal Lead and serve that customer using trackage rights over MPRR's Pine Bluff-Little Rock line, SP would have been violating the MOU.

Finally, Mr. McClanahan is wrong to suggest that SP would never have agreed to downgrade its ability to serve future shippers who chose to locate on the Arsenal Lead. The MOU's language clearly shows that SP did exactly that, first by agreeing to sever the connection between its mainline through Pine Bluff and the Arsenal Lead, then by agreeing to use MPRR's Pine Bluff-Little Rock track to serve only its existing shippers, and finally be removing the track from some 1.25 miles of the Arsenal Lead beginning in downtown Pine Bluff.

Mr. McClanahan argues that SP had no reason to agree to any limitation on its right to access the Arsenal Lead, but this is clearly not the case. As Messrs. Wilmoth, Bradley and Somervell point out in their verified statements, the MOU allowed SP to avoid the costs associated with reconnecting, maintaining and operating the Arsenal Lead. (SP paid no trackage rights fee for its use of the Pine Bluff-Little Rock track to serve the Pine Bluff Arsenal or Gaylord Spur shippers.) In return for these benefits, SP had to give up something, and what it gave up was access to new shippers on the Arsenal Lead. Based on my experience in the railroad industry, it was not surprising to me that SP would decide, in light of the fact that it used the Arsenal Lead to serve only a handful of shippers in its forty years of existence, and the fact that it could maintain access to all of those shippers as a result of the MOU, that the benefits of its agreement with MPRR outweighed any potential costs.[1]

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[1] Mr. McClanahan argues that the costs of reconnecting the Arsenal Lead would have been borne by the project and not SP. He says that this fact demonstrates that SP had no reason to agree to accept anything less than the same rights to access the Arsenal Lead that it would have had prior to the relocation project. However, it is clear from the MOU that SP made the decision to remove 1.25 miles of the Arsenal Lead and not to reconnect the Lead independently of the relocation project. While the MOU provided that track materials recovered as part of the relocation project were to be credited to the project (see Exhibit B, p. 9), UP's

(continued...)

Mr. McClanahan also argues that SP could not have agreed to the "existing shipper" limitation without violating its common carrier obligation. UP's lawyers tell me that this is not the case. In any event, SP had several options for providing service to new Arsenal Lead shippers after the Pine Bluff relocation project. For example, SP could have negotiated with UP for the trackage rights necessary to serve new shippers using UP's Pine Bluff-Little Rock line. Depending on the amount the business involved and the amount of consideration offered, UP might or might not have agreed to grant such rights, although UP would not have agreed to grant trackage rights to serve Entergy's White Bluff plant unless the consideration was equivalent to the business UP potentially would have lost. In addition, SP may have been able to reconnect its Arsenal Lead with its mainline through Pine Bluff. I cannot help but note that Mr. McClanahan argues that SP would have taken steps to reconnect the Arsenal Lead with its mainline through Pine Bluff if presented with the opportunity to transport coal to Entergy's White Bluff facility. In other words, the "existing shipper" limitation was not so disabling as Entergy and Mr. McClanahan would have the Board believe.

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[1](...continued)
records show that SP received all of the proceeds from the sale of the track that was salvaged when the Arsenal Lead was severed. See Exhibit C (noting that all salvageable material from the Arsenal Branch was to be credited to SP, but that for other salvaged material, one-third was to be credited to SP and two-thirds were credited to the project).

VERIFICATION

STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

I, Richard K. Davidson, being duly sworn, state that I have read the foregoing statement, that I know its contents and that those contents are true as stated.

Richard K. Davidson
RICHARD K. DAVIDSON

Subscribed and sworn to before me this
12 day of October, 1999.

Beverly A. Meeks
Notary Public

GENERAL NOTARY-State of Nebraska
BEVERLY A. MEEKS
My Comm. Exp. Sept. 2, 2003

US OFFICE PRODUCTS

VERIFIED STATEMENT

OF

JERRY S. WILMOTH

My name is Jerry S. Wilmoth. I am Director-Joint Facilities for Union Pacific Railroad Company ("UP"). As Director-Joint Facilities, I am generally responsible for agreements between UP and other railroads that create rights for each railroad to operate over the other's lines and to share other facilities. As part of my responsibilities, I am also familiar with the conditions imposed by the Board as part of the UP/SP merger that allow UP and BNSF to operate over each others' lines.

I am submitting this statement on behalf of UP in response to the exemption petition filed by Entergy Arkansas ("Entergy") in connection with Entergy's proposed build-out from its White Bluff plant to obtain rail service from Burlington Northern & Santa Fe Railway Company ("BNSF"). In this statement, I respond to Entergy's assertion that, prior to the UP/SP merger, Southern Pacific Transportation Company ("SP") would have had the right to use UP's Pine Bluff-Little Rock line to participate in the Entergy's proposed build-out plans.

As I understand Entergy's proposal, it is an attempt to take advantage of the UP/SP merger "build-out" condition under which BNSF would move loaded coal trains over the former SP line to Pine Bluff. From Pine Bluff, the trains would move onto UP's Pine Bluff-Little Rock line to a point at which Entergy would construct a new crossover between UP's lines and the remnant of a former SP line known as the Arsenal Lead. The trains would then move

over the Arsenal Lead onto tracks owned by the U.S. Government at the Pine Bluff Arsenal, which Entergy would rehabilitate as part of the build-out and connect with new track that it would construct leading to its White Bluff plant.

Entergy apparently assumes that, prior to the UP/SP merger, SP could have used UP's Pine Bluff-Little Rock line to move loaded coal trains to White Bluff as Entergy now proposes. But SP could not have used UP's line in that manner. SP's right to use UP's line was for the limited purpose of serving those shippers it actually served before it obtained the right to use UP's line. To understand why SP did not have the rights that Entergy apparently supposes it had, it is necessary to understand something about the history of UP and SP operations in Pine Bluff. The map of the Pine Bluff area attached as Exhibit A to this opposition filing makes it easier to understand the discussion that follows.

For many years, UP and SP each had their own lines in Pine Bluff that they used to serve the Pine Bluff Arsenal. In the early 1940s, UP and the U.S. Army entered into an agreement that allowed UP (actually, at that time, the Missouri Pacific Railroad Company) to serve the Arsenal using a connection to a siding located on UP's Pine Bluff-Little Rock line. Also in the 1940s, the U.S. Army entered into an agreement with SP (actually, at that time, the St. Louis Southwestern Railway Company) that provided a second means of obtaining rail service. Under the latter agreement, SP constructed a line (the "Arsenal Lead") that branched off SP's mainline in downtown Pine Bluff and ran roughly parallel to UP's Pine Bluff-Little Rock line over an easement granted by the government until it reached the Arsenal.

In the 1950s, in response to a request from a shipper, UP and SP jointly constructed the Gaylord Spur. The switch to the Spur is located on the Arsenal Lead, and a crossover was connected from UP's Pine Bluff-Little Rock line to the Arsenal Lead so that UP could access the Spur. UP and SP also entered into a switching agreement which provided that UP and SP would alternate switching of Gaylord Spur shippers on an annual basis.

In 1984, UP, SP and Arkansas state and local governmental bodies entered into a Memorandum of Understanding ("MOU") for a project to relocate SP's mainline through Pine Bluff. A copy of the MOU is attached as Exhibit 1 to this statement. The project involved relocating SP's mainline to run along the same corridor as UP's mainline. As part of the relocation project, SP's Arsenal Lead was severed from the SP mainline through Pine Bluff.[1]

The MOU recognized that the relocation project would sever connections between SP and several shippers in the Pine Bluff area, including the Arsenal. It therefore provided that SP would be allowed to use UP track as necessary to serve its existing Pine Bluff shippers. The MOU provided:

> "The [SP] will have the right to provide rail service to their existing shippers and receivers of railway carloads of freight by use of rail connections as provided by the project and/or as in agreement with [UP] operations."

---

[1] UP's records show that approximately 1.25 miles of the Arsenal Lead, starting in downtown Pine Bluff, were removed at the time of the relocation project in 1987. UP's records also show that all of the remaining portion of the Arsenal Lead, except for a few hundred feet from a point just south of the switch for the Gaylord Spur to the Pine Bluff Arsenal property line, was sold to Peter J. Smykla and Mid-State Corporation in 1992.

The MOU also identified the Pine Bluff Arsenal specifically as one of the affected shippers:

> "The [SP] lead to the Pine Bluff arsenal will be removed . . . and the [SP] will have the right to operate in bridge movements only, over the tracks of [UP] for access to the Pine Bluff Arsenal."

In accordance with the MOU, once the relocation project was completed, UP allowed SP to use UP's Pine Bluff-Little Rock line (including the crossover to the Arsenal Lead) to serve the Arsenal and existing shippers on the Gaylord Spur.

Based on the language contained in the MOU, it is clear that SP's rights to use UP's Pine Bluff-Little Rock line were strictly limited to the right to serve the existing customers it served before its Arsenal Lead was severed.

Based on my experience as Director-Joint Facilities, what occurred in Pine Bluff is routine in the railroad industry. One railroad, SP, was able to avoid the costs associated with maintaining (and in this case, reconnecting) track that it used to serve several shippers through an agreement to use the track of another railroad that served the same customers. In such situations, it has been standard practice for the tenant railroad to agree not to use the rights granted by the landlord to serve shippers that were not its customers at the time. And that is what the MOU in this case provides. Thus, it is clear that SP would not have had the right to participate in Entergy's build-out as currently proposed.

VERIFICATION

STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

I, Jerry S. Wilmoth, being duly sworn, state that I have read the foregoing statement, that I know its contents and that those contents are true as stated.

JERRY S. WILMOTH

Subscribed and sworn to before me this 30 day of August, 1999.

Notary Public

GENERAL NOTARY State of Nebraska
BEVERLY J SOMMER
My Comm. Exp. Nov. 9, 1999

VERIFIED STATEMENT

OF

CARL BRADLEY

My name is Carl Bradley. I am the General Superintendent-Transportation Services, Western Region, for Union Pacific Railroad Company ("UP"). Prior to the UP/SP merger, I was employed by Southern Pacific Transportation Company ("SP") and its subsidiary, the St. Louis Southwestern Railway Company ("SSW"). (I will use "SP" to refer to SP and SSW.) During my many years with SP, I served as District Superintendent and Superintendent in several locations, including Pine Bluff, Arkansas.

I am submitting this statement in connection with the exemption petition filed by Entergy Arkansas ("Entergy") seeking the right to construct a build-out from its White Bluff plant to a piece of track that was part of the former SP's Arsenal Lead in Pine Bluff. I will describe the nature of SP's right to access that piece of track prior to the UP/SP merger.

I began my railroading career in 1960 as a brakeman for SP stationed in Pine Bluff, Arkansas. Except for a brief period of time between September 1979 and April 1981 when I was stationed in East St. Louis, I worked in Pine Bluff from 1960 until September 1989, in positions of increasing responsibility. After serving as a brakeman and a conductor, I became a manager in 1976, and I served as Assistant Superintendent from 1982 until 1988, and as District Superintendent from 1988 until I left Pine Bluff in September 1989.

Based on my many years of experience in Pine Bluff, I am very familiar with SP's operations there, including SP's operations to serve the Pine Bluff Arsenal and shippers on the

Gaylord Spur — an industrial track that connects to the former SP's Arsenal Lead that UP and SP jointly constructed and jointly switched to serve several shippers in the Pine Bluff area.

When I first began working for SP, both UP and SP served the Pine Bluff Arsenal using their own lines. UP's mainline ran through Pine Bluff towards Little Rock, and UP had constructed a connection to one of the Arsenal's tracks from a siding on its Pine Bluff-Little Rock Line. SP's mainline did not pass by the Arsenal, but SP had constructed a track (the "Arsenal Lead") that branched off its mainline in downtown Pine Bluff and ran roughly parallel to UP's Pine Bluff-Little Rock line until it connected with one of the Arsenal's tracks. UP and SP picked up and set out cars on different Arsenal tracks.

UP and SP also served the Gaylord Spur using their separate lines to reach the beginning of the spur. The switch for the spur was located on SP's Arsenal Lead, but the railroads had constructed a crossover track that allowed UP to move off of its Pine Bluff-Little Rock line and over a small segment of the Arsenal Lead to reach the Gaylord Spur. The Spur itself was a joint facility, and UP and SP had an agreement under which the parties traded off switching responsibilities each year. Under the agreement, each railroad would move its own cars to and from interchange tracks located on the Spur, and the railroad performing the switching would move cars between the interchange track and the shipper facilities.

In 1987, these operations changed. That year, the railroads implemented the Pine Bluff Railroad Demonstration Project. The project involved the relocation of SP's mainline through Pine Bluff so that it would run along the same corridor as UP's line in order to eliminate a number of street grade crossings. As a result of the line relocation, the connection between SP's mainline and its Arsenal Lead was severed.

Rather than incur the expense of building a new connection between the relocated mainline and the Arsenal Lead, and to avoid the costs of maintaining the track, which served only one small shipper other than the Arsenal between downtown Pine Bluff and the switch for the Gaylord Spur, SP obtained rights to move over UP's Pine Bluff-Little Rock line and to use the crossover that had been constructed to allow UP to reach the Gaylord Spur in order to preserve service to its existing shippers. This arrangement allowed SP to access the remains of the Arsenal Lead so that it could maintain its service to the Arsenal and other existing shippers that it had served using the Arsenal Lead. The arrangement also allowed UP and SP to continue their practice of alternating switching on the Gaylord Spur.

I understand that Entergy is claiming that, after the relocation project, SP could have used its rights to move trains over UP's Pine Bluff-Little Rock line and over the crossover to the remains of the Arsenal Lead in order to move coal trains to Entergy as part of a build-out. As someone who was there at the time the arrangement was reached, I can definitively say that SP had no such right. It was understood by all involved that SP obtained the right to use UP's tracks to serve its existing shippers only. It could not have used UP's Little Rock-Pine Bluff line to move coal to a build-out line from Entergy's White Bluff plant, which was exclusively served by UP. SP understood that the agreement involved a trade-off: SP was able to avoid the cost of reconnecting the Arsenal Lead to its mainline, and was able to save the costs associated with maintaining the Lead, but it had the right to use UP's line to serve existing customers only. It was a trade-off that SP was willing to make, and it was a kind of trade-off that, in my almost 30 years of railroading experience, is relatively common in similar circumstances.

VERIFICATION

I, Carl Bradley, verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.

Executed on August 28, 1999.

Carl Bradley

CARL BRADLEY

US OFFICE PRODUCTS

VERIFIED STATEMENT

OF

WILLIAM F. SOMERVELL

My name is William F. Somervell. I am Regional Director-Joint Facilities for the Northern Region of Union Pacific Railroad Company ("UP"). For almost my entire railroad career, I have had responsibilities for joint facilities agreements in the Pine Bluff, Arkansas, area.

I am submitting this statement in connection with the exemption petition filed by Entergy Arkansas ("Entergy") to construct a build-out from its White Bluff plant to a piece of track that was part of the Arsenal Lead formerly owned by Southern Pacific Transportation Company ("SP") in Pine Bluff, Arkansas. I will describe the nature of SP's right to access that island of track prior to the UP/SP merger.

I began my railroad career in 1964 in the Little Rock district engineering office of the Missouri Pacific Railroad Company ("MP"). The district engineering office had responsibility for several geographic regions, including the Pine Bluff area. My responsibilities included both civil engineering work for track construction and utility lease projects, and the drafting of agreements, including joint-facility agreements, associated with those projects. Over the next 35 years I received a number of promotions to positions of increasing responsibility, and during all of that time I had responsibilities for contracts and joint facilities agreements for regions that encompassed the Pine Bluff area. In January of this year I became UP's Regional Director-Joint Facilities for the Northern Region.

In 1984, I was Director of Contracts & Real Estate for the MP system. As part of my responsibilities, I was involved in a project known as the Pine Bluff Railroad Demonstration Project. This involved the relocation of SP's mainline through Pine Bluff so that it would occupy the same rail corridor as UP's mainline. (At the time, MP and UP had not merged, and the line was formally MP's mainline, but I will use UP to refer to both MP and UP.) I attended several meetings involving the relocation project, and I participated in drafting the Memorandum of Understanding ("MOU") regarding the project that was signed by UP, SP and several Arkansas state and local governmental bodies.

In planning the relocation project, UP and SP recognized that one of the project's side effects would be to sever certain connections that SP had used to serve shippers in the Pine Bluff area. One example of these severed connections was SP's Arsenal Lead. SP used its Arsenal Lead to serve the U.S. Army's Pine Bluff Arsenal and several shippers along a jointly-owned track known as the Gaylord Spur. As part of the relocation project, SP's Arsenal Lead was severed from SP's mainline.

In recognition of this general problem, UP and SP agreed in the MOU that SP would be allowed to use UP track as necessary to reach its existing shippers. The MOU also provided that SP would be allowed to use UP's Pine Bluff-Little Rock line to reach the remains of the Arsenal Lead in order to serve the Pine Bluff Arsenal. Although the MOU did not specifically mention shippers located along the Gaylord Spur, SP's right to access those shippers was addressed by the general provision preserving access to existing shippers, and it was understood that they would be served using the rights that SP would use to serve the Pine Bluff Arsenal.

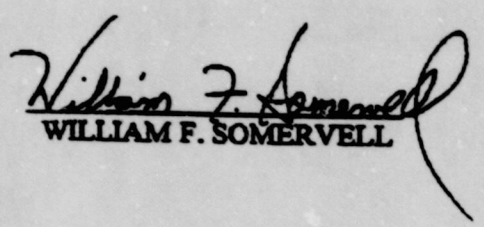
I understand that Entergy is claiming that, after the relocation project and prior to the UP/SP merger, SP could have used its rights over UP's Pine Bluff-Little Rock line to serve the Pine Bluff Arsenal in order to move coal trains over that line and over a new crossover to the remains of SP's Arsenal Lead in order to serve Entergy as part of its proposed build-out. Based on my involvement in the relocation project, and my involvement in Pine Bluff-area joint facility agreements both before and after the relocation project, I can say that SP had no such right.

The MOU provided that SP could serve only existing shippers to whom connections were severed as part of the relocation project. UP did not agree, and would never have agreed, not only to allow SP to use its new rights over UP's lines to re-establish connections with SP shippers and save the costs of constructing and maintaining its own lines to those shippers, but also to allow SP to use those rights in an effort to establish its own service to a customer that was exclusively served by UP. SP's rights were established in the MOU and were clearly understood: SP obtained the right to use UP track to serve its existing shippers in the Pine Bluff area and could not have used those rights to participate in the build-out that Entergy is proposing.

VERIFICATION

I, William F. Somervell, verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.

Executed on August 30, 1999.



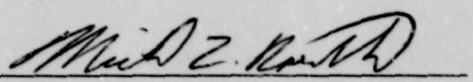
WILLIAM F. SOMERVELL

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that on this 12th day of October 1999, 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, and on

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

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



Michael L. Rosenthal

191084

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

APPLICANTS' REPLY TO BNSF'S
PETITION FOR LEAVE TO FILE REPLY

Applicants UPC, UPRR and SPR[1] hereby reply to the "Petition for Leave to File and Reply of the Burlington Northern and Santa Fe Railway Company in Support of Petition for Enforcement of Merger Condition," filed September 2, 1998.

BNSF's Petition does not, as claimed (p. 1), "correct significant misstatements in Applicants' reply so that the Board will have a complete and accurate record." BNSF identifies no misstatements. Instead, it merely rehashes arguments that BNSF made or could have made in its initial Petition. Normally, such an effort would not merit a reply.

1/ Acronyms used herein are the same as those in Appendix B of Decision No. 44. The following original Applicants have been merged with UPRR: MPRR (on January 1, 1997); DRGW and SPCSL (on June 30, 1997); SSW (on September 30, 1997); and SPT (on February 1, 1998). For simplicity, and in light of the fact that SPT has merged with UPRR and no longer has any separate existence, we generally refer to the combined UP/SP rail system herein as "UP."

We are filing a brief reply in this instance, however, because BNSF creates a significant misimpression in its new Petition that requires correction.

In its Petition, BNSF argues (p. 4) that it had no reasonable basis for knowing that UP had, prior to granting BNSF trackage rights over the line, replaced and recalibrated the mileposts on the former Missouri-Kansas-Texas Railroad Company ("MKT") line between Houston and San Antonio along which South Texas Liquid Terminal, Inc. ("STL Terminal") because UP's track charts "are not generally available." BNSF also argues (p. 5) that "UP has offered BNSF and the public no realistic alternative to reliance on UP's own tariffs in order to determine the applicable switching limits for the former MKT line."

In making these statements, BNSF misleads the Board by ignoring the history of how it received trackage rights over the MKT line in question. That history demonstrates that BNSF clearly recognized that the MKT mileposts had been replaced and recalibrated, and further serves to negate BNSF's claim that it could properly rely on UP's obsolete tariff.

BNSF did not receive rights over the MKT line at issue as part of its settlement agreement with UP. BNSF received rights over the line as a result of negotiations between UP, CPSB and BNSF in order to fulfill a condition the Board had imposed on the UP/SP merger in favor of CPSB. See

Decision No. 44, pp. 56-58, 185-186. The lengthy negotiations required to finalize the rights over the MKT line (referred to in the relevant pleadings as "Track No. 2") were not completed until September 15, 1997, at which time BNSF, UP and CPSB filed a Joint Submission (UP/SP-321/CPSB-14/BNSF-83) reporting their agreement, and BNSF and UP simultaneously filed a Notice of Exemption for the trackage rights in Finance Docket No. 32760 (Sub-No. 24). These two documents are attached as Exhibits A and B hereto.[2/]

While BNSF claims that it had no reason to know that UP had replaced and recalibrated the mileposts along the MKT line, its own Joint Submission and Notice of Exemption contained both language and maps that clearly indicated the milepost system in use along the MKT line at issue. Both the Joint Submission and the Notice of Exemption include as exhibits the "First Supplement to the Sealy, Texas, to Waco and Eagle Pass, Texas, Trackage Rights Agreement," which clearly describes the line segment in question as "UPRR's main track no. 2 at Craig Junction, Texas, in the vicinity of Milepost 235.9 and SP Junction (Tower 112) in the vicinity of UPRR's Milepost 259.8." The parties' Notice of Exemption (p. 5) contains the same description of the line at issue.

[2/] Because the two documents are lengthy and a large number of parties appear on the service list, we are not including these exhibits in the service copies. Any parties that wish to obtain copies can do so by contacting the undersigned counsel.

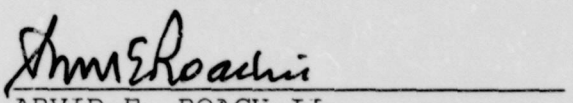
Finally, both the Joint Submission and the Notice of Exemption included maps that indicated the applicable mileposts. BNSF thus knew long before it entered into a contract with STL Terminal that the MKT mileposts in the 1028.55 through 1038 range described in tariff MP 8170-C had been replaced.

UP submits that, even absent these particular circumstances, BNSF could have had no reasonable expectation that it would have access to STL Terminal, but we will not repeat here the argument we made in our initial reply. In this instance, however, it is especially clear that, despite BNSF misleading claims in its most recent petition, BNSF in fact had no reasonable expectation of access.

Respectfully submitted,

CARL W. VON BERNUTH
RICHARD J. RESSLER
Union Pacific Corporation
Suite 5900
1717 Main Street
Dallas, Texas 75201
(214) 743-5640

JAMES V. DOLAN
LAWRENCE E. WZOREK
Law Department
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-5000



ARVID E. ROACH II
J. MICHAEL HEMMER
MICHAEL L. ROSENTHAL
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044-7566
(202) 662-5388

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

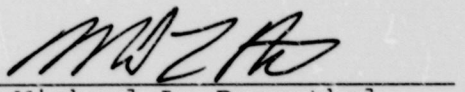
September 11, 1998

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that, on this 11th 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 all parties of record in Finance Docket No. 32760, and on

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

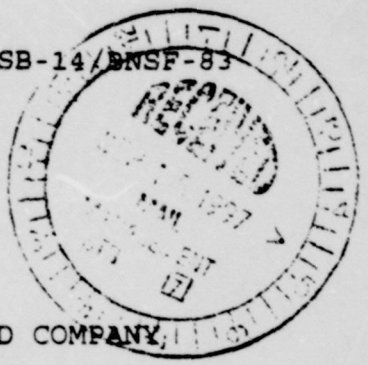
Premerger Notification Office
Bureau of Competition
Room 303
Federal Trade Commission
Washington, D.C. 20580



Michael L. Rosenthal

EXHIBIT A

UP/SP-321/CPSB-14/BNSF-83



BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

JOINT SUBMISSION OF THE PARTIES
CONCERNING THE CPSB CONDITION

WILLIAM L. SLOVER
JOHN H. LESEUR
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for City Public Service Board of San Antonio

JEFFREY R. MORELAND
RICHARD E. WEICHER
MICHAEL E. ROPER
SIDNEY L. STRICKLAND
Burlington Northern Santa Fe Corporation
3017 Lou Menk Drive
P.O. Box 961039
Fort Worth, Texas 76161-0039
(817) 352-2353

and

1700 East Golf Road
Schaumburgh, Illinois 60173
(847) 995-6887

CARL W. VON BERNUTH
RICHARD J. RESSLER
Union Pacific Corporation
Martin Tower
Eighth and Eaton Avenues
Bethlehem, Pennsylvania 18018
(610) 861-3290

JAMES V. DOLAN
PAUL A. CONLEY, JR.
LOUISE A. RINN
Law Department
Union Pacific Railroad Company
Southern Pacific Transportation Company
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-5000

ARVID E. ROACH II
J. MICHAEL HEMMER
MICHAEL L. ROSENTHAL
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044-7566
(202) 662-5388

Attorneys for Union Pacific Corporation, Union Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company and St. Louis Southwestern Railway Company

[additional counsel on next page]

ERIKA Z. JONES
ADRIAN L. STEEL, JR.
ROY T. ENGLERT, JR.
KATHRYN A. KUSSKE
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 463-2000

Attorneys for The Burlington
Northern and Santa Fe
Railway Company

September 15, 1997

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

JOINT SUBMISSION OF THE PARTIES
CONCERNING THE CPSB CONDITION

On August 23, 1996, Applicants[1/] and CPSB jointly submitted to the STB proposed terms implementing the CPSB Condition. UP/SP-273/CPSB-9 ("UP-CPSB Submission"). Those terms consisted of agreed-upon amendments to the BNSF Agreement and the Sealy Agreement. These amendments were set forth in Exhibit A to the UP-CPSB Submission.

On August 30, 1996, BNSF submitted a reply to the UP-CPSB Submission. Therein, BNSF agreed with all of the UP-CPSB Submission terms, except the Track No. 2 facilities restriction. That restriction precluded BNSF from serving new industries or transloading facilities on UP's Track No. 2 line between Craig Junction and SP Junction (Tower 112).

1/ Acronyms used herein are the same as those used by the STB in Decision Nos. 44, 52 and 61. MPRR merged into UPRR on January 1, 1997. DRGW and SPCSL merged into UPRR on June 30, 1997.

In Decision No. 52, served on September 10, 1996, the STB directed BNSF to accept the UP-CPSB implementing terms; reserved judgment on BNSF's objection to the Track No. 2 facilities restriction; and authorized UP, CPSB and BNSF, "upon agreement of all three parties," to amend the UP-CPSB implementing terms. Decision No. 52, p. 6.

In Decision No. 61, served on November 20, 1996, the STB held that BNSF could serve new industries and transloading facilities on Track No. 2. This ruling "effectively nullifie[d]" the Track No. 2 facilities restriction set forth in the UP-CPSB Submission. Decision No. 61, p. 12 n.34. The STB directed UP, CPSB and BNSF to make "conforming amendments to the BNSF agreement and the Sealy Trackage Rights Agreement" to remove the facilities restriction. Id.

Pursuant to the STB's directive in Decision No. 61, the parties have agreed upon revisions to the Sealy Agreement, and UP and BNSF have incorporated those revisions into an agreement entitled "First Supplement to the Sealy, Texas to Waco and Eagle Pass, Texas Trackage Rights Agreement." The First Supplement removes the Track No. 2 facilities restriction and make other agreed-upon conforming changes. The First Supplement is appended as Exhibit A hereto.

The First Supplement is intended by the parties to supersede the provisions of the Sealy Agreement approved by the STB in Decision No. 52.

Pursuant to the STB's Decision No. 46, UP and BNSF are filing simultaneously herewith a 49 C.F.R. 1180.2(d)(7) class exemption notice covering the Sealy Agreement.

On July 1, 1997, UP submitted an amended and restated version of the BNSF Agreement. Although UP and BNSF are still attempting to resolve certain disagreements, UP, BNSF and CPSB have agreed on the amendments designed to conform that Agreement, insofar as it applies to the CPSB Condition, to Decision Nos. 52 and 61, which amendments are reflected in the July 1 filing.

Respectfully submitted,

John H. LeSeur /mcm

WILLIAM L. SLOVER
JOHN H. LESEUR
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for City Public Service Board of San Antonio

JEFFREY R. MORELAND
RICHARD E. WEICHER
MICHAEL E. ROPER
SIDNEY L. STRICKLAND
Burlington Northern Santa Fe Corporation
3017 Lou Menk Drive
P.O. Box 961039
Fort Worth, Texas 76161-0039
(817) 352-2353

and

1700 East Golf Road
Schaumburgh, Illinois 60173
(847) 995-6887

Erika Z. Jones /mcm

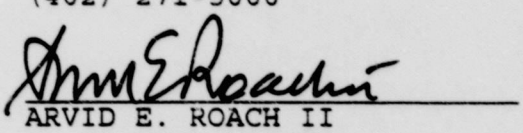
ERIKA Z. JONES
ADRIAN L. STEEL, JR.
ROY T. ENGLERT, JR.
KATHRYN A. KUSSKE
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 463-2000

Attorneys for The Burlington Northern and Santa Fe Railway Company

September 15, 1997

CARL W. VON BERNUTH
RICHARD J. RESSLER
Union Pacific Corporation
Martin Tower
Eighth and Eaton Avenues
Bethlehem, Pennsylvania 18018
(610) 861-3290

JAMES V. DOLAN
PAUL A. CONLEY, JR.
LOUISE A. RINN
Law Department
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-5000



ARVID E. ROACH II
J. MICHAEL HEMMER
MICHAEL L. ROSENTHAL
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044-7566
(202) 662-5388

Attorneys for Union Pacific Corporation, Union Pacific Railroad Company, Southern Pacific Rail Corporation, Southern Pacific Transportation Company and St. Louis Southwestern Railway Company

CERTIFICATE OF SERVICE

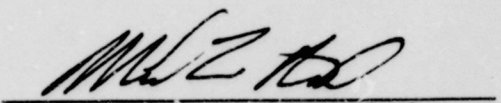
I, Michael L. Rosenthal, certify that, on this 15th day of September, 1997, I caused a copy of the foregoing document, to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery upon:

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

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

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

Erika Z. Jones
Mayer, Brown & Platt
Suite 6500
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1882



Michael L. Rosenthal

EXHIBIT A

FIRST SUPPLEMENT TO THE SEALY, TEXAS TO WACO AND EAGLE PASS, TEXAS TRACKAGE RIGHTS AGREEMENT

THIS FIRST SUPPLEMENTAL AGREEMENT, made and entered into as of the 28th day of August, 1997, by and between UNION PACIFIC RAILROAD COMPANY, a Utah corporation ("UPRR"), and SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation ("SPT") (UPRR and SPT are hereinafter referred to collectively as "Owner"), on the one hand, and THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, a Delaware corporation ("BNSF") (BNSF is hereinafter referred to collectively as "User"), on the other hand.

WITNESSETH:

WHEREAS, pursuant to an agreement dated September 25, 1995, as amended (the "Settlement Agreement"), between Union Pacific Corporation ("UPC"), Union Pacific Railroad Company ("UPRR"), Missouri Pacific Railroad Company ("MPRR") (UPC, UPRR and MPRR are hereinafter referred to collectively as "UP"), Southern Pacific Rail Corporation ("SPC"), SPT, St. Louis Southwestern Railway Company ("SSW"), The Denver and Rio Grande Western Railroad Company ("DRGW"), and SPCSL Corp. ("SPCSL") (SPC, SPT, SSW, DRGW and SPCSL are hereinafter referred to collectively as "SP") (UP and SP are hereinafter referred to collectively as "UP/SP"), on the one hand, and Burlington Northern Railroad Company ("BN") and The Atchison, Topeka & Santa Fe Railway Company ("Santa Fe"), on the other hand, UP/SP agreed to grant certain rights to User, including overhead bridge rights between Sealy and Waco and Eagle Pass, Texas, and the right to access industries presently served either directly or by reciprocal switching, joint facility or other arrangement by both UP and SP and no other railroad at points listed in the Settlement Agreement, as well as the right to access City Public Service Board of San Antonio ("CPSB") plants at Elmendorf, TX, except as otherwise provided, such rights to be effective upon UP's acquisition of control of SP pursuant to the application to the STB in Finance Docket No. 32760.

WHEREAS, there is now in effect an agreement dated June 1, 1996 (the "Original Agreement"), entered into between the parties in compliance with the Settlement Agreement, pursuant to which Owner granted to User trackage rights over certain of Owner's tracks between Sealy, Waco and Eagle Pass, Texas (hereinafter referred to as the "Joint Trackage"), including the right to access CPSB's Elmendorf plants under certain specified terms.

WHEREAS, in the STB's Decision No. 44 in Finance Docket No. 32760 (served August 12, 1996) approving the merger of UP and SP, the STB imposed a condition in favor of CPSB that required Owner to modify the trackage rights that had been granted to

allow User to access CPSB's Elmendorf plants (the "CPSB Condition").

WHEREAS, UP/SP and CPSB reached an agreement on amendments to the Original Agreement to allow User the right to access CPSB's Elmendorf Plants, that was (i) submitted to the STB on August 23, 1996, and (ii) accepted by the STB in Decision No. 52 in Finance Docket No. 32760 (served September 10, 1996), as fulfilling the CPSB Condition.

WHEREAS, the STB ruled in Decision No. 61 in Finance Docket No. 32760 (served November 20, 1996) ("Decision No. 61") that the new facilities and transload conditions imposed in Decision No. 44 applied to the lines over which Owner had agreed to grant User trackage rights to access CPSB's Elmendorf facilities.

WHEREAS, Owner has agreed to grant BNSF trackage rights over UPRR's line between Craig Junction and SP Junction (SP Tower 112), and over SPT's line between SP Tower 105 and SP Junction (SP Tower 112) to satisfy the CPSB Condition and comply with Decision No. 61.

NOW, THEREFORE, it is mutually agreed, by and between the parties hereto, as follows:

I. AMENDMENTS TO THE ORIGINAL AGREEMENT.

The Original Agreement is hereby amended as follows:

(a) The first "WHEREAS" clause shall be amended, by adding after the fifth subparagraph:

> "UPRR's main track no. 2 at Craig Junction, Texas, in the vicinity of UPRR's Milepost 235.9 and SP Junction (Tower 112) in the vicinity of UPRR's Milepost 259.8."

(b) The first "WHEREAS" clause shall be amended, by inserting at the beginning of the seventh subparagraph after the colon:

> "a line of railroad of SPT between San Antonio, in the vicinity of SPT's Del Rio Subdivision, Milepost 212.7 (Tower 105) and SP Junction (Tower 112), in the vicinity of SPT's Milepost 211.0, and"

(c) The first "WHEREAS" clause shall be amended by deleting the three lines following the seventh subparagraph and replacing them with the following:

> "as shown by bold and dash lines on the attached prints (identified as Exhibit "A") (Figures, 4-1, 4-2 and 4-3), and further described in Section 1.7 of Exhibit "B", which shall be referred to herein as the "Joint Trackage"; and"

(d) Subparagraph (b) of Section 2 of the Original Agreement shall be deleted in its entirety and replaced with the following:

> "(b) The rights granted in Section 2(a) shall be for all rail traffic of all kinds and commodities, both carload and intermodal, of all commodities."

(e) Section 2(g) is amended by striking the first two sentences and inserting:

> "(g) User shall have the right to (a) access all existing industries which are served by UP and SP and no other railroad directly, by reciprocal switching, joint facility or other arrangements, (b) access City Public Service Board of San Antonio ("CPSB") facilities at Elmendorf, Texas, including expansions of or additions to these facilities and any new CPSB facilities at Elmendorf, (c) serve any new shipper facility (including any new transloading facility), to the extent permitted by STB Decision No. 44 in Finance Docket No. 32760 (served August 12, 1996) and STB Decision No. 61 in Finance Docket No. 32760 (served November 20, 1996), on any SP-owned or UP-owned line over which BNSF received trackage rights pursuant to Section 2(a) of this Agreement, and (d) subject to the geographic limitations set forth below, serve new shipper facilities and existing and future transloading facilities and establish and exclusively serve intermodal and auto facilities at points listed in Exhibit A to the Settlement Agreement. The geographic limitations applicable to subparagraph (d) above shall generally correspond to the territory within which, prior to the merger of UP and SP, a new customer could have constructed a facility that would have been open to service by both UP and SP either directly or through reciprocal switch."

(f) Section 2 shall be amended by adding after subparagraph (l):

"(m) User shall also have the right, at City Public Service Board of San Antonio, Texas' option, to connect for movement to and from Elmendorf, TX, where its trackage rights granted pursuant to this Agreement intersect at SP Junction (Tower 112) with the existing trackage rights SP has granted to City Public Service Board of San Antonio, TX."

(g) Exhibit "A" to the Original Agreement shall be amended by adding the revised Figures 4-1, 4-2 and 4-3.

(h) A new Section 9 shall be added to the Original Agreement immediately following Section 8, as follows:

"9. Pending Appeal.

Owner has appealed to the United States Court of Appeals for the District of Columbia Circuit the STB's denial in Decision No. 61 of Owner's Petition for Clarification as to the applicability of certain of the STB conditions. The parties agree that the provisions of subsection (c) of Section 2(g) of this Agreement shall be null and void and of no force and effect to the extent the STB conditions challenged by Owner are overturned or modified on appeal."

II. EFFECT ON ORIGINAL AGREEMENT.

This First Supplement is supplemental to the Original Agreement and nothing herein contained shall be construed as amending or modifying the same except as herein specifically provided.

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[SIGNATURES APPEAR ON NEXT PAGE]

IN WITNESS WHEREOF, the parties hereto have caused this First Supplement to be duly executed as of the day and year first above written.

UNION PACIFIC RAILROAD COMPANY

By: James V D Dan
Its: _____

SOUTHERN PACIFIC TRANSPORTATION COMPANY

By: James V D Dan
Its: _____

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

By: _____
Its: _____

IN WITNESS WHEREOF, the parties hereto have caused this First Supplement to be duly executed as of the day and year first above written.

UNION PACIFIC RAILROAD COMPANY

By:_____
Its:_____

SOUTHERN PACIFIC TRANSPORTATION COMPANY

By:_____
Its:_____

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

By: F.W. Woolley
Its: Assistant Controller & Asst Treasurer

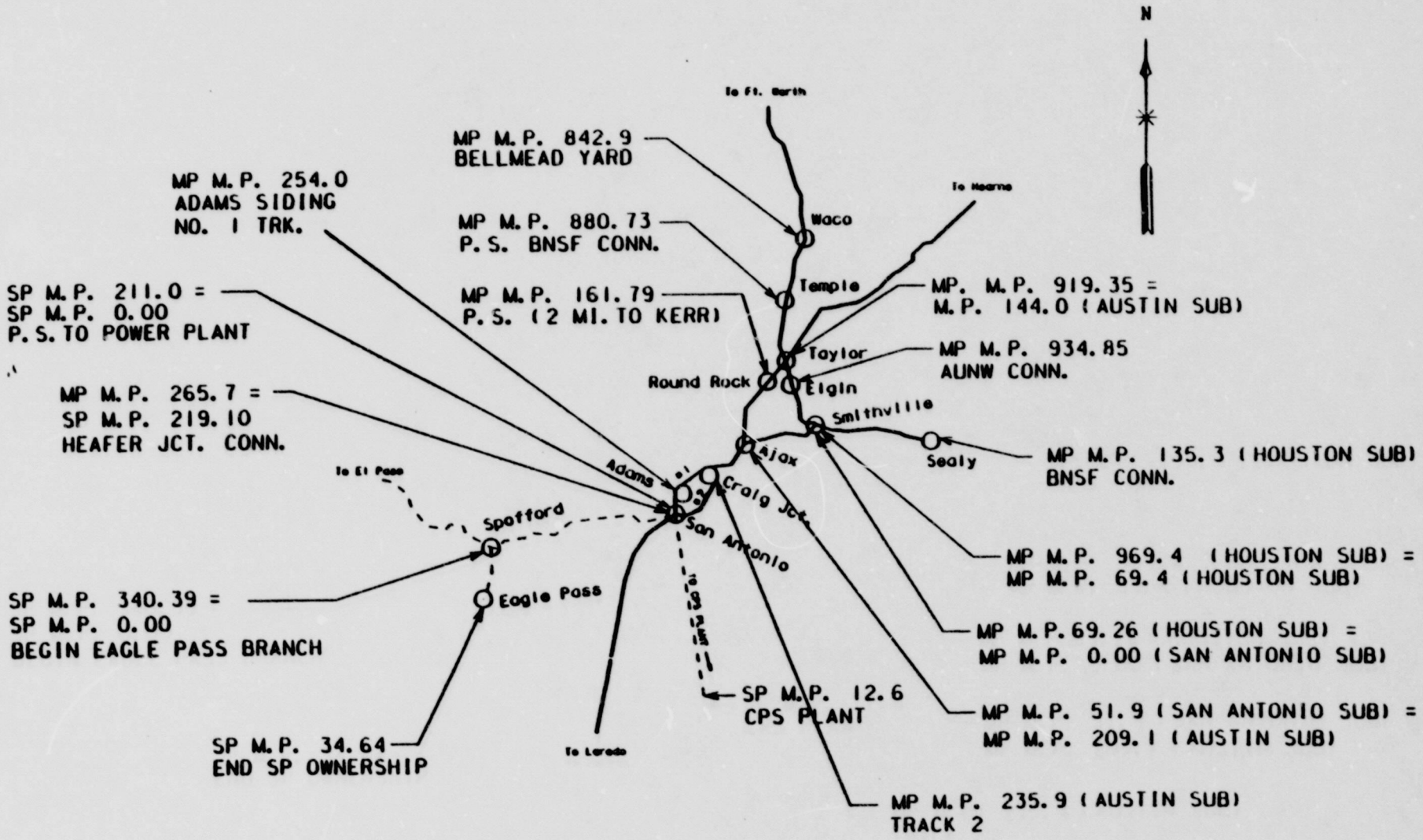
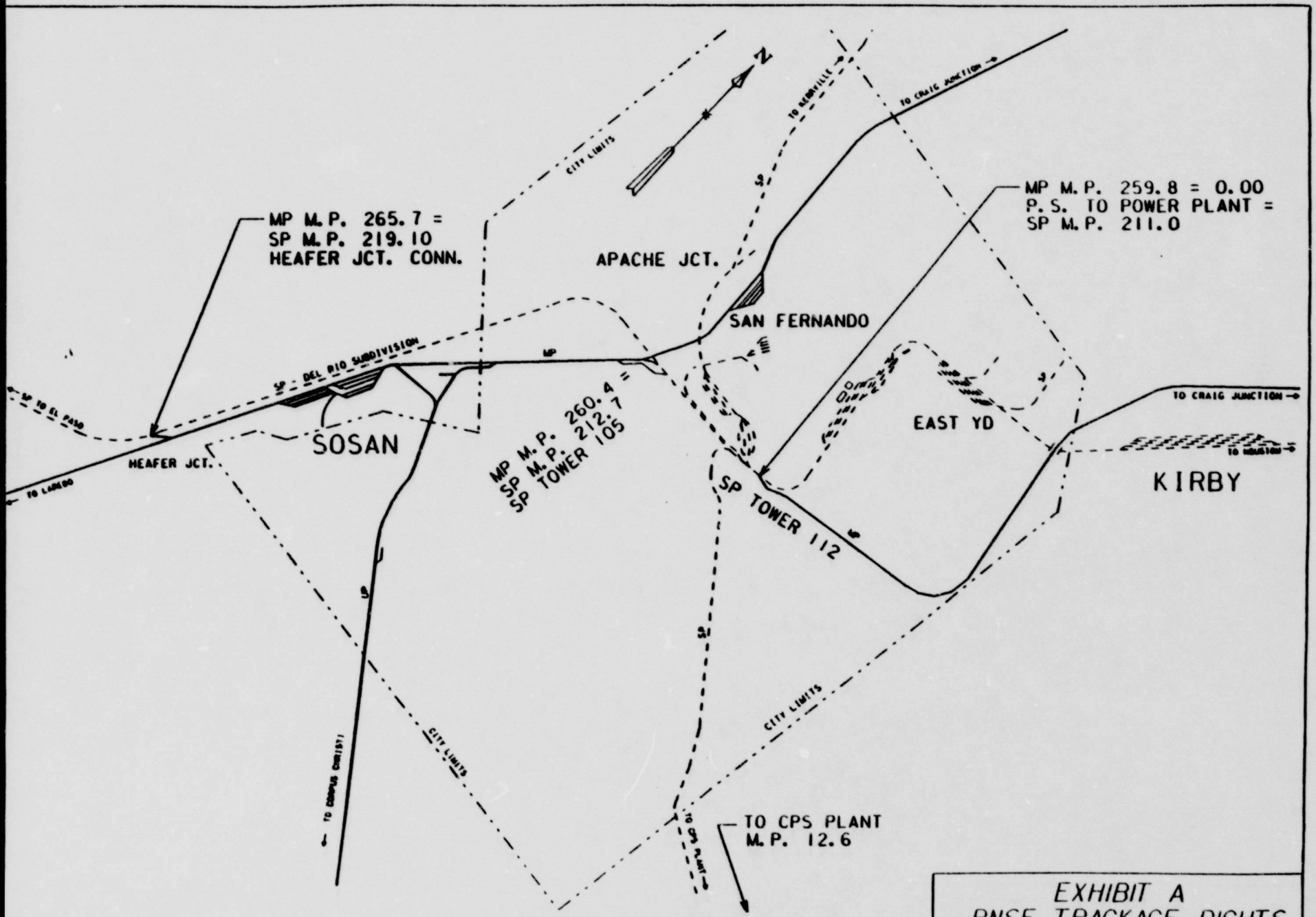


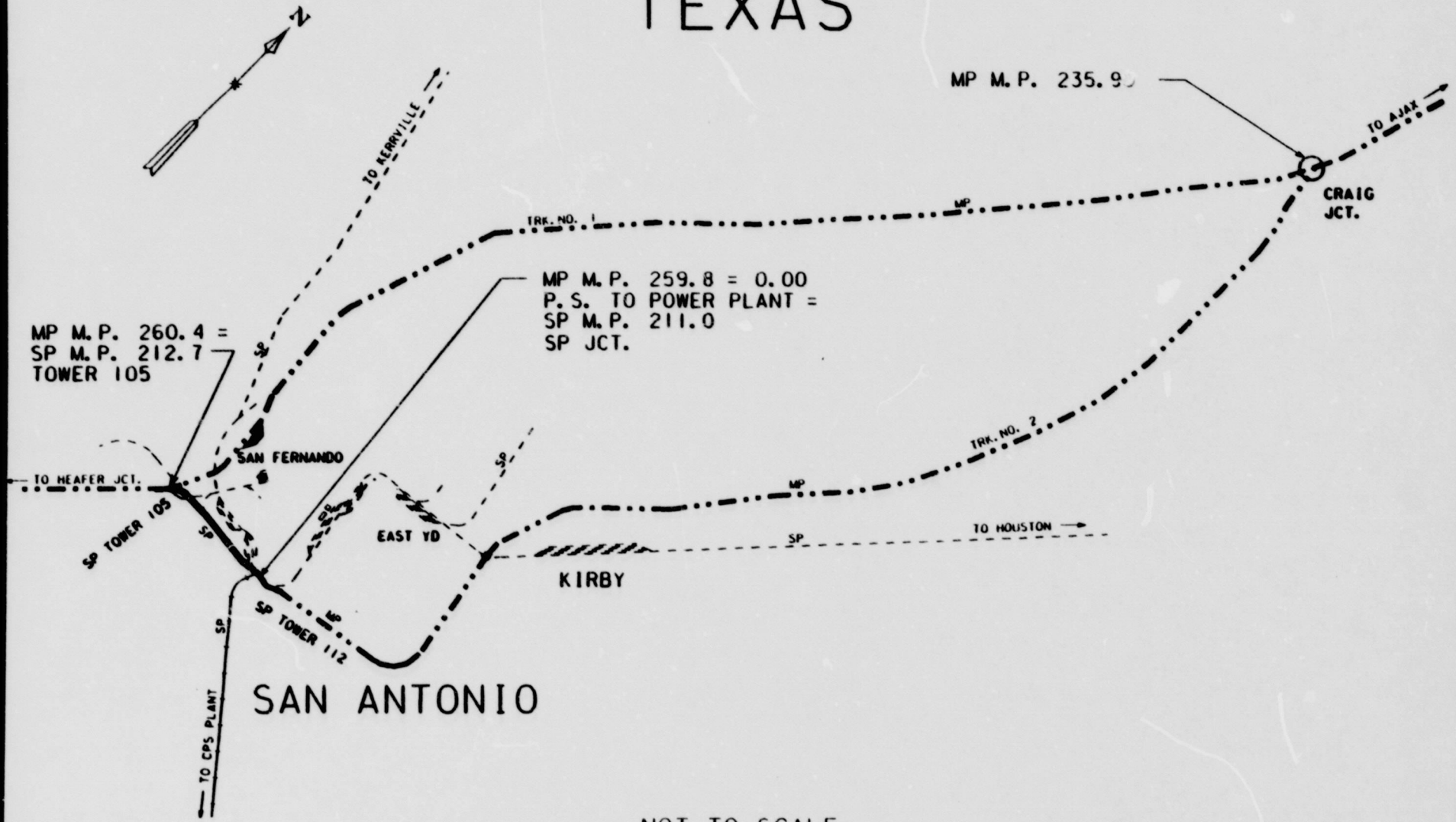
EXHIBIT A
BNSF TRACKAGE RIGHTS
CENTRAL TEXAS
06/01/96 FIGURE 4-1
REVISED: 05/07/97



SAN ANTONIO, TEXAS

EXHIBIT A
BNSF TRACKAGE RIGHTS
SAN ANTONIO
06/01/96 FIGURE 4-2
REVISED: 05/07/97

TEXAS



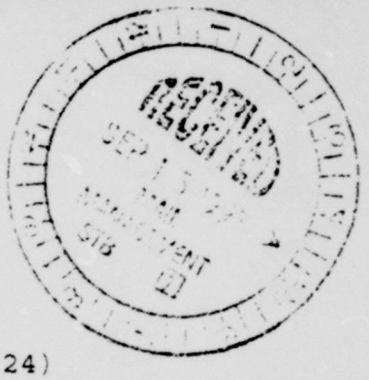
NOT TO SCALE

LEGEND:

- BNSF TRACKAGE RIGHTS ON MISSOURI PACIFIC RR
- BNSF TRACKAGE RIGHTS ON SOUTHERN PACIFIC RR
- CPSB AND BNSF TRACKAGE RIGHTS ON SOUTHERN PACIFIC RR
- SOUTHERN PACIFIC RR

EXHIBIT A
BNSF TRACKAGE RIGHTS
SAN ANTONIO TO CRAIG JCT.
09/11/96 FIGURE 4-3
REVISED: 05/07/97

EXHIBIT B



BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. 24)

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
-- TRACKAGE RIGHTS EXEMPTION --
UNION PACIFIC RAILROAD COMPANY AND
SOUTHERN PACIFIC TRANSPORTATION COMPANY

NOTICE OF EXEMPTION FOR TRACKAGE RIGHTS

The trackage rights that are the subject of this exemption notice are granted pursuant to a trackage rights agreement between Missouri Pacific Railroad Company and Southern Pacific Transportation Company, on the one hand, and Burlington Northern Railroad Company and The Atchison, Topeka & Santa Fe Railway Company, on the other hand, dated June 1, 1996 (the "Sealy Agreement"), and the First Supplement to the Sealy, Texas to Waco and Eagle Pass, Texas Trackage Rights Agreement, between Union Pacific Railroad Company and Southern Pacific Transportation Company, on the one hand, and The Burlington Northern and Santa Fe Railway Company ("BNSF"), on the other hand, dated August 28, 1997 (the "First Supplement").

In Decision No. 44 in Finance Docket No. 32760, served August 12, 1996, the Board required that Applicants fulfill their representation that BNSF would be permitted directly to serve CPSB's Elmendorf, Texas, facilities, and also required that Applicants preserve CPSB's ability to use

its existing trackage rights over SP by allowing BNSF to serve CPSB using the CPSB trackage rights.

The majority of the trackage rights required to permit BNSF to serve CPSB's Elmendorf, Texas, facilities were the subject of a Notice of Exemption that the Board granted in Decision No. 44 in Finance Docket No. 32760 (Sub-No. 1). Applicants also granted BNSF trackage rights over an additional segment of track necessary to access CPSB's Elmendorf facilities in the Second Supplemental Agreement, dated June 27, 1996 (the "Second Supplemental Agreement"), to the Agreement between Applicants and BNSF, dated September 25, 1995 ("the Settlement Agreement"), which was not a subject of the Notice of Exemption in Finance Docket No. 32760 (Sub-No. 1).

On August 23, 1996, Applicants and CPSB reached an agreement regarding further trackage rights to be granted to BNSF in order to meet the conditions the Board had set in Decision No. 44, and submitted that agreement to the Board. Applicants agreed to grant BNSF trackage rights over a short segment of SP track between Tower 105 and SP Junction (Tower 112) that had been inadvertently omitted from Applicants' settlement agreement with BNSF, but that was required for BNSF to serve CPSB's Elmendorf facilities. Applicants also agreed to grant BNSF additional trackage rights between Craig

Junction, Texas, and SP Junction (Tower 112), via Fratt, Texas (the "Track No. 2 routing").

In Decision No. 46 in Finance Docket No. 32760, served Aug. 26, 1996, the Board granted a BNSF request for additional time to review the Joint Submission of the Applicants and CPSB. The Board noted that, once the scope of the trackage rights was clear, Applicants and BNSF would be required to file a class exemption notice with regard to the trackage rights.

In Decision No. 52 in Finance Docket No. 32760, served Sept. 10, 1996, the Board indicated that Applicants' agreement with CPSB satisfied the conditions imposed on Applicants in Decision No. 44, but reserved judgment on BNSF's argument that BNSF should be allowed to serve new facilities and site transloading facilities along the Track No. 2 routing.

In Decision No. 61 in Finance Docket No. 32760, served Nov. 20, 1996, the Board ruled that the new facilities and transload conditions imposed in Decision No. 44 applied to the lines along the Track No. 2 routing, and indicated that the parties should make any necessary conforming amendments to the Settlement Agreement and the related trackage rights implementing agreement.

This Notice of Exemption is being filed in accordance with the Board's orders in Decisions Nos. 44, 52 and 61.

This Notice of Exemption, with accompanying Verification, is submitted pursuant to the Board's trackage rights class exemption at 49 C.F.R. § 1180.2(d)(7). The trackage rights are bridge rights granted to BNSF by UP and SP for movement of overhead traffic, with local access rights as specified in Decision Nos. 44 and 61.

The Board's trackage rights class exemption applies if specified criteria are met. Railroad Consolidation Procedures -- Trackage Rights Exemption, 1 I.C.C.2d 270 (1985), aff'd sub nom. Illinois Commerce Commission v. ICC, 819 F.2d 311 (D.C. Cir. 1987). Because a written agreement forms the basis of these trackage rights and the trackage rights are not being filed or sought in a responsive application in a rail consolidation proceeding, the Board's exemption criteria are met.

Pursuant to the Board's regulations at 49 C.F.R. § 1180.4(g), in order to qualify for an exemption, a verified Notice of Exemption must be filed with the Board containing the information in 49 C.F.R. § 1180.6(a)(1)(i)-(iii), (5), (6) and (7)(ii), and indicating the level of labor protection to be imposed. Responses to these requirements are provided below.

Section 1180.6(a)(1) - Description of Proposed Transaction

SP owns a line of railroad extending from milepost 212.7 near Tower 105 in San Antonio, Texas, to milepost 211.0 near SP Junction (Tower 112) in San Antonio, Texas, and will grant trackage rights to BNSF. These trackage rights are to close a gap in trackage rights previously granted to allow BNSF to serve CPSB's Elmendorf facilities. The rights are for the movement of overhead traffic, with additional local access rights as specified in Decision No. 44.

Union Pacific Railroad Company owns a line of railroad extending from milepost 235.9 near Craig Junction, Texas, to milepost 259.8 near SP Junction (Tower 112), via Fratt, Texas, and will grant trackage rights to BNSF. These trackage rights are for the movement of overhead traffic to CPSB's Elmendorf facility, with additional local access rights as specified in Decision Nos. 44 and 61.

Section 1180.6(a)(1)(i) - Summary of the proposed transaction, the name of applicants, their business address and telephone number, and the name of counsel to whom questions can be addressed

The trackage rights are overhead trackage rights with local access as specified, and extend for a distance of approximately 25.6 miles in the state of Texas.

The exact name, address and telephone number of the parties are:

Union Pacific Railroad Company
Southern Pacific Transportation Company
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-5000

The Burlington Northern and Santa Fe Railway Company
6th Floor
1700 East Golf Road
Schaumburg, Illinois 60173-5860
(847) 995-6000

Questions regarding this transaction can be addressed to the counsel named below:

Paul A. Conley, Jr.
Assistant Vice President-Law
Union Pacific Railroad Company
Southern Pacific Transportation Company
1416 Dodge Street, #830
Omaha, Nebraska 68179
(402) 271-4229

Richard E. Weicher
Vice President and General Counsel
Burlington Northern Santa Fe Corporation
6th Floor
1700 East Golf Road
Schaumburg, Illinois 60173-5860
(847) 995-6887

Section 1180.6(a)(1)(ii) - Consummation Date

The transaction is expected to be consummated on, or soon as possible after, September 22, 1997.

Section 1180.6(a)(1)(iii) - Purpose of the Transaction

The trackage rights are designed to meet concerns regarding BNSF's access to CPSB's Elmendorf facilities and to comply with Decisions Nos 44, 52 and 61 in Finance Docket No. 32760.

Section 1180.6(a)(5) - States in Which the Party Operates

Following are the states in which any part of the real property of each railroad carrier is situated:

State	Rail Carrier	State	Rail Carrier
AL	BNSF	MO	UP, SP, BNSF
AR	UP, SP, BNSF	MT	UP, BNSF
AZ	SP, BNSF	ND	BNSF
CA	UP, SP, BNSF	NE	UP, BNSF
CO	UP, SP, BNSF	NM	SP, BNSF
FL	BNSF	NV	UP, SP
ID	UP, BNSF	OK	UP, SP, BNSF
IL	UP, SP, BNSF	OR	UP, SP, BNSF
IA	UP, BNSF	SD	BNSF
KS	UP, SP, BNSF	TN	UP, SP, BNSF
KY	BNSF	TX	UP, SP, BNSF
LA	UP, SP, BNSF	UT	UP, SP
MN	UP, BNSF	WA	UP, BNSF
MS	BNSF	WI	UP, BNSF
		WY	UP, BNSF

Section 1180.6(a)(6) - Map (Exhibit 1)

A map is provided as Exhibit 1 hereto. As required by 49 C.F.R. § 1180.6(a)(6), 20 unbound copies of the map are enclosed.

Section 1180.6(a)(7)(ii) - Agreement (Exhibit 2)

The Sealy Agreement and the First Supplement are submitted as Exhibit 2 hereto.

Section 1180.4(g)(1)(i) - Labor Protection

Each party is responsible for any and all costs relating to providing employee protection benefits, if any, to its employees. The parties are agreeable to the labor protection conditions generally imposed in trackage rights proceedings as required by 49 U.S.C. § 11326.

Section 1180.4(g)(2)(i) - Caption Summary (Exhibit 3)

A proposed caption summary is submitted as Exhibit 3 hereto.

49 C.F.R. § 1105.6(c)(4) - Environmental

Environmental impacts associated with trackage rights proceedings generally are considered to be insignificant. Therefore, an environmental report and documentation normally need not be submitted for these types of transactions, pursuant to 49 C.F.R. § 1105.6(c)(4).

Respectfully submitted,

Jeffrey R. Moreland
Richard E. Weicher
Michael E. Roper
Sidney L. Strickland
Burlington Northern Santa Fe
Corporation
3017 Lou Menk Drive
P.O. Box 961039
Fort Worth, Texas 76161-0039
(817) 352-2353

and

1700 East Golf Road
Schaumburgh, Illinois 60173
(847) 995-6887

Erika Z. Jones /mrk

Erika Z. Jones
Adrian L. Steel, Jr.
Roy T. Englert, Jr.
Kathryn A. Kusske
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 463-2000

Attorneys for The Burlington
Northern and Santa Fe
Railway Company

September 15, 1997

James V. Dolan
Paul A. Conley, Jr.
William G. Barr
Union Pacific Railroad Company
Southern Pacific
Transportation Company
1416 Dodge Street
Omaha, NE 68179
(402) 271-5000

Arvid E. Roach II
J. Michael Hemmer
Michael L. Rosenthal
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044-7566
(202) 662-5388

Attorneys for Union Pacific
Corporation, Union Pacific
Railroad Company, Southern
Pacific Rail Corporation,
Southern Pacific
Transportation Company,
and St. Louis Southwestern
Railway Company

VERIFICATION

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

Richard E. Weicher, Vice President and General Counsel of Burlington Northern Santa Fe Corporation, being first duly sworn, deposes and says that he has read the foregoing Notice of Exemption For Trackage Rights in Finance Docket No. 32760 (Sub-No. 24), knows the contents thereof, and that the same are true as stated to the best of his knowledge, information and belief.

Richard E. Weicher
Richard E. Weicher

Subscribed and sworn to before me this 12th day of September, 1997.

Nadine M Grandi
Notary Public

My Commission Expires:
03/18/00

OFFICIAL SEAL
NADINE M GRANDI
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES:03/18/00

VERIFICATION

STATE OF NEBRASKA)
) ss:
COUNTY OF DOUGLAS)

PAUL A. CONLEY, JR., Assistant Vice President-Law of Union Pacific Railroad Company, being first duly sworn, deposes and says that he has read the foregoing Notice of Exemption For Trackage Rights in Finance Docket No. 32760 (Sub-No. 24), knows the contents thereof, and that the same are true as stated to the best of his knowledge, information and belief.

Paul A. Conley, Jr.

SUBSCRIBED and sworn to before me this 10th day of September, 1997.

Notary Public

My Commission expires:

Nov. 30, 2000

(SEAL)

GENERAL NOTARY-State of Nebraska
DORIS J. VAN BIBBER
My Comm. Exp. Nov. 30, 2000

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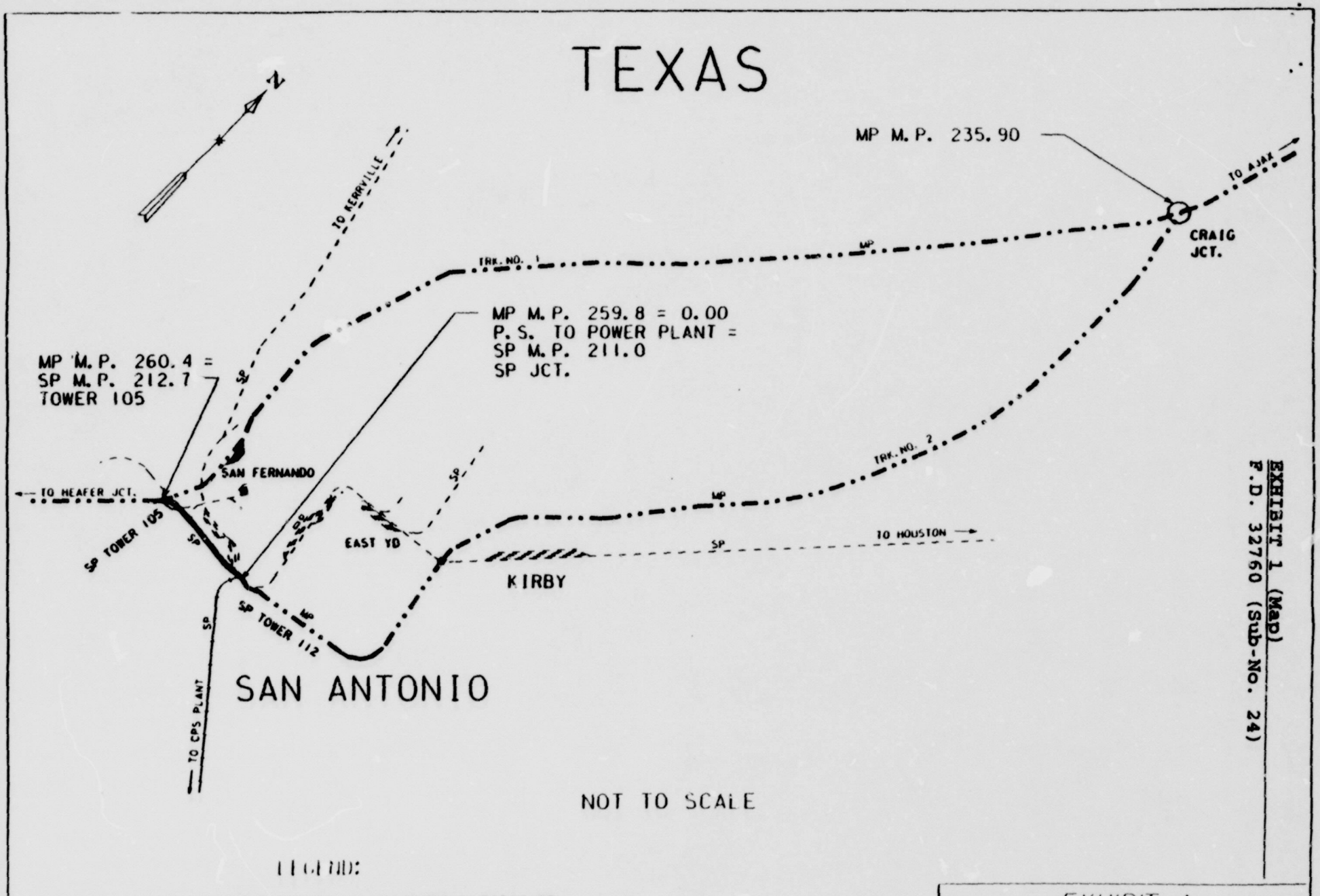

EXHIBIT 1 (Map)
F.D. 32760 (Sub-No. 24)

EXHIBIT A
BNSF TRACKAGE RIGHTS
SAN ANTONIO TO CRAIG JCT.
09/11/96 FIGURE 4-3
REVISED: 05/07/97

SEALY, TEXAS TO WACO AND EAGLE PASS, TEXAS
TRACKAGE RIGHTS AGREEMENT

THIS AGREEMENT made as of this 1st day of June, 1996, between MISSOURI PACIFIC RAILROAD COMPANY, a Delaware corporation ("MPRR") SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation ("SPT") (MPRR and SPT are hereinafter referred to collectively as "Owner"), on the one hand, and BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation ("BN"), and THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Delaware corporation ("Santa Fe") (BN and Santa Fe are hereinafter referred to collectively as "User"), on the other hand.

WITNESSETH:

WHEREAS, Owner owns lines of railroad consisting of track structure extending between:

Sealy, Texas, in the vicinity of MPRR's Milepost 135.3, and Smithville, Texas, in the vicinity of MPRR's Houston Subdivision Milepost 69.4 ("Sealy-Smithville Route");

Smithville, in the vicinity of MPRR's Houston Subdivision Milepost 969.4, and Waco, Texas, in the vicinity of MPRR's Houston Subdivision Milepost 842.9 ("Smithville-Waco Route") which shall include:

Taylor, Texas, in the vicinity of MPRR's Austin Subdivision Milepost 144.0 (MPRR's Smithville-Waco Route Milepost 919.35) and Round Rock (Kerr), Texas, in the vicinity of MPRR's Austin Subdivision Milepost 161.79 ("Taylor-Round Rock Line");

Smithville, in the vicinity of MPRR's San Antonio Subdivision Milepost 0.00, and Ajax, Texas, in the vicinity of MPRR's Milepost 51.9 (MPRR's Austin Subdivision Milepost 209.1) ("Smithville-Ajax Route");

Ajax, Texas, in the vicinity of MPRR's Austin Subdivision Milepost 209.1, and San Antonio, Texas in the vicinity of MPRR's Milepost 265.7 via Adams ("Ajax-San Antonio Route");

San Antonio, in the vicinity of SPT's Del Rio Line Milepost 219.10, and Spofford, Texas, in the vicinity of SPT's Del Rio Line Milepost 340.39 (SPT's Eagle Pass Branch Milepost 0.0), and Eagle Pass, Texas, in the vicinity of SPT's Eagle Pass Branch Milepost 34.64 ("San Antonio-Eagle Pass Route"), which shall include:

a line of railroad of SPT between San Antonio, in the vicinity of SPT's Del Rio Line Milepost 211.0 (SPT's Rockport Branch Milepost 0.00) and CPS (Elmendorf), Texas, in the vicinity of SPT's Rockport Branch Milepost 12.6 ("San Antonio-CPS Line"),

as shown by bold and dashed lines on the attached print dated June 1, 1996 (and identified as Exhibit "A") (Figures 4-1 and 4-2) and further described in Section 1.7 of Exhibit "B", which shall be referred to herein as the "Joint Trackage"; and

WHEREAS, pursuant to an agreement dated September 25, 1995, as amended (the "Settlement Agreement"), between Union Pacific Corporation ("UPC"), Union Pacific Railroad Company ("UPRR"), MPRR (UPC, UPRR and MPRR are collectively referred to hereinafter as "UP"), Southern Pacific Rail Corporation ("SPC"), SPT, The Denver and Rio Grande Western Railroad Company ("DRGW"), St. Louis Southwestern Railway Company ("SSW") and SPCSL Corp. ("SPCSL") (SPC, SPT, DRGW, SSW and SPCSL are hereinafter referred to collectively as "SP") (UP and SP are hereinafter referred to collectively as "UP/SP"), on the one hand, and BN and Santa Fe, on the other hand, Owner granted certain rights to User, including overhead bridge trackage rights between Sealy and Waco and Eagle Pass, Texas, and the right to access all industries which are presently served either directly or by reciprocal switching, joint facility or other arrangement by both UP and SP and no other railroad except as may be otherwise herein provided, such rights to be effective upon UP's acquisition of control of SP pursuant to the application currently pending before the STB in Finance Docket No. 32760.

WHEREAS, pursuant to the Settlement Agreement, Owner and User wish to more specifically define the terms and conditions under which said trackage rights shall be exercised.

NOW, THEREFORE, it is mutually agreed by and between the parties:

1. General Conditions:

The General Conditions set forth in Exhibit "B" attached hereto are hereby made a part of this Agreement. All capitalized terms used and not otherwise defined in this Agreement shall have the meaning ascribed to them in the General Conditions. If any conflict between the General Conditions and this Agreement shall arise, the provisions of this Agreement shall prevail.

2. Rights of User:

(a) Subject to the terms and conditions contained herein, Owner grants to User the nonexclusive right to use the Joint Trackage for the limited operation of Equipment in User's account over the Joint Trackage in common with Owner and such other railroad company or companies as Owner has heretofore admitted or may hereafter at any time in the future admit to the joint use of all or part of the Joint Trackage (provided that such future admittance shall not materially hinder or obstruct the fair and reasonable exercise of the rights granted in this Agreement), such other railroad company or companies to hereinafter be considered Owner for the purposes of this Agreement, it being understood and agreed that User shall not have the right to:

(i) Switch industries upon the Joint Trackage, except as hereinafter provided;

(ii) Set out, pick up or store Equipment upon the Joint Trackage, or any part thereof, except as otherwise provided in this Section 2 and in Sections 2.12, 2.13 and 2.14 of Exhibit B;

(iii) Serve any industry, team or house track, intermodal or auto facility now existing or hereafter located along the Joint Trackage, except as otherwise provided in this Section 2;

(iv) Permit or admit any third party to the use of all or any portion of the Joint Trackage, nor, under the guise of doing its own business, contract or make any agreement to handle as its own Equipment over or upon the Joint Trackage, or any portion thereof, the Equipment of any such third party which in the normal course of business would not be considered the Equipment of User; provided, however, that the foregoing shall not prevent User, pursuant to a run-through agreement with any railroad, from using the locomotives and cabooses of another railroad as its own under this Agreement; or

(v) Connect with or interchange with any other railroad except as hereinafter provided.

(b) The rights granted in Section 2 (a) shall be for rail traffic of all kinds and commodities, both carload and intermodal, of all commodities, except that the rights granted to User on the San Antonio-CPS Line and on the line serving the LCRA plant at Halsted, Texas ("LCRA") shall be limited to the operation of loaded and empty unit coal trains destined to or returning from the City Public Service Board of San Antonio, Texas plant at Elmendorf and LCRA as the case may be.

(c) User shall have the right to interchange with the Longhorn Railroad Company at Elgin, Texas on the Smithville-Waco Route, Georgetown Railroad Company at Kerr and Granger (in the event interchange at Granger is possible in the future) on the Taylor-Round Rock Line, and the Ferrocarriles Nationales de Mexico ("FNM") at Eagle Pass on the San Antonio-Eagle Pass Route.

(d) At Eagle Pass, User shall have parity with SPT and shall have equal access to the Mexican border crossing at Eagle Pass; provided, however, movements to and from the border crossing bridge and within Eagle Pass shall be under the direction and control of the authorized representative of SPT. The parties also agree that:

(i) User shall be responsible for issuing all shipment notifications; preparation and rendition of all assessorial billing; performing all collections; and provide all rail car tracing in connection with rail cars of User going to or from Mexico, as described in tariffs, transportation agreements and circulars published by User.

(ii) User shall be responsible for instructing importers, exporters and brokers on processes required on the rail cars of User in order to comply with United States and Mexican customs regulations, agricultural regulations and other United States and Mexican federal regulatory agency regulations required to move rail cars of User between the United States and Mexico.

(iii) User shall be responsible for the preparation and submission of all inward Cargo Manifests, United States Customs Form 7533, and In-Bond Documents, United States Customs Form 7512, required by United States Customs on rail cars of User entering the United States. Further, User shall be responsible for submitting all In-Bond T&Es, United States Customs Form 75330-C, on all rail cars of User transiting the United States and exporting via User to Mexico.

(iv) User shall be responsible for surrendering all Shippers Export Declarations, Form 7525, to United States Customs on United States export shipments of User.

(v) User shall be responsible for providing, at its sole cost and expense, grain rail car cleaning, fumigation or other services that may be required to prepare a conveyance or its commodity for compliance with regulatory requirements for entry into the United States or Mexico.

(vi) User shall be responsible for providing, at its sole cost and expense, all labor and equipment required to comply with United States Customs conveyance and/or commodity inspection requirements relative to rail cars of User moving north and south across the United States/Mexican border.

(vii) User shall be responsible for determining and supplying, at its sole cost and expense (if it chooses to supplement the rail car supply needs of the Mexican railroads), empty rail cars for all rail car orders for northbound loading out of Mexico when User is designated the first United States linehaul carrier in the route.

(viii) any switching required by User relative to the interchange of Equipment with FNM at Eagle Pass shall be performed at the Storage Tracks (as defined in Section 2(e)(ii) below) by User unless directed otherwise by the authorized representative of SPT. Such switching shall include, but not be limited to, immediately moving any Equipment that is refused, rejected, or set-back by FNM from the interchange tracks at Eagle Pass to the Storage Tracks (as defined in Section 2(e)(ii) below).

(e) (i) User shall have the right to set out and pick up traffic on MPRR's line at Adams, Texas, MPRR Milepost 254.0, Smithville, Texas and at the LCRA plant at Halsted.

(ii) SPT shall make available to User, without monetary consideration, two (2) storage tracks at Eagle Pass of approximately ten thousand (10,000) feet each in length at approximately SPT's Eagle Pass Branch Milepost 22 ("Storage Tracks") on which User shall have the right to set out, pick up, stage and/or switch rail cars as necessary relative to the industrial and interchange rights granted in this Agreement. The use of the Storage Tracks without charge is conditioned on User's compliance with the terms of its agreement with SP dated April 13, 1995.

In addition to the Storage Tracks, User shall have the right to set out and pick up at other locations in the vicinity of Eagle Pass as directed by the authorized representatives of SPT to facilitate an efficient operation between the parties.

If, at a later date, User wishes, at its sole cost and expense, to construct or have constructed additional trackage in the vicinity of Owner's Milepost 22 at Eagle Pass in connection with its operations

at Eagle Pass, and if in the reasonable opinion of Owner, property of Owner is available for such purpose, Owner shall convey to User, such property at its then fair market value. User agrees that the portions of connections(s) or crossover(s) (from point(s) of switch(es) to clear point(s)) ("Portions of Connection(s)") and diverging from the trackage of Owner shall be conveyed, without monetary consideration, by User to Owner. Such Portions of Connection(s) shall thereafter be maintained by Owner at the sole cost and expense of User on a flat rate basis to be agreed upon between Owner and User no later than six (6) months after the completion of the construction of the Portions of Connection(s).

(f) User shall have the right to establish crew change points at San Antonio and Eagle Pass, or such other points as from time to time may be mutually agreed to by Owner and User.

However, User agrees that if sufficient trackage is not available at such locations(s) to facilitate crew changes of User, Owner may require User to construct additional trackage ("Improvements") in the vicinity of such location as may be required in the reasonable judgement of Owner, the cost and expense of which shall be borne by User. In the event such Improvements are constructed at the cost and expense of User, and Owner shall choose to use such Improvements, Owner shall pay User fifty-percent (50%) of the cost of constructing such Improvements. Should Owner decline to participate, Owner shall be denied access to such Improvements. However, should Owner elect at a later date to use such Improvements, such right shall be granted to Owner by User upon payment of fifty percent (50%) of User's initial costs plus per annum interest thereon at a rate equal to the average paid on 90-day Treasury Bills of the United States Government as of the date of completion until the date of use by User commences. Per annum interest shall be adjusted annually on the first day of the twelfth (12th) month following the date of completion and every year thereafter on such date, based on the percentage increase or decrease, in the average yield of 30-year U.S. Treasury Notes for the prior year compared to their average yield in first year of completion of the Improvements. Each annual adjustment shall be subject, however, to a "cap" (up or down) of two percentage points of the prior year's interest rate (i.e. the adjustment may not exceed an amount equal to two percentage points of the immediately preceding year's interest rate).

In addition, Owner shall lease to User by separate written agreement, existing facilities, for office, locker, change and lunchroom purposes by User's personnel upon request of User to Owner, and as reasonably available, or property of Owner as reasonably available for User to establish its own facilities.

(g) User shall have the right to (a) access all existing industries which are served by UP and SP and no other railroad directly, by reciprocal switching, joint facility or other

arrangements, (b) serve any new shipper facility on any SP-owned line over which BNSF receives trackage rights pursuant to this Agreement, and (c) subject to the geographic limitations set forth below, serve new shipper facilities, future transloading facilities and to establish and exclusively serve intermodal and auto facilities at points listed on Exhibit A to the Settlement Agreement. The geographic limitations applicable to subparagraph (c) above shall generally correspond to the territory within which, prior to the merger of UP and SP, a new customer could have constructed a facility that would have been open to service by both UP and SP either directly or through reciprocal switch. Where switching districts have been established they shall be presumed to establish these geographic limitations.

User shall participate in fifty percent (50%) of Owner's cost and expense of any Improvements constituting connecting and access tracks and switches for such new shipper facilities upon User's election to directly serve such new shipper facility which then shall become part of the Joint Trackage. Should User decline to participate in the cost and expense of Improvements required to serve any new shipper facility, User shall be denied access to such new shipper facility and the Improvements then shall not be part of the Joint Trackage; provided, however, should User elect at a later date to serve such new shipper facility, such right shall be granted to User by Owner upon payment of fifty percent (50%) of Owner's initial cost and expense of the Improvements plus interest as calculated pursuant to Section 2 (f) above.

If User wishes to provide rail service to any new shipper facility at the locations set forth in this Section 2 (g), User shall provide Owner with written notice of its plans including a proposed rail service plan to the new shipper facility and Owner shall, within thirty (30) days of its receipt of such notice and plan, notify User of its approval or disapproval of User's plans for construction, which approval Owner shall not unreasonably withhold. In the event a request is approved by Owner, Owner shall construct and maintain the Improvements at User's sole cost and expense, provided, that Owner, subject to the provisions of the second paragraph of this Section 2(g) regarding payment of fifty percent (50%) of the cost thereof plus interest, if applicable, may elect to participate in the cost of Improvements at that time or in the future.

Forty-five (45) days before initiating service to a customer, User must elect, in writing, whether its service shall be (i) direct, (ii) through reciprocal switch, or (iii) with UP/SP's prior written agreement, using a third party contractor to perform switching for User alone or both User and UP/SP. User shall have the right, upon one hundred eighty (180) days' prior written notice to UP/SP, to change its election; provided, however, that User shall (x) not change its election more often than once every five (5) years and (y) shall reimburse UP/SP for any costs incurred by UP/SP in connection with such changed election.

(h) It is the intent of the parties that User shall, where sufficient volume exists, be able to utilize its own terminal facilities to handle local traffic. Facilities or portions thereof presently utilized by UP/SP shall, pursuant to a separate written agreement entered into between the parties, be provided by UP/SP to User by lease or purchase at normal and customary charges. Upon request of User and subject to availability and capacity, UP/SP shall, pursuant to a separate written agreement entered into between the parties, provide User with terminal support services, including fueling, running repairs and switching. UP/SP shall be reimbursed by User for such services at UP/SP's normal and customary charges. Where terminal support services are not required, User shall not be assessed additional charges for train movement through a terminal.

MPRR, pursuant to a separate written agreement, shall provide User emergency fueling and minor or emergency mechanical repairs at San Antonio.

(i) User may, subject to Owner's written consent, use agents for limited feeder service on the Joint Trackage.

(j) User shall have the right to inspect the Joint Trackage and require Owner to make such reasonable improvements as User deems necessary to facilitate its operations at User's sole cost and expense. Any such inspection must be completed and improvements identified to Owner within one (1) year of the effectiveness of this Agreement.

(k) User shall have the right to connect, for movements in all directions, with its present lines (including existing trackage rights) at points where its present lines (including existing trackage rights) intersect with lines it will purchase or be granted trackage rights over pursuant to the Settlement Agreement.

(l) User agrees that when entering, exiting, setting out or picking up from its existing lines of railroad or trackage rights lines ("User's Operations"), it shall do so without unreasonable interference or impairment of the Joint Trackage. However, User agrees that if sufficient trackage is not available at such location(s) to facilitate User's Operations, Owner may require User to construct additional trackage in the vicinity of such location(s) as may be required in the reasonable judgment of Owner, the cost and expense of which shall be borne solely by User. In the event such trackage is constructed at the cost and expense of User, and Owner shall choose to use such trackage, Owner shall pay User fifty percent (50%) of the cost of constructing such trackage plus interest as calculated pursuant to Section 2 (f) above.

3. GTM Rates:

(a) In addition to other payments to be made under this Agreement, User shall remit to Owner for the use of the Joint Trackage in the operation of its Equipment therealong and thereover, the total amount of the following sums monthly, which sums per

GTM ("GTM Rates") shall be deemed to include ordinary and programmed maintenance of the Joint Trackage, Changes in and/or Additions to the Joint Trackage (to the extent required by the first sentence of Section 2.2 of the General Conditions), operating expenses, interest rental, depreciation and taxes:

(i) 3.1 mills per GTM for all Equipment, except as provided in Subsection (a)(ii) of this Section 3.

(ii) 3.0 mills per GTM for unit trains (trains consisting entirely of sixty-seven (67) or more rail cars of bulk freight of a single commodity (except for intermodal shipments, unless of a single commodity), loaded or empty ("Unit Trains").

(b) For the purpose of computing the GTM Rates under this Section 3, it is mutually agreed that the distance between the designated points of the Joint Trackage shall be determined by reference to UPRR's EPMS Engineering Mileage Master and SPT's Station Pair Master File which shall be subject to verification by User.

(c) The GTM Rates set forth in Section 3 (a) of this Agreement shall be subject to adjustment annually, commencing as of July 1, 1997, as follows:

The GTM Rates shall be adjusted upward or downward effective July 1 of each year during the term of this Agreement by the percentage difference in the two (2) preceding years in UP/SP's system average URCS costs for the categories of maintenance and operating costs covered by the GTM Rates. "URCS Costs" shall mean costs developed using the Uniform Rail Costing System.

Upon every fifth anniversary of the effective date of this Agreement ("Anniversary Date"), either party may request, on ninety (90) days' written notice, that the parties jointly review the operations of the adjustment mechanism and renegotiate its application. If the parties do not agree on the need for or extent of adjustment to be made upon such renegotiation, either party may request binding arbitration under Section 6 of the General Conditions. It is the intention of the parties that rates and charges for trackage rights and services granted under this Agreement reflect the same basic relationship to operating costs as upon execution of this Agreement.

4. Reciprocal Switching Charges:

In addition to the other payments to be made under this Agreement, User shall remit to Owner the following amounts for reciprocal switching User elects to be performed by Owner under this Agreement.

(a) Except as provided in Subsection 4(b) below, Owner shall receive One Hundred Thirty Dollars ($130) per rail car for rail cars of certain commodities switched to

and from an industry directly served by either SP or UP (such charge to apply once for the movement in and out).

(b) Owner shall receive Sixty Dollars ($60) per rail car for rail cars constituting part of a Unit Train switched to and from an industry directly served by either SP or UP (such charge to apply once for the movement in and out) that contain commodities within the following Standard Transportation Commodity Codes ("STCC"): 01131, 01132, 01133, 01135, 01136, 01137, 01139 and 01144.

Charges set forth in this Section 4 shall be adjusted July 1 of each year during the term of this Agreement to reflect fifty percent (50%) of increases or decreases in the Rail Cost Adjustment Factor ("Index"), not adjusted for changes in productivity ("RCAF-U"), published by the STB or successor agency or other organization. In the event the RCAF-U is no longer maintained, the parties shall select a substantially similar index and failing to agree on such an index, the matter shall be referred to binding arbitration under Section 6 of the General Conditions. The ratio between the Index for the year immediately prior to any year in which an increase or decrease is to be made effective and the Index for the year 1995 shall be developed, and the reciprocal switching charge shall be increased or decreased in direct proportion to 50% of such ratio, but under no circumstances shall the adjusted rate be less than the initial reciprocal switching charges provided in this Agreement.

5. Additions:

(a) Owner and User shall conduct a joint inspection to determine what connections ("Connections") and sidings or siding extensions associated with Connections ("Sidings") are necessary to implement the rights granted under Section 2 of this Agreement. User, at its sole cost and expense, shall pay the cost of such Connections and Sidings. In the event Owner shall elect to use such Connections and Sidings, Owner shall pay to User fifty percent (50%) of the cost to User of constructing the Connections and Sidings, plus interest as calculated pursuant to Section 2 above. Owner shall maintain the part of any Connection or Siding on its property at its sole cost and expense, and User, at its sole cost and expense, shall maintain the part of any Connection or Siding on its property or property of others.

(b) Except as provided in Section 5 (a) above, expenditures for any future Changes in and/or Additions to the Joint Trackage, such as, but not limited to, sidings (other than Improvements), Centralized Traffic Control, grade separations, and future connections (other than Connections), shall be handled as follows:

(i) Owner shall bear the cost of all Changes in and/or Additions to the Joint Trackage that are necessary to achieve the benefits of the consolidation of UP and SP as outlined in the application filed with the STB in Finance Docket No. 32760 for UP to control SP. The operating plan filed by UP and SP in support of that application shall

be given presumptive weight in determining what Changes in and/or Additions to the Joint Trackage are necessary to achieve these benefits.

(ii) Any Changes in and/or Additions to the Joint Trackage other than those covered by subparagraph (b)(i) of this Section 5 above shall be shared by Owner and User on the basis that the parties' respective GTMs operated over the Joint Trackage bear to total GTMs operated over the Joint Trackage for the twelve (12) month period immediately prior to the month work on the project is commenced; provided, that User shall not be required to share in the cost of any Changes in and/or Additions to the Joint Trackage under the provision of this subparagraph (ii) for eighteen (18) months following UP's acquisition of control of SP as outlined in the application filed with the STB in Finance Docket No. 32760. The use of Joint Trackage by any third party shall be attributed to Owner for purposes of computing respective GTMs for purposes of this Section 5 (b).

6. Notices:

All notices, demands, requests, submissions and other communications which are required or permitted to be given pursuant to this Agreement shall be given by either party to the other in writing and shall be deemed properly served if delivered by hand, or mailed by overnight courier or by registered or certified mail, return receipt requested, with postage prepaid, to such other party at the address listed below:

If intended for UP/SP:

Executive Vice President-Operation
Room 1206
1416 Dodge Street
Omaha, Nebraska 68179

With a copy to:

Director Joint Facilities
Room 1200
1416 Dodge Street
Omaha, Nebraska 68179

If intended for User:

Sr. Vice President-Operations
2600 Lou Menk Drive
P.O. Box 961034
Fort Worth, Texas 76161-0034

With a copy to:

General Director Contracts
and Joint Facilities
2600 Lou Menk Drive
P.O. Box 961034
Fort Worth, Texas 76161-0034

Notice of address change may be given any time pursuant to the provisions of this Section 6.

7. Settlement Agreement.

The provisions, rights and obligations set forth in the Settlement Agreement, as amended and supplemented from time to time, shall survive, and nothing herein shall be deemed to repeal or supersede the Settlement Agreement, as amended and supplemented. If any conflict between the Settlement Agreement and this Agreement shall arise, the provisions of the Settlement Agreement, as amended and supplemented, shall govern.

8. Other Agreements.

This Agreement shall not become effective unless and until each and every trackage rights, haulage, purchase/sale and proportional rate agreement between and among the parties to the Settlement Agreement (collectively, the "Other Agreements") necessary to implement the Settlement Agreement becomes effective in accordance with the terms of each such Other Agreement and the Settlement Agreement; and in the event that one or more of such Other Agreements for any reason does not become effective, this Agreement shall be of no force and effect and shall terminate.

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[SIGNATURES APPEAR ON NEXT PAGE]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

SOUTHERN PACIFIC TRANSPORTATION COMPANY

By:_____
Its:_____

MISSOURI PACIFIC RAILROAD COMPANY

By: James V Dolan
Its: Vice President - Law

BURLINGTON NORTHERN RAILROAD COMPANY

By:_____
Its:_____

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

By:_____
Its:_____

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

SOUTHERN PACIFIC TRANSPORTATION COMPANY

By: _____
Its: VP

MISSOURI PACIFIC RAILROAD COMPANY

By: _____
Its: _____

BURLINGTON NORTHERN RAILROAD COMPANY

By: _____
Its: _____

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

By: _____
Its: _____

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

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By: _____
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By: _____
Its: _____

BURLINGTON NORTHERN RAILROAD COMPANY

By: _____
Its: _____

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

By: _____
Its: _____

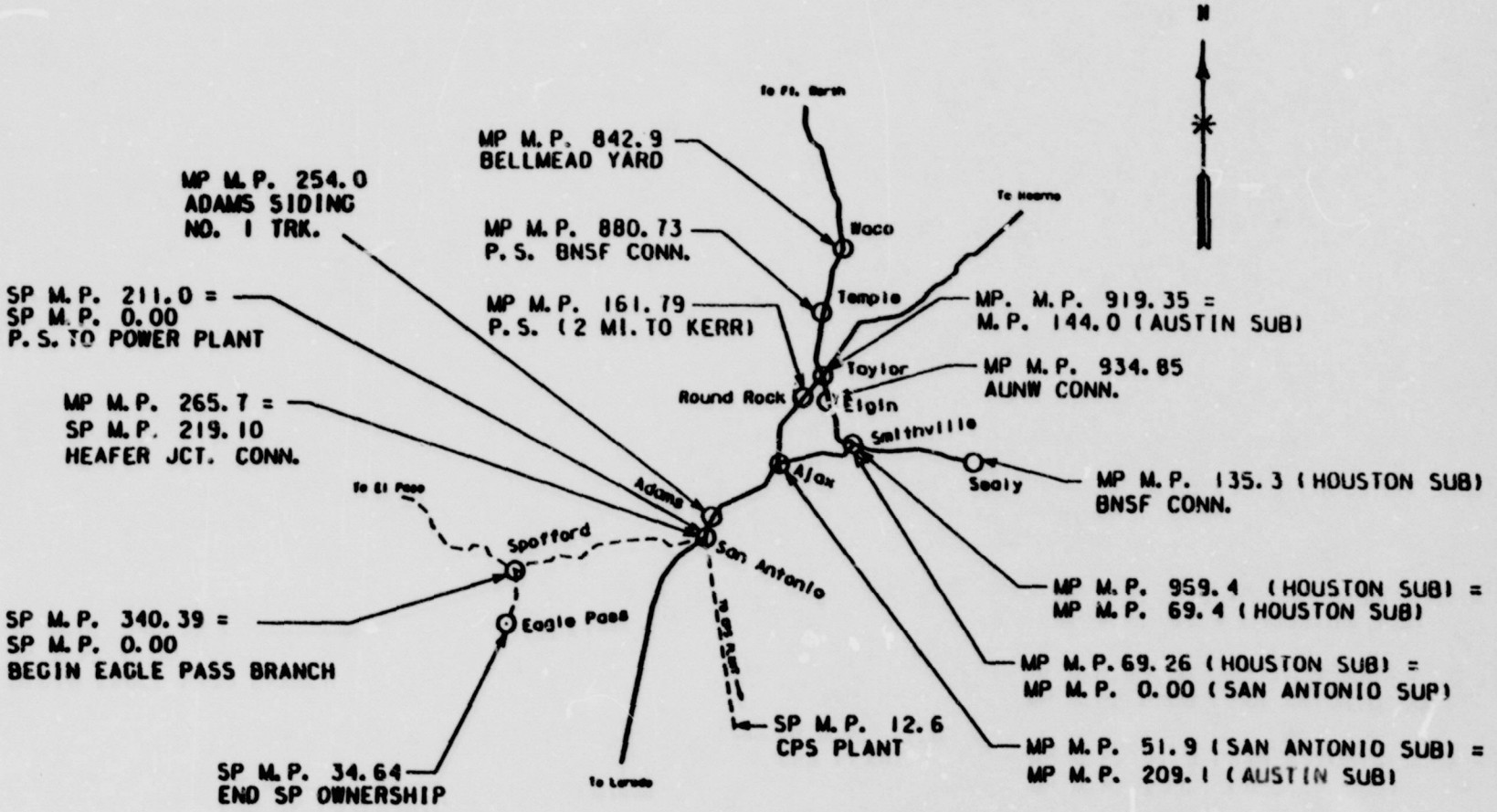

EXHIBIT A
BNSF TRACKAGE RIGHTS
CENTRAL TEXAS
06/01/96 FIGURE 4-1

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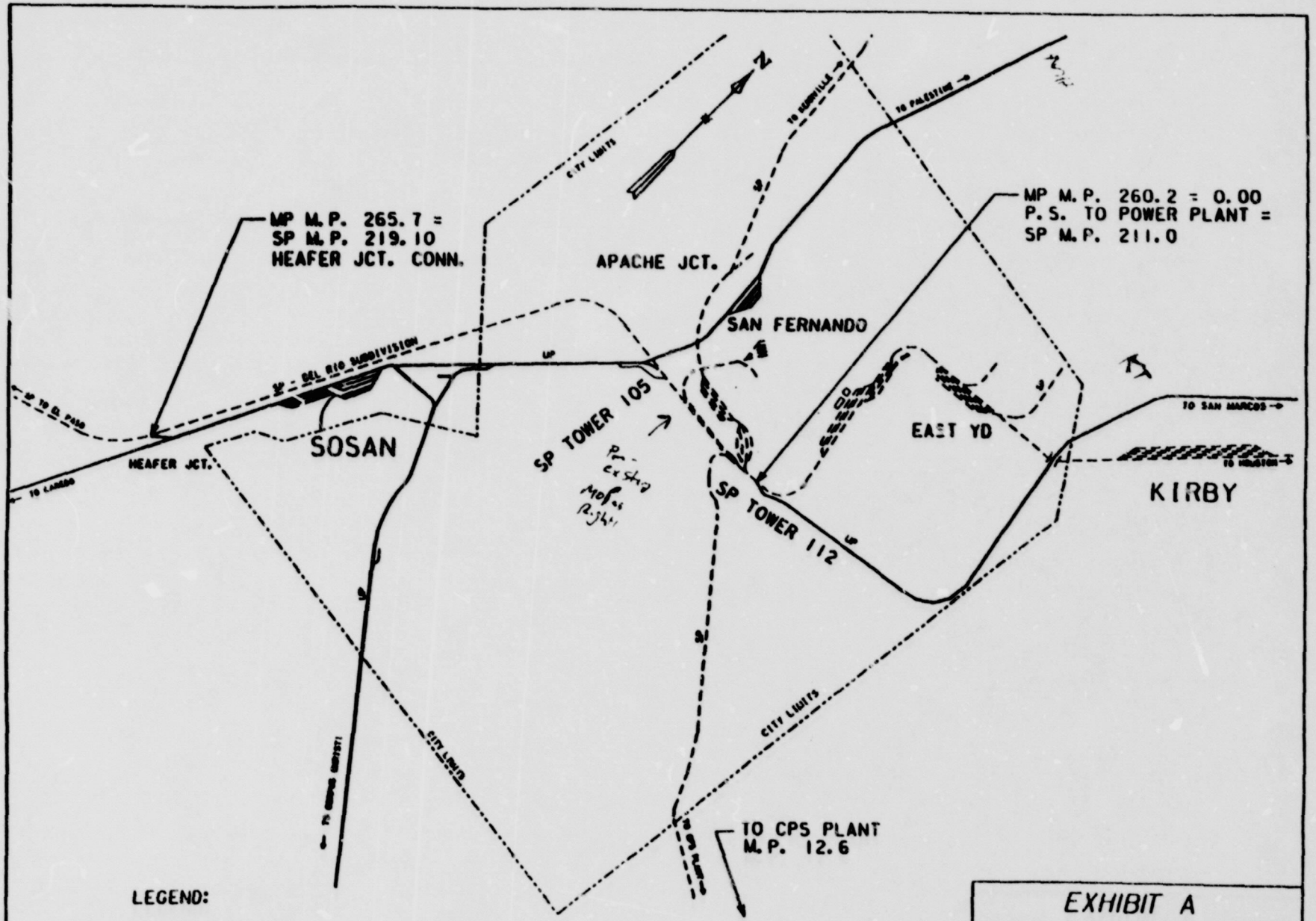

SAN ANTONIO, TEXAS

EXHIBIT A
BNSF TRACKAGE RIGHTS
SAN ANTONIO
06/01/96 FIGURE 4-2

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EXHIBIT "B"

GENERAL CONDITIONS

Section 1. DEFINITIONS

1.1 "Agreement" shall mean that certain agreement dated June 1, 1996 to which this Exhibit "B" is appended.

1.2 "Annual" shall mean a calendar year.

1.3 "Changes in and/or Additions to" shall mean work projects and retirements, the cost of which is chargeable in whole or in part to Property Accounts during the term of this Agreement.

1.4 "Equipment" shall mean trains, locomotives, rail cars (loaded or empty), intermodal units (loaded or empty), cabooses, vehicles, and machinery which are capable of being operated on railroad tracks or on right-of-way for purpose of the maintenance or repair of such railroad tracks.

1.5 "GTM" shall mean gross ton mile which is all tonnage for Equipment transported over one (1) mile of track included in the Joint Trackage.

1.6 "GTM Handled Proportion" shall mean the GTMs handled over the Joint Trackage by or for a party divided by the total number of GTMs handled by or for all parties using the Joint Trackage, during the same period. For the purpose of computing such GTM's Handled Proportion, Equipment engaged in work service pertaining to construction, maintenance or operation of the Joint Trackage or Changes in and/or Additions to the Joint Trackage shall not be counted.

1.7 "Joint Trackage" shall mean the track structure of Owner as described in the Agreement including necessary right-of-way and all appurtenances, signals, communications, and facilities of Owner and all Changes in and/or Additions to now or in the future located as are required or desirable for the operation of the Equipment of the parties hereto.

1.8 "Mill" shall mean one-tenth of a cent ($0.001 US).

1.9 "Owner" shall have the meaning given to it in the Agreement.

1.10 "Property Accounts" shall mean accounts so designated under the Uniform System of Accounts for Railroad Companies prescribed by the Interstate Commerce Commission, or any replacement of such system prescribed by the applicable federal regulatory agency, if any, and used by the parties hereto.

1.11 "STB" means the Surface Transportation Board of the United States Department of Transportation or any successor agency.

1.12 "User" shall have the meaning given to it in the Agreement.

Section 2. MAINTENANCE, ADDITIONS, OPERATION, AND CONTROL

2.1 Owner shall have sole charge of the maintenance and repair of the Joint Trackage with its own supervisors, labor, materials and equipment. Owner, from time to time, may make such Changes in and/or Additions to the Joint Trackage as shall be required by any law, rule, regulation or ordinance promulgated by any government body having jurisdiction, or as Owner, in its sole discretion, shall deem necessary, subject to Section 2.2. Such Changes in and/or Additions to the Joint Trackage shall become a part of the Joint Trackage or in the case of retirements shall be excluded from the Joint Trackage.

2.2 Unless otherwise mutually agreed to by the parties in writing, Owner shall, (i) keep and maintain the Joint Trackage on a consistent basis at no less than the track standard designated in the timetable in effect on the date of the Agreement, including special instructions for the Joint Trackage as of the date of the Agreement, (ii) maintain at least the physical capacity of the Joint Trackage as of the date of the Agreement (i.e., number of main tracks, support tracks, signal systems, rail weight, line clearances, etc.), and (iii) be responsible for any Changes in and/or Additions to the Joint Trackage as shall be necessary to accommodate the traffic of Owner and User while maintaining existing service standards (including transit times) in effect on the date of the Agreement. In the event that User desires that the Joint Trackage be improved to a condition in excess of the standard set forth in this Section 2.2, or desires that other Changes in and/or Additions to be made to the Joint Trackage, Owner agrees to make such Changes in and/or Additions to the Joint Trackage if funded in advance by User. Thereafter, such Changes in and/or Additions to the Joint Trackage shall become part of the Joint Trackage and shall be maintained by Owner in such improved condition.

2.3 Owner shall employ all persons necessary to construct, operate, maintain, repair and renew the Joint Trackage. Owner shall be bound to use reasonable and customary care, skill and diligence in the construction, operation, maintenance, repair and renewal of the Joint Trackage and in managing of the same. Owner shall make its best effort to ensure that User is given the same advance notice of maintenance plans and schedules as is provided to Owner's personnel.

2.4 The trackage rights granted hereunder shall give User access to and joint use of the Joint Trackage equal to that of Owner. The management, operation (including dispatching) and maintenance of the Joint Trackage shall, at all times, be under the exclusive direction and control of Owner, the movement of Equipment over and along the Joint Trackage shall at all times be subject to the exclusive direction and control of Owner's authorized representatives and in accordance with such reasonable operating rules as Owner shall from time to time institute, but in the management, operation (including dispatching) and maintenance of the Joint Trackage, Owner and User shall be treated equally. All operating, dispatching and maintenance decisions by Owner affecting the movement of Equipment on the Joint Trackage shall be made pursuant to the BNSF-UP/SP Dispatching Protocols attached hereto as Attachment 1.

2.5 If the use of the Joint Trackage shall at any time be interrupted or traffic thereon or thereover be delayed for any cause, neither party shall have or make any claim against the other for loss, damage or expense caused by or resulting solely from such interruption or delay.

2.6 Owner may from time to time provide any track or tracks on the Joint Trackage other than those delineated in Exhibit A to the Agreement for use by User provided there shall at all times be afforded User a continuous route of equal utility for the operations of its Equipment between the termini of the Joint Trackage. When such tracks which are not part of the Joint Trackage are used as provided herein, the Agreement shall govern for purposes of direction and control and liability as if all movement had been made over the Joint Trackage.

2.7 Each party shall be responsible for furnishing, at its sole cost and expense, all labor, fuel and train and other supplies necessary for the operation of its own Equipment over the Joint Trackage. In the event a party does furnish such labor, fuel or train and other supplies to another party, the party receiving the same shall promptly, upon receipt of billing therefor, reimburse the party furnishing the same for its reasonable costs thereof, including customary additives.

2.8 User shall be responsible for the reporting and payment of any mileage, per diem, use or rental charges accruing on Equipment in User's account on the Joint Trackage. Except as may be specifically provided for in this Agreement, nothing herein contained is intended to change practices with respect to interchange of traffic between the parties or with other carriers on or along the Joint Trackage.

2.9 Except as otherwise may be provided in the Agreement, User shall operate its Equipment over the Joint Trackage with its own employees, but before said employees are assigned or permitted to operate Equipment over the Joint Trackage as herein provided, and from time to time thereafter as and when reasonably requested by Owner, they shall be required to pass the applicable rules examinations required by

Owner of its own employees. Owner shall delegate to specified User's officers the conduct of such examinations in the event User chooses to conduct such examinations. If an Owner officer conducts such examinations of employees of User, User shall pay Owner a reasonable fee for each employee so examined, such fee to be mutually agreed upon by the parties from time to time in a separate agreement. Notwithstanding any such examination, User shall be responsible for ensuring that its employees are qualified and have taken all such rules examinations. During the initial start-up period, User shall allow Owner's pilot, at User's sole cost and expense, to accompany User over the Joint Trackage as Owner may in its reasonable judgment deem necessary. Should Owner ever require a pilot on User's Equipment after the initial start-up period on a frequent basis, that matter shall be referred to the Committee for resolution.

2.10 If any employee of User shall neglect, refuse or fail to abide by Owner's rules, instructions and restrictions governing the operation on or along the Joint Trackage, such employee shall, upon written request of Owner, be prohibited by User from working on the Joint Trackage. If either party shall deem it necessary to hold a formal investigation to establish such neglect, refusal or failure on the part of any employee of User, then upon such notice presented in writing, Owner and User shall promptly hold a joint investigation in which the parties concerned shall participate and bear the expense for their respective officers, counsel, witnesses and employees. Notice of such investigations to User's employees shall be given by User's officers, and such investigation shall be conducted in accordance with the terms and conditions of schedule agreements between User and its employees. If, in the judgment of Owner, the result of such investigation warrants, such employee shall, upon written request by Owner, be withdrawn by User from service on the Joint Trackage, and User shall release and indemnify Owner from and against any and all claims and expenses arising from such withdrawal.

If the disciplinary action is appealed by an employee of User to the National Railroad Adjustment Board or other tribunal lawfully created to adjudicate such cases, and if the decision of such board or tribunal sustains the employee's position, such employee shall not thereafter be barred from service on the Joint Trackage by reason of such disciplinary action.

2.11 If any Equipment of User is bad ordered enroute on the Joint Trackage and (i) it is necessary that it be set out, and (ii) only light repairs to the Equipment are required, such bad ordered Equipment shall be promptly repaired, and, thereafter, be promptly removed from the Joint Trackage by User. Owner may, upon request of User and at User's sole cost and expense, furnish the required labor and material and perform light repairs to make such bad ordered Equipment safe for movement. The employees and Equipment of Owner while in any manner so engaged or while enroute to or returning to Owner's terminal from such an assignment shall be considered Sole Employees (as hereinafter defined) of User and Sole Property (as hereinafter defined)

of User. However, should Owner's employees after repairing such bad ordered Equipment for User move directly to perform service for Owner's benefit rather than return to Owner's terminal, then User's exclusive time and liability will end when Owner's employees depart for work to be performed for Owner's benefit. In the case of such repairs by Owner to freight cars in User's account, billing therefor shall be in accordance with the Field and Office Manuals of the Interchange Rules, adopted by the Association of American Railroads, hereinafter called "Interchange Rules", in effect on the date of performance of the repairs. Owner shall then prepare and submit billing directly to and collect from the car owner for car owner responsibility items as determined under said Interchange Rules, and Owner shall prepare and submit billing directly to and collect from User for handling line responsibility items as determined under said Interchange Rules. Owner also shall submit billing to and collect from User any charges for repair to freight cars that are User's car owner responsibility items as determined under said Interchange Rules, should said car owner refuse or otherwise fail to make payment therefor. Repairs to locomotives shall be billed as provided for in Section 3 of these General Conditions.

2.12 If Equipment of User shall become derailed, wrecked, or otherwise disabled while upon the Joint Trackage, it shall be rerailed or cleared by Owner, except that employees of User may rerail User's derailed Equipment on the Joint Trackage whenever use of motorized on or off track equipment is not required; however, in any such case, employees of User shall consult with and be governed by the directions of Owner. Owner reserves the right to rerail Equipment of User when, in the judgment of Owner, Owner deems it advisable to do so to minimize delays and interruptions to train movement. The reasonable costs and expenses of rerailing or clearing derailed, wrecked or disabled Equipment shall be borne by the parties in accordance with Section 5 of these General Conditions. Services provided under this section shall be billed in accordance with Section 3 of these General Conditions.

2.13 In the event Equipment of User shall be forced to stop on the Joint Trackage, and such stoppage is due to insufficient hours of service remaining among User's employees, or due to mechanical failure of User's Equipment (other than bad ordered Equipment subject to light repairs pursuant to Section 2.12), or to any other cause not resulting from an accident or derailment (including the failure of User to promptly repair and clear bad ordered Equipment pursuant to Section 2.12), and such Equipment is unable to proceed, or if a train of User fails to maintain the speed required by Owner on the Joint Trackage, or if, in emergencies, disabled Equipment is set out of User's trains on the Joint Trackage, Owner shall have the option to furnish motive power or such other assistance (including but not limited to the right to recrew User's train) as may be necessary to haul, help or push such Equipment, or to properly move the disabled Equipment off the Joint Trackage. The reasonable costs and expenses of rendering such assistance shall be borne by User. Services provided

under this section shall be billed in accordance with Section 3 of these General Conditions.

2.14 User shall pay to Owner reasonable expenses incurred by Owner in the issuance of timetables made necessary solely by changes in the running time of the trains of User over the Joint Trackage. If changes in running time of trains of Owner or third parties, as well as those of User, require the issuance of timetables, then User shall pay to Owner that proportion of the expenses incurred that one bears to the total number of parties changing the running time of their trains. If changes in running time of trains of Owner or third parties, but not those of User, require the issuance of timetables, then User shall not be required to pay a proportion of the expenses incurred in connection therewith.

2.15 User, at Owner's request, shall be responsible for reporting to Owner the statistical data called for in the Agreement, which may include, but is not limited to, the number and type of Equipment and GTMs operated on the Joint Trackage.

Section 3. BILLING

3.1 Billing shall be accomplished on the basis of data contained in a billing form mutually agreed to between the parties. Such billing forms shall contain sufficient detail to permit computation of payments to be made hereunder. Billing shall be prepared according to the rules, additives, and equipment rental rates as published by the Owner. User shall pay to Owner at the Office of the Treasurer of Owner, or at such other location as Owner may from time to time designate in writing, all the compensation and charges of every name and nature which in and by the Agreement User is required to pay in lawful money of the United States within sixty (60) days after the rendition of bills therefor. Bills shall contain a statement of the amount due on account of the expenses incurred, properties and facilities provided and services rendered during the billing period.

3.2 Errors or disputed items in any bill shall not be deemed a valid excuse for delaying payment, but shall be paid subject to subsequent adjustment; provided, no exception to any bill shall be honored, recognized or considered if filed after the expiration of three (3) years from the last day of the calendar month during which the bill is rendered and no bill shall be rendered later than three (3) years (i) after the last day of the calendar month in which the expense covered thereby is incurred, or (ii) in the case of claims disputed as to amount or liability, after the amount is settled and/or the liability is established. This provision shall not limit the retroactive adjustment of billing made pursuant to exception taken to original accounting by or under authority of the STB or retroactive adjustment of wage rates and settlement of wage claims.

3.3 So much of the books, accounts and records of each party hereto as are related to the subject matter of Agreement shall at all reasonable times be open to inspection by the authorized representatives and agents of the parties hereto.

All books, accounts, and records shall be maintained to furnish readily full information for each item in accordance with any applicable laws or regulations.

3.4 Should any payment become payable by Owner to User under the Agreement, the provisions of Sections 3.1 and 3.2 of these General Conditions shall apply with User as the billing party and Owner as the paying party.

3.5 Either party hereto may assign any receivables due it under this Agreement; provided, however, that such assignments shall not relieve the assignor of any rights or obligations under the Agreement.

Section 4. COMPLIANCE WITH LAWS

4.1 With respect to operation of Equipment on the Joint Trackage, each party shall comply with all applicable federal, state and local laws, rules, regulations, orders, decisions and ordinances ("Standards"), and if any failure on the part of any party to so comply shall result in a fine, penalty, cost or charge being imposed or assessed on or against another party, such other party shall give prompt notice to the failing party and the failing party shall promptly reimburse and indemnify the other party for such fine, penalty, cost or charge and all expenses and attorneys' fees incurred in connection therewith, and shall upon request of the other party defend such action free of cost, charge and expense to the other party.

4.2 User agrees to comply fully with all applicable Standards concerning "hazardous waste" and "hazardous substances" ("Hazardous Materials"). User covenants that it shall not treat or dispose of Hazardous Materials on the Joint Trackage. User further agrees to furnish Owner (if requested) with proof, satisfactory to Owner, that User is in such compliance.

In the event any accident, bad ordered Equipment, derailment, vandalism or wreck (for purposes of this Section 4.2 and 4.3 hereinafter called collectively "Derailment") involving Equipment of or a train operated by User carrying Hazardous Materials shall occur on any segment of the Joint Trackage, any report required by federal, state or local authorities shall be the responsibility of User. User shall also advise the owner/shipper of the Hazardous Materials involved in the Derailment, and Owner, immediately.

In the event of a Derailment, Owner shall assume responsibility for cleaning up any release of Hazardous Materials from User's Equipment in accordance with all

federal, state, or local regulatory requirements. User may have representatives at the scene of the Derailment to observe and provide information and recommendations concerning the characteristics of Hazardous Materials release and the cleanup effort. Such costs shall be borne in accordance with Section 5 of these General Conditions.

If a Hazardous Materials release caused by a derailment involving Equipment of User, or on a train operated by User, results in contamination of real property or water on the Joint Trackage or on real property or water adjacent to the Joint Trackage (whether such real property or water is owned by Owner or a third party), Owner shall assume responsibility for emergency cleanup conducted to prevent further damage. User shall be responsible for performing cleanup efforts thereafter. Any costs associated with cleaning up real property or water on or adjacent to the Joint Trackage contaminated by Hazardous Materials shall be borne in accordance with Section 5 of these General Conditions.

If Hazardous Materials must be transferred to undamaged Equipment or trucks as a result of a release caused by a derailment involving Equipment of User, or on a train operated by User, User shall perform the transfer; PROVIDED, HOWEVER, that if the Hazardous Materials are in damaged Equipment that is blocking the Joint Trackage, Owner, at its option, may transfer the Hazardous Materials with any costs associated with such transfer borne in accordance with Section 5 of these General Conditions. Transfers of Hazardous Materials by User shall only be conducted after being authorized by Owner.

4.3 The total cost of clearing a Derailment, cleaning up any Hazardous Materials released during such Derailment, and/or repairing the Joint Trackage or any other property damaged thereby shall be borne by the party or parties liable therefor in accordance with Section 5 of these General Conditions.

4.4 In the event of release of Hazardous Materials caused by faulty Equipment or third parties, cleanup will be conducted as stated in Sections 4.2 and 4.3 of these General Conditions.

Section 5. LIABILITY

5.1 General. The provisions of this Section 5 shall apply only as between the parties hereto and are solely for their benefit. Nothing herein is intended to be for the benefit of any person or entity other than the parties hereto. It is the explicit intention of the parties hereto that no person or entity other than the parties hereto is or shall be entitled to bring any action to enforce any provision hereof against any of the parties hereto, and the assumptions, indemnities, covenants, undertakings and agreements set forth herein shall be solely for the benefit of, and shall be enforceable only by, the parties hereto. Notwithstanding anything contained in this Section 5, no

provisions hereof shall be deemed to deprive Owner or User of the right to enforce or shall otherwise restrict any remedies to which they would otherwise be entitled under other provisions of this Agreement as a result of the other party's failure to perform or observe any other obligation or duty created by this Agreement. The provisions of this Section 5 shall apply as between the parties hereto irrespective of the terms of any other agreements between the parties hereto and other railroads using the Joint Trackage, and the allocation of liabilities provided for herein shall control as between the parties hereto.

5.2 Definitions and Covenants. The parties agree that for the purposes of this Section 5:

(a) The term "Employee(s)" of a party shall mean all officers, agents, employees and contractors of that party. Such Employees shall be treated either as "Sole Employees" or "Joint Employees", as hereinafter specified;

(b) "Sole Employees" and "Sole Property" shall mean one or more Employees, Equipment, tools and other equipment and machinery while engaged in, en route to or from, or otherwise on duty incident to performing service for the exclusive benefit of one party. Pilots furnished by Owner to assist in operating Equipment of User shall be considered the Sole Employees of User while engaged in such operations. Equipment shall be deemed to be the Sole Property of the party receiving the same at such time as deemed interchanged under AAR rules or applicable interchange agreements, or when such party is responsible for the car hire or per diem for the Equipment under agreement between the parties;

(c) "Joint Employee" shall mean one or more Employees while engaged in maintaining, repairing, constructing, renewing, removing, inspecting or managing the Joint Trackage or making Changes in and/or Additions to the Joint Trackage for the benefit of both of the parties hereto, or while preparing to engage in, en route to or from, or otherwise on duty incident to performing such service for the benefit of both parties;

(d) "Joint Property" shall mean the Joint Trackage and all appurtenances thereto, and all Equipment, tools and other equipment and machinery while engaged in maintaining, repairing, constructing, renewing, removing, inspecting, managing or making Changes in and/or Additions to the Joint Trackage for the benefit of both of the parties hereto, or while being prepared to engage in, en route to or from, or otherwise incident to performing such service;

(e) "Loss and/or Damage" shall mean injury to or death of any person, including Employees of the parties hereto, and loss or damage to any property, including property of the partes hereto and property being transported by the parties, which arises out of an incident occurring on, the Joint Trackage and shall include liability for any and all claims, suits, demands, judgments and damages resulting from or arising out of such injury, death, loss or damage, except liability for punitive and exemplary damages as specified in the next following sentence. Loss and/or Damage shall include all costs and expenses incidental to any claims, suits, demands and judgments, including attorneys' fees, court costs and other costs of investigation and litigation, but Loss and/or Damage shall not include exemplary or punitive damages (any such exemplary or punitive damages arising out of an incident occurring on, or taking place on, the Joint Trackage being hereinafter referred to as "Other Liability"). Loss and/or Damage shall further include the expense of clearing wrecked or derailed Equipment and the costs of environmental protection, mitigation or clean up necessitated by such wreck or derailment and shall include any liabilities for any third-party claims for personal injury or death, property damage, natural resource damage, or any penalties, judgments or fines associated with a release of any contaminants resulting from such wreck or derailment. Loss and/or Damage shall be reduced by any amount recovered from third parties;

(f) Operating Employees of Owner whose service may be jointly used by the parties hereto for the movement of trains over the Joint Trackage, including, but not limited to, train dispatchers, train order operators, operator clerks and watchmen shall at the time of performing their services be deemed to be Sole Employees of the party hereto for whose benefit said services may be separately rendered (during the time they are so separately rendered) and be deemed to be Joint Employees of the parties hereto at such time as their services may be rendered for the parties' joint benefit;

(g) All Employees, Equipment, tools and other equipment and machinery other than as described in (b), (c), (d) or (f) above or in Section 5.4. shall be deemed the Sole Employees of the employing party and the Sole Property of the using party;

(h) Any railroad not a party to this Agreement heretofore or hereafter admitted to the use of any portion of the Joint Trackage, shall, as between the parties hereto, be regarded in the same light as a third party. Without limiting the generality of the foregoing, neither of the parties hereto assumes any responsibility to the other under the

provisions of this Agreement for any Loss and/or Damage or Other Liability occasioned by the acts or omissions of any employees of any such other railroad, or for any Loss and/or Damage or Other Liability which such other railroad shall be obligated to assume in whole or in part pursuant to law or any agreement relating to such other railroad's use of any portion of the Joint Trackage;

(i) For the purpose of this Section 5, Equipment of foreign lines being detoured over the Joint Trackage, and all persons other than Joint Employees engaged in moving such Equipment, shall be considered the Equipment and Employees of the party hereto under whose detour agreement or other auspices such movement is being made.

5.3 Reimbursement and Defense. The parties agree that:

(a) Each party hereto shall pay promptly Loss and/or Damage or Other Liability for which such party shall be liable under the provisions of this Section 5, and shall indemnify the other party against such Loss and/or Damage or Other Liability, including reasonable attorneys' fees and costs. If any suit or suits shall be brought against either of the parties hereto and any judgment or judgment shall be recovered which said party is compelled to pay, and the other party shall under the provisions of the Agreement be solely liable therefor, then the party which is so liable shall promptly repay on demand to the other party paying the same any monies which it may have been required to pay, whether in the way of Loss and/or Damage, Other Liability, costs, fees or other expenses; and if the Loss and/or Damage or Other Liability in such case or cases is joint or allocated between the parties to the Agreement, the party defendant paying the same or any costs, fees or other expenses shall be reimbursed by the other party as allocated pursuant to this Agreement;

(b) Each party covenants and agrees with the other party that it will pay for all Loss and/or Damage or Other Liability, both as to persons and property, and related costs which it has herein assumed, or agreed to pay, the judgment of any court in a suit by third party or parties to the contrary notwithstanding, and will forever indemnify and save harmless the other party, its successors and assigns, from and against all liability and claims therefor, or by reason thereof, and will pay, satisfy and discharge all judgments that may be rendered by reason thereof, and all costs, charges and expenses incident thereto;

(c) Each party hereto shall have the sole right to settle, or cause to be settled for it, all claims for Loss and/or Damage and Other

Liability for which such party shall be solely liable under the provisions of this Section 5, and the sole right to defend or cause to be defended all suits for the recovery of any such Loss and/or Damage or Other Liability for which such party shall be solely liable under the provisions of this Section 5;

(d) User shall provide written notice to Owner of any accidents or events resulting in Loss and/or Damage or Other Liability within seven (7) days of its discovery or receipt of notification of such occurrence;

(e) In the event both parties hereto may be liable for any Loss and/or Damage or Other Liability under the provisions of this Section 5 ("Co-Liable"), and the same shall be settled by a voluntary payment of money or other valuable consideration by one of the parties Co-Liable therefor, release from liability shall be taken to and in the name of all the parties so liable; however, no such settlement in excess of the sum of One Hundred Thousand Dollars ($100,000) shall be made by or for any party Co-Liable therefor without the written consent of the other parties so liable, but any settlement made by any party in consideration of One Hundred Thousand Dollars ($100,000) or a lesser sum shall be binding upon the other parties and allocated in accordance with Section 5.5; and no party shall unreasonably withhold its consent to a settlement proposed by the other party; **[failure by a party to secure consent from the other shall not release such other party except to the extent such other party was prejudiced by the failure.]**

(f) In case a claim or suit shall be commenced against any party hereto for or on account of Loss and/or Damage or Other Liability for which another party hereto is or may be solely liable or Co-Liable under the provisions of this Section 5, the party against whom such claim or suit is commenced shall give to such other party prompt notice in writing of the pendency of such claim or suit, and thereupon such other party shall assume or join in the defense of such claim or suit as follows: If the claim or suit involves Loss and/or Damage to the Sole Employees or Sole Property of a party or its invitee or property in its care, custody or control, that party shall assume and control the investigation and defense of such claim or suit; if the claim or suit involves Loss and/or Damage to third parties, Joint Employees or the Joint Trackage, the party whose Sole Employees or Equipment were involved in the incident shall investigate and defend such claim or suit; and if such claim or suit involves Loss and/or Damage to third parties, Joint Employees or the Joint Trackage and neither or both party's Equipment and Sole Employees were involved in the incident, Owner shall investigate and defend such claim or suit;

provided that the other party also may participate in the defense of any of the foregoing if it may have liability as a result of such incident;

[failure by a party to secure consent from the other shall not release such other party except to the extent such other party was prejudiced by the failure.]

(g) No party hereto shall be conclusively bound by any judgments against the other party, unless the former party shall have had reasonable notice requiring or permitting it to investigate and defend and reasonable opportunity to make such defense. When such notice and opportunity shall have been given, the party so notified and the other party shall be conclusively bound by the judgment as to all matters which could have been litigated in such suit, including without limitation a determination of the relative or comparative fault of each and the fault resulting in Other Liability.

5.4 Wrecks and Derailment. The cost and expense of repairing bad ordered Equipment, clearing wrecks or otherwise disabled Equipment or rerailing Equipment (and the costs of repair or renewal of damaged Joint Trackage or adjacent properties) shall be borne by the party whose Equipment was wrecked, disabled, or derailed or caused such damage. All Employees or Equipment, while engaged in, en route to or from, or otherwise incident to operating wrecker or work trains clearing wrecks, disabled Equipment or Derailments or engaged in repair or renewal of the Joint Trackage subsequent to any such wreck, disability or Derailment, shall be deemed to be Sole Employees and/or Sole Property of the party whose Equipment was wrecked, disabled or derailed. However, such Employees or Equipment, while en route from performing such clearing of wrecks, disabled Equipment or Derailments or repairing or renewing the Joint Trackage to perform another type of service, shall not be deemed to be performing service incident to the instant wreck, disability or Derailment.

5.5 Allocation.

(a) Each party shall bear all costs of Loss and/or Damage to its Sole Employees or its Sole Property, or property in its care, custody or control or its invitees without regard to which party was at fault.

(b) Loss and/or Damage to third parties (i.e., any person or entity other than a party hereto, a Sole Employee of either party, a Joint Employee or an invitee of either party) or their property, to Joint Employees or their property or to Joint Property shall be borne by the parties hereto as follows:

(i) If the Loss and/or Damage is attributable to the actions or omissions of only one party hereto, that party shall bear and pay all of such Loss and/or Damage.

(ii) If such Loss and/or Damage is attributable to the acts or omissions of more than one party hereto, such Loss and/or Damage shall be borne and paid by those parties in accordance with a comparative negligence standard, whereby each such party shall bear and pay a portion of the Loss and/or Damage equal to the degree of causative fault or percentage of responsibility for the Loss and/or Damage attributable to that party without regard to laws limiting recovery if one party is more than fifty percent (50%) at fault.

(iii) Loss and/or Damage to third parties or Joint Employees occurring in such a way that it cannot be determined how such Loss and/or Damage came about shall be apportioned equally between the parties, provided that, without limitation, User shall not bear or incur any liability for claims, suits, demands, judgments, losses or damages resulting from environmental contamination of or hazardous material on or released from the Joint Trackage, except contamination or a release of hazardous materials from User's own Equipment or caused by or arising from the actions or omissions of User or User's Employees, and then only in accordance with the other provisions hereof.

(c) Other Liability shall be borne by the parties hereto as follows:

(i) If the Other Liability is based upon the act or omission of only one party hereto, that party shall bear and pay all of such Other Liability.

(ii) If the Other Liability is based upon the acts or omissions of more than one party hereto, such Other Liability shall be borne and paid by the Parties in accordance with a comparative negligence standard whereby each party shall bear and pay a portion of the Other Liability equal to the degree of causative fault or percentage of responsibility for the Other Liability attributable to that party without regard to laws limiting recovery if one party is more than fifty percent (50%) at fault.

The allocation of Other Liability between the parties shall be determined solely on bases applicable to punitive or exemplary

damages and separately from any determination of responsibility for Loss and/or Damage.

(d) The parties agree that the characterization herein of certain Employees as "Sole Employees" or "Joint Employees" is only for the purpose of allocating Loss and/or Damage suffered by those Employees. Except as specified in subsection (a) of this Section 5.5. (which provides for the allocation of certain Loss and/or Damage between the parties without regard to fault), no party shall be liable for the acts or omissions (negligent or otherwise) of any other party's Employee.

5.6 OWNER AND USER EXPRESSLY INTEND THAT WHERE ONE PARTY IS TO INDEMNIFY THE OTHER PURSUANT TO THE TERMS OF THIS AGREEMENT, SUCH INDEMNITY SHALL INCLUDE (1) INDEMNITY FOR THE NEGLIGENCE OR ALLEGED NEGLIGENCE, WHETHER ACTIVE OR PASSIVE, OF THE INDEMNIFIED PARTY WHERE THAT NEGLIGENCE IS A CAUSE OF THE LOSS OR DAMAGE; (2) INDEMNITY FOR STRICT LIABILITY OF THE INDEMNIFIED PARTY RESULTING FROM A VIOLATION OR ALLEGED VIOLATION OF ANY FEDERAL, STATE OR LOCAL LAW OR REGULATION BY THE INDEMNIFIED PARTY, INCLUDING BUT NOT LIMITED TO THE FEDERAL EMPLOYERS LIABILITY ACT ("FELA"), THE SAFETY APPLIANCE ACT, THE BOILER INSPECTION ACT, THE OCCUPATIONAL SAFETY AND HEALTH ACT ("OSHA"), THE RESOURCE CONSERVATION AND RECOVERY ACT ("RCRA"), THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT ("CERCLA"), THE CLEAN WATER ACT ("CWA"), THE OIL POLLUTION ACT ("OPA"), AND ANY SIMILAR STATE STATUTE IMPOSING OR IMPLEMENTING SIMILAR STANDARDS; AND (3) INDEMNITY FOR ACTS OR ALLEGED ACTS OF GROSS NEGLIGENCE OF THE INDEMNIFIED PARTY, OR OTHER CONDUCT ON THE PART OF THE INDEMNIFIED PARTY FOR WHICH PUNITIVE DAMAGES MIGHT BE SOUGHT.

Section 6. ARBITRATION

6.1 If at any time a question or controversy shall arise between the parties hereto in connection with the Agreement upon which the parties cannot agree, such question or controversy shall be submitted to and settled by arbitration. Unless other procedures are agreed to by the parties, arbitration between the parties pursuant to this Section 6 shall be governed by the rules and procedures set forth in this Section 6.

6.2 If the parties to the dispute are able to agree upon a single competent and disinterested arbitrator within twenty (20) days after written notice by one party of its desire for arbitration to the other party, then the question or controversy shall be submitted to and settled by that single arbitrator. Otherwise, any party (the notifying party) may notify the other party (the noticed party) in writing of its request for

arbitration and nominating one arbitrator. Within twenty (20) days after receipt of said notice, the noticed party shall appoint an arbitrator and notify the notifying party in writing of such appointment. Should the noticed party fail within twenty (20) days after receipt of such notice to name its arbitrator, said arbitrator may be appointed by the Chief Judge (or acting Chief Judge) of the United States District Court for the District of Columbia upon application by either party after ten (10) days' written notice to the other party. The two arbitrators so chosen shall select one additional arbitrator to complete the board. If the arbitrators so chosen fail to agree upon an additional arbitrator, the same shall, upon application of a party, be appointed by said judge in the manner heretofore stated.

6.3 Upon selection of the arbitrator(s), said arbitrator(s) shall, with reasonable diligence, determine the questions as disclosed in said notice of arbitration, shall give both parties reasonable notice of the time and place (of which the arbitrator(s) shall be the judge) of hearing evidence and argument, may take such evidence as the arbitrator(s) shall deem reasonable or as either party may submit with witnesses required to be sworn, and hear arguments of counsel or others. If an arbitrator declines or fails to act, the party (or parties in the case of a single arbitrator) by whom the arbitrator was chosen or said judge shall appoint another to act in the arbitrator's place.

6.4 After considering all evidence, testimony and arguments, said single arbitrator or the majority of said board of arbitrators shall promptly state such decision or award and the reasoning for such decision or award in writing which shall be final, binding, and conclusive on all parties to the arbitration when delivered to them. The award rendered by the arbitrator(s) may be entered as a judgment in any court having jurisdiction thereof and enforced as between the parties without further evidentiary proceeding, the same as entered by the court at the conclusion of a judicial proceeding in which no appeal was taken. Until the arbitrator(s) shall issue the first decision or award upon any question submitted for arbitration, performance under the Agreement shall continue in the manner and form existing prior to the rise of such question. After delivery of said first decision or award, each party shall forthwith comply with said first decision or award immediately after receiving it.

6.5 Each party to the arbitration shall pay all compensation, costs, and expenses of the arbitrator appointed in its behalf and all fees and expenses of its own witnesses, exhibits, and counsel. The compensation, cost, and expenses of the single arbitrator or the additional arbitrator in the board of arbitrators shall be paid in equal shares by all parties to the arbitration.

6.6 The parties may obtain discovery and offer evidence in accordance with the Federal Rules of Civil Procedure Rules 26 - 37, and Federal Rules of Evidence, as each may be amended from time to time.

6.7 Interest compounded annually, at a rate equal to the average then paid of 90-day Treasury Bills of the United States Government, shall be applied to any and all arbitrator's awards requiring the payment of money and shall be calculated from the date of the applicable arbitration decision.[?]

Section 7. GOVERNMENTAL APPROVAL and ABANDONMENT

7.1 Owner and User shall, at their respective cost and expense, initiate by appropriate application or petition and thereafter diligently prosecute proceedings for the procurement of all necessary consent, approval or authority from any governmental agency for the sanction of the Agreement and the operations to be carried on or conducted by User thereunder. User and Owner agree to cooperate fully to procure all such necessary consent, approval or authority.

7.2 In the event Owner shall be involuntarily dispossessed, including by threat of condemnation by competent public authority, of the right to operate upon and maintain any portion of its Joint Trackage and Owner fails or declines to replace said Joint Trackage, Owner shall have no obligation hereunder to provide tracks in replacement of such Joint Trackage for User's use, and User shall have and shall make no claim of any kind, legal or otherwise, against Owner for failure to provide such Joint Trackage for User's use.

7.3 To the extent that Owner may lawfully do so, Owner reserves to itself the exclusive right, exercisable at any time during the life of the Agreement without concurrence of User, to elect to abandon all or any part of the Joint Trackage by giving six (6) months' prior written notice to User of its intention so to do ("Notice of Abandonment").

Owner shall, concurrent with its Notice of Abandonment, if legally able to do so, give to User the option to purchase the part or parts of the Joint Trackage thereof to be abandoned at the Net Liquidation Value thereof, on the date of said notice. "Net Liquidation Value" shall mean fair market value of land and salvage value of track components and other facilities less estimated cost of removal. User shall have three (3) months from the date of receipt of Owner's notice to exercise its option and shall evidence the exercise of its option by giving Owner written notice thereof. Thereafter User shall immediately make appropriate application to secure all necessary governmental authority for such transaction. Within thirty (30) days following the effective date of all requisite governmental approval of the transaction, User shall pay to Owner the amount of money required to purchase said Joint Trackage to be abandoned at the aforesaid Net Liquidation Value. Upon the receipt of payment of such sum, the Agreement shall terminate as to the part of the Joint Trackage so purchased by User. Contemporaneously with such payment, by instrument or instruments, Owner shall convey and assign by good and sufficient quit claim deed or deeds, bills of sale or

other instruments, all of Owner's right, title, interest and equity, in and to the Joint Trackage so purchased. Owner agrees that it shall promptly take all necessary action to obtain from the trustees of its mortgages all releases or satisfactions covering the same and shall deliver to User such instruments.

If User fails to exercise the option herein granted within the time and in the manner above specified, Owner may forthwith proceed free of all obligation to User to abandon the portion of Joint Trackage or make appropriate application, if necessary, to secure all necessary governmental authority for such abandonment. User agrees that at such time it shall concurrently make application for all necessary governmental authority for abandonment of its right to operate over such Joint Trackage. The Agreement shall terminate as to the section of Joint Trackage so abandoned upon the effective date of such approval by governmental authority.

7.4 Owner and User each shall be responsible for and shall bear labor claims, and employee protection payable to, its own respective employees (and employees of its respective affiliated companies) including any amounts that either Owner or User may be required to pay to its own respective employees pursuant to labor protective conditions imposed by the STB.

Section 8. CATASTROPHIC EXPENSE

Catastrophic expense to the Joint Trackage, such as, but not limited to, that arising from flood, earthquake or acts of God, etc., in excess of One Hundred Thousand Dollars ($100,000) for each occurrence shall be billed in addition to the GTM Rates and apportioned on the basis of the parties' GTMs operated over the Joint Trackage for the twelve (12) month period ending immediately prior to the first day of the month of occurrence.

Section 9. TERM

9.1 The Agreement shall be effective upon execution for a term of ninety-nine (99) years, provided, however, the trackage rights granted to User pursuant to the Agreement shall not become effective until the acquisition of control of SP by UP pursuant to STB Finance Docket No. 32760, and provided also that in the event the acquisition by UP of control of SP is finally disapproved by the STB and the time for any appeal has passed or, if the disapproval was appealed, the disapproval was affirmed on appeal, the trackage rights granted pursuant to the Agreement shall be of no force and effect. User shall have the right to terminate the Agreement upon twelve (12) months' prior written notice to Owner. Liabilities created under this Agreement, if it becomes effective and is later terminated, shall survive such termination.

9.2 Upon termination of the Agreement, or any partial termination, as the applicable case may be, however the same may occur, User shall be released from any and all manner of obligations and shall be deemed to have forever relinquished, abandoned, surrendered and renounced any and all right possessed by User to operate over that part of the Joint Trackage to which such termination applied, and as to such part, User shall forever release and discharge Owner of and from any and all manner of obligations, claims, demands, causes of action, or suits which User might have, or which might subsequently accrue to User growing out of or in any manner connected with, directly or indirectly, the contractual obligations of Owner under the Agreement, in all events provided, however, the aforesaid relinquishment, abandonment, surrender, renunciation, release and discharge by User shall not in any case affect any of the rights and obligations of either Owner or User which may have accrued, or liabilities accrued or otherwise, which may have arisen prior to such termination or partial termination. Upon any termination, Owner shall remove from Owner's right of way any connecting track, and any exclusive facility of User, at User's expense with salvage to be delivered to and retained by User. Upon any partial termination of the Agreement, however the same may occur, the terms and conditions hereof shall continue and remain in full force and effect for the balance of the Joint Trackage.

Section 10. ASSIGNMENT.

Except as provided in Section 3.5 and in the sentence immediately following, the Agreement and any rights granted hereunder may not be assigned in whole or in part by Owner or User without the prior written consent of the other. The Agreement may be assigned by Owner or User without the prior written consent of the other only (i) as a result of a merger, corporate reorganization, consolidation, change of control or sale of substantially all of its assets, or (ii) to an affiliate of the assigning party where the term "affiliate" means a corporation, partnership or other entity controlled, controlling or under common control with the assigning party. In the event of an authorized assignment, the Agreement and the operating rights hereunder shall be binding upon the successors and assigns of the parties.

Section 11. DEFAULT

11.1 Notwithstanding the provisions of Section 3 of these General Conditions, either party hereto claiming default of any of the provisions of the Agreement (including these General Conditions) shall furnish notice and written demand to the other party for performance or compliance with the covenant or condition of the Agreement claimed to be in default, which notice shall specify wherein and in what respect such default is claimed to exist and shall specify the particular Section or Sections of the Agreement under which such claim of default is made.

11.2 If the default shall continue for an additional period of thirty (30) days after receipt of such written notice and demand, and such default has not been remedied within said thirty (30) day period, or reasonable steps have not been nor continue to be taken to remedy a failure or default which cannot reasonably be remedied within said thirty (30) day period, and such default relates to the provisions and terms of the Agreement, either party shall resort to binding arbitration provided that the arbitrator shall not have the authority to amend, modify or terminate the Agreement.

11.3 Failure of a party to claim a default shall not constitute a waiver of such default. Either party hereto entitled to claim default may waive any such default, but no action by such party in waiving such default shall extend to or be taken to effect any subsequent defaults or impair the rights of either party hereto resulting therefrom.

Section 12. OTHER CONSIDERATIONS

12.1 The Agreement and each and every provision hereof is for the exclusive benefit of the parties hereto and not for the benefit of any third party. Nothing herein contained shall be taken as creating or increasing any right in any third person to recover by way of damages or otherwise against any of the parties hereto.

12.2 If any covenant or provision of the Agreement not material to the right of User to use the Joint Trackage shall be adjudged void, such adjudication shall not affect the validity, obligation or performance of any other covenant or provision which is in itself valid. No controversy concerning any covenant or provision shall delay the performance of any other covenant or provision. Should any covenant or provision of the Agreement be adjudged void, the parties shall make such other arrangements as will effect the purposes and intent of the Agreement.

12.3 In the event there shall be any conflict between the provisions of these General Conditions and the Agreement, the provisions of the Agreement shall prevail, except that the definition of Joint Trackage set forth in Section 1.7 of these General Conditions shall prevail.

12.4 All section headings are inserted for convenience only and shall not affect any construction or interpretation of the Agreement.

END OF EXHIBIT "B"

FIRST SUPPLEMENT TO THE SEALY, TEXAS TO WACO AND EAGLE PASS, TEXAS TRACKAGE RIGHTS AGREEMENT

THIS FIRST SUPPLEMENTAL AGREEMENT, made and entered into as of the 28th day of August, 1997, by and between UNION PACIFIC RAILROAD COMPANY, a Utah corporation ("UPRR"), and SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation ("SPT") (UPRR and SPT are hereinafter referred to collectively as "Owner"), on the one hand, and THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, a Delaware corporation ("BNSF") (BNSF is hereinafter referred to collectively as "User"), on the other hand.

WITNESSETH:

WHEREAS, pursuant to an agreement dated September 25, 1995, as amended (the "Settlement Agreement"), between Union Pacific Corporation ("UPC"), Union Pacific Railroad Company ("UPRR"), Missouri Pacific Railroad Company ("MPRR") (UPC, UPRR and MPRR are hereinafter referred to collectively as "UP"), Southern Pacific Rail Corporation ("SPC"), SPT, St. Louis Southwestern Railway Company ("SSW"), The Denver and Rio Grande Western Railroad Company ("DRGW"), and SPCSL Corp. ("SPCSL") (SPC, SPT, SSW, DRGW and SPCSL are hereinafter referred to collectively as "SP") (UP and SP are hereinafter referred to collectively as "UP/SP"), on the one hand, and Burlington Northern Railroad Company ("BN") and The Atchison, Topeka & Santa Fe Railway Company ("Santa Fe"), on the other hand, UP/SP agreed to grant certain rights to User, including overhead bridge rights between Sealy and Waco and Eagle Pass, Texas, and the right to access industries presently served either directly or by reciprocal switching, joint facility or other arrangement by both UP and SP and no other railroad at points listed in the Settlement Agreement, as well as the right to access City Public Service Board of San Antonio ("CPSB") plants at Elmendorf, TX, except as otherwise provided, such rights to be effective upon UP's acquisition of control of SP pursuant to the application to the STB in Finance Docket No. 32760.

WHEREAS, there is now in effect an agreement dated June 1, 1996 (the "Original Agreement"), entered into between the parties in compliance with the Settlement Agreement, pursuant to which Owner granted to User trackage rights over certain of Owner's tracks between Sealy, Waco and Eagle Pass, Texas (hereinafter referred to as the "Joint Trackage"), including the right to access CPSB's Elmendorf plants under certain specified terms.

WHEREAS, in the STB's Decision No. 44 in Finance Docket No. 32760 (served August 12, 1996) approving the merger of UP and SP, the STB imposed a condition in favor of CPSB that required Owner to modify the trackage rights that had been granted to

allow User to access CPSB's Elmendorf plants (the "CPSB Condition").

WHEREAS, UP/SP and CPSB reached an agreement on amendments to the Original Agreement to allow User the right to access CPSB's Elmendorf Plants, that was (i) submitted to the STB on August 23, 1996, and (ii) accepted by the STB in Decision No. 52 in Finance Docket No. 32760 (served September 10, 1996), as fulfilling the CPSB Condition.

WHEREAS, the STB ruled in Decision No. 61 in Finance Docket No. 32760 (served November 20, 1996) ("Decision No. 61") that the new facilities and transload conditions imposed in Decision No. 44 applied to the lines over which Owner had agreed to grant User trackage rights to access CPSB's Elmendorf facilities.

WHEREAS, Owner has agreed to grant BNSF trackage rights over UPRR's line between Craig Junction and SP Junction (SP Tower 112), and over SPT's line between SP Tower 105 and SP Junction (SP Tower 112) to satisfy the CPSB Condition and comply with Decision No. 61.

NOW, THEREFORE, it is mutually agreed, by and between the parties hereto, as follows:

I. AMENDMENTS TO THE ORIGINAL AGREEMENT.

The Original Agreement is hereby amended as follows:

(a) The first "WHEREAS" clause shall be amended, by adding after the fifth subparagraph:

> "UPRR's main track no. 2 at Craig Junction, Texas, in the vicinity of UPRR's Milepost 235.9 and SP Junction (Tower 112) in the vicinity of UPRR's Milepost 259.8."

(b) The first "WHEREAS" clause shall be amended, by inserting at the beginning of the seventh subparagraph after the colon:

> "a line of railroad of SPT between San Antonio, in the vicinity of SPT's Del Rio Subdivision, Milepost 212.7 (Tower 105) and SP Junction (Tower 112), in the vicinity of SPT's Milepost 211.0, and"

(c) The first "WHEREAS" clause shall be amended by deleting the three lines following the seventh subparagraph and replacing them with the following:

> "as shown by bold and dash lines on the attached prints (identified as Exhibit "A") (Figures, 4-1, 4-2 and 4-3), and further described in Section 1.7 of Exhibit "B", which shall be referred to herein as the "Joint Trackage"; and"

(d) Subparagraph (b) of Section 2 of the Original Agreement shall be deleted in its entirety and replaced with the following:

> "(b) The rights granted in Section 2(a) shall be for all rail traffic of all kinds and commodities, both carload and intermodal, of all commodities."

(e) Section 2(g) is amended by striking the first two sentences and inserting:

> "(g) User shall have the right to (a) access all existing industries which are served by UP and SP and no other railroad directly, by reciprocal switching, joint facility or other arrangements, (b) access City Public Service Board of San Antonio ("CPSB") facilities at Elmendorf, Texas, including expansions of or additions to these facilities and any new CPSB facilities at Elmendorf, (c) serve any new shipper facility (including any new transloading facility), to the extent permitted by STB Decision No. 44 in Finance Docket No. 32760 (served August 12, 1996) and STB Decision No. 61 in Finance Docket No. 32760 (served November 20, 1996), on any SP-owned or UP-owned line over which BNSF received trackage rights pursuant to Section 2(a) of this Agreement, and (d) subject to the geographic limitations set forth below, serve new shipper facilities and existing and future transloading facilities and establish and exclusively serve intermodal and auto facilities at points listed in Exhibit A to the Settlement Agreement. The geographic limitations applicable to subparagraph (d) above shall generally correspond to the territory within which, prior to the merger of UP and SP, a new customer could have constructed a facility that would have been open to service by both UP and SP either directly or through reciprocal switch."

(f) Section 2 shall be amended by adding after subparagraph (l):

"(m) User shall also have the right, at City Public Service Board of San Antonio, Texas' option, to connect for movement to and from Elmendorf, TX, where its trackage rights granted pursuant to this Agreement intersect at SP Junction (Tower 112) with the existing trackage rights SP has granted to City Public Service Board of San Antonio, TX."

(g) Exhibit "A" to the Original Agreement shall be amended by adding the revised Figures 4-1, 4-2 and 4-3.

(h) A new Section 9 shall be added to the Original Agreement immediately following Section 8, as follows:

"9. Pending Appeal.

Owner has appealed to the United States Court of Appeals for the District of Columbia Circuit the STB's denial in Decision No. 61 of Owner's Petition for Clarification as to the applicability of certain of the STB conditions. The parties agree that the provisions of subsection (c) of Section 2(g) of this Agreement shall be null and void and of no force and effect to the extent the STB conditions challenged by Owner are overturned or modified on appeal."

II. EFFECT ON ORIGINAL AGREEMENT.

This First Supplement is supplemental to the Original Agreement and nothing herein contained shall be construed as amending or modifying the same except as herein specifically provided.

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[SIGNATURES APPEAR ON NEXT PAGE]

IN WITNESS WHEREOF, the parties hereto have caused this First Supplement to be duly executed as of the day and year first above written.

UNION PACIFIC RAILROAD COMPANY

By: _____
Its: _____

SOUTHERN PACIFIC TRANSPORTATION COMPANY

By: _____
Its: _____

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

By: _____
Its: _____

IN WITNESS WHEREOF, the parties hereto have caused this First Supplement to be duly executed as of the day and year first above written.

UNION PACIFIC RAILROAD COMPANY

By:_____
Its:_____

SOUTHERN PACIFIC TRANSPORTATION COMPANY

By:_____
Its:_____

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

By: F.W. Woolley
Its: Director Contracts & Joint Facilities

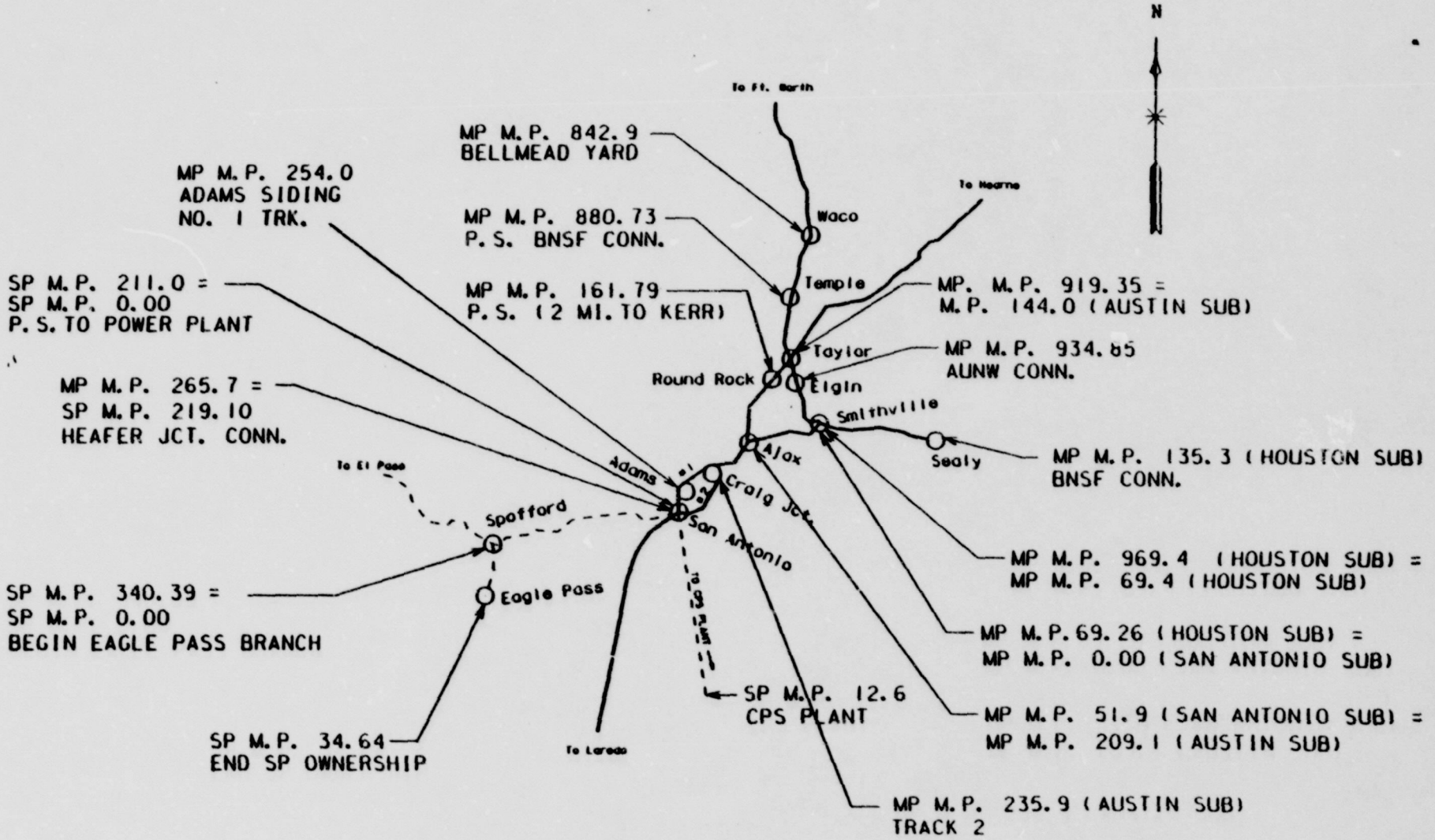
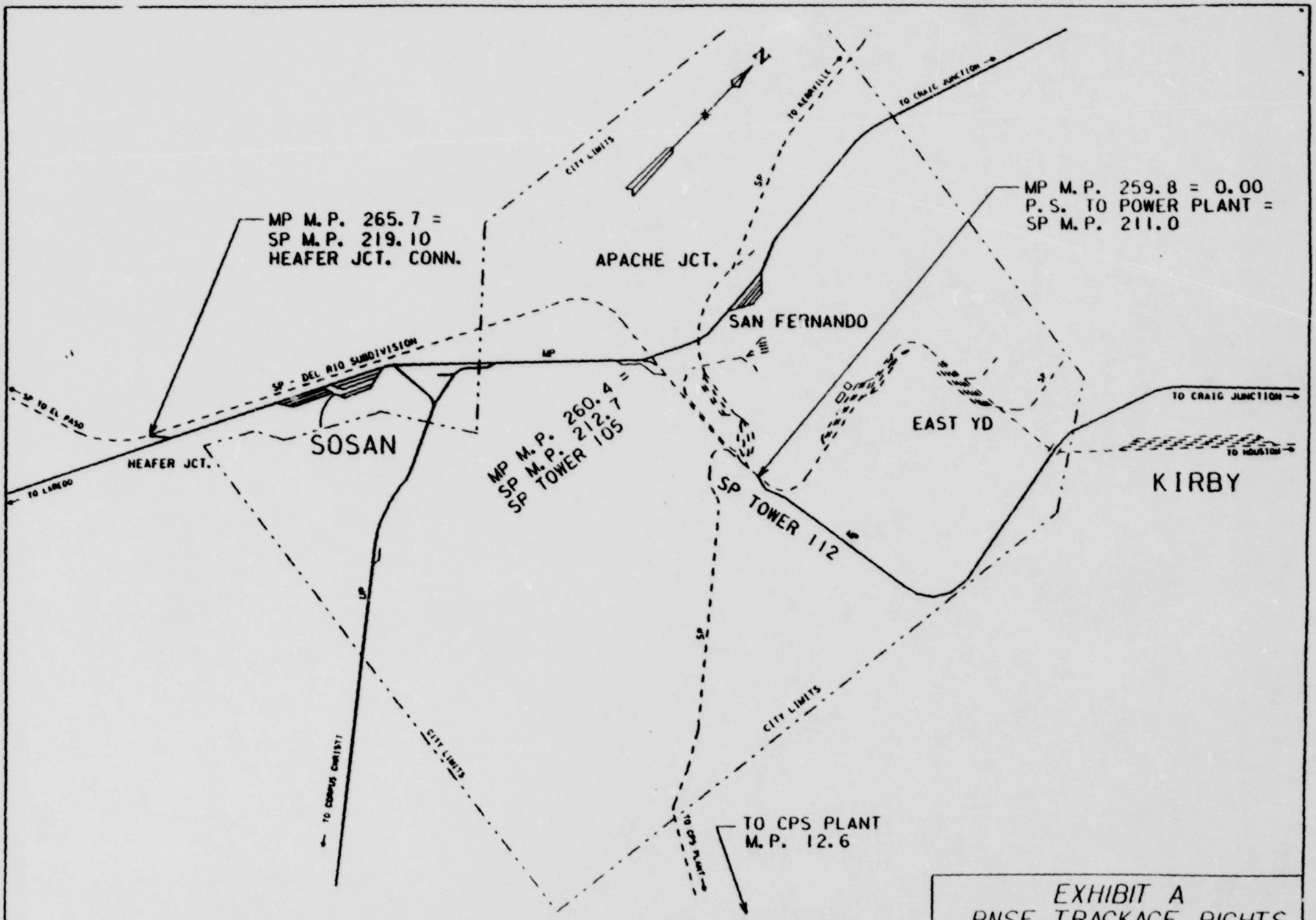


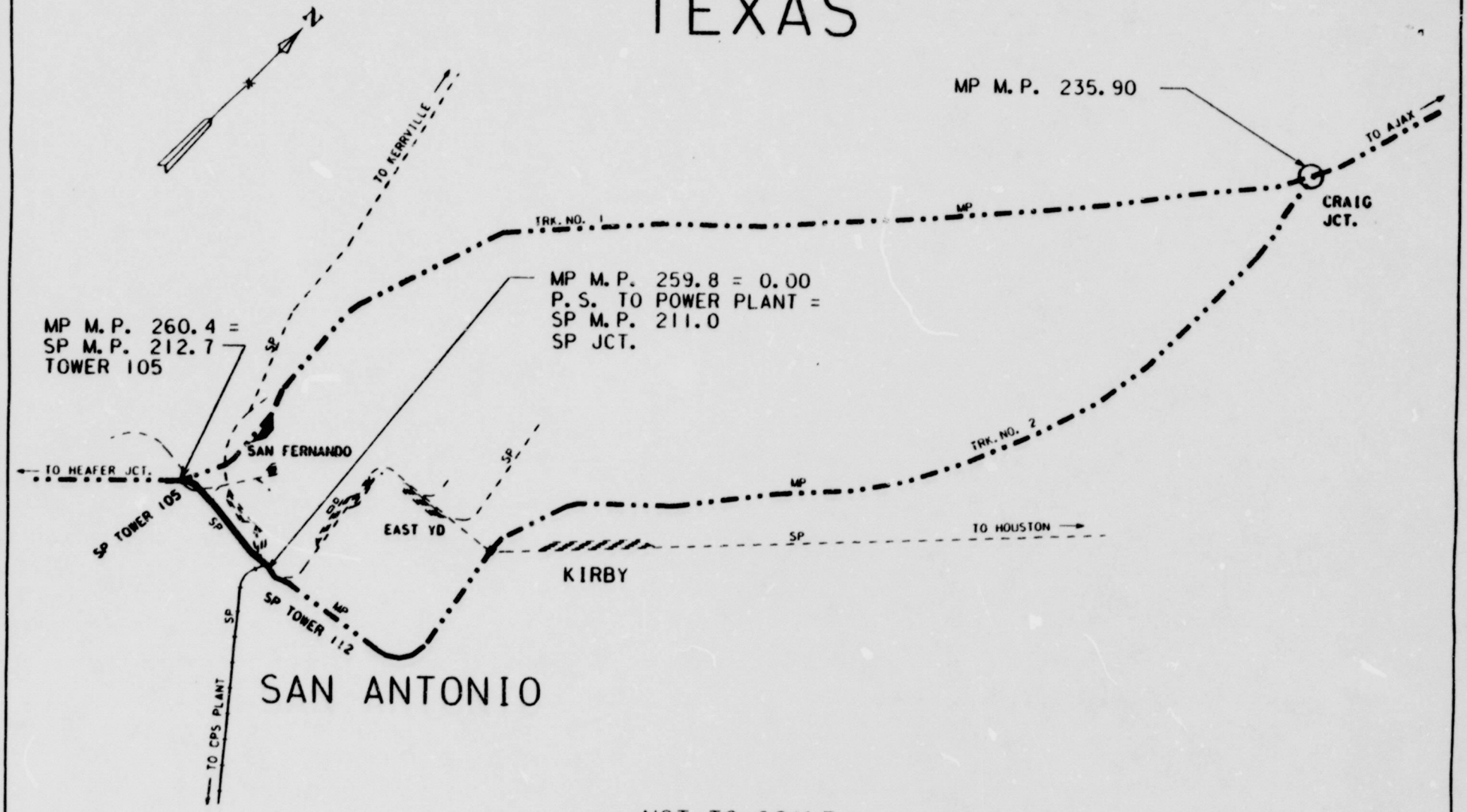
EXHIBIT A
BNSF TRACKAGE RIGHTS
CENTRAL TEXAS
06/01/96 FIGURE 4-1
REVISED: 05/07/97



SAN ANTONIO, TEXAS

EXHIBIT A
BNSF TRACKAGE RIGHTS
SAN ANTONIO
06/01/96 FIGURE 4-2
REVISED: 05/07/97

TEXAS



NOT TO SCALE

LEGEND:

- BNSF TRACKAGE RIGHTS ON MISSOURI PACIFIC RR
- BNSF TRACKAGE RIGHTS ON SOUTHERN PACIFIC RR
- CPSB AND BNSF TRACKAGE RIGHTS ON SOUTHERN PACIFIC RR
- SOUTHERN PACIFIC RR

EXHIBIT A
BNSF TRACKAGE RIGHTS
SAN ANTONIO TO CRAIG JCT.
09/11/96 FIGURE 4-3
REVISED: 05/07/97

EXHIBIT 3 (Caption Summary)
F.D. No. 32760 (Sub-No. 24)

SURFACE TRANSPORTATION BOARD

NOTICE OF EXEMPTION

FINANCE DOCKET NO. 32760 (SUB-NO. 24)

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
-- TRACKAGE RIGHTS EXEMPTION --
UNION PACIFIC RAILROAD COMPANY,
SOUTHERN PACIFIC TRANSPORTATION COMPANY

Applicants in Finance Docket No. 32760, UP -- Merger -- SP, have agreed to grant overhead trackage rights, and local access as specified, over (a) UPRR's line between Craig Junction, Texas, and SP Junction (Tower 112), via Fratt, Texas, and (b) SPT's line between Tower 105 in San Antonio, Texas, and SP Junction (Tower 112), to The Burlington Northern and Santa Fe Railway Company. The trackage rights will be effective September 22, 1997.

The Notice is filed under 49 C.F.R. § 1180.2(d)(7). Petition to revoke the exemption under 49 U.S.C. § 10505(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction.

Dated:
By the Board,

Vernon A. Williams
Secretary