Points Referred to in Section 4(b)

Brownsville TX
Port of Brownsville TX
Port of Corpus Christi
Harlingen TX
Corpus Christi TX
Sinton TX
San Antonio TX
Elmendorf TX
Halstead TX (LCRA plant)
Waco TX
Points on Sierra Blanca-El Paso line

Points Referred to in Section 5(b)

Baytown TX
Amelia TX
Orange TX
Mont Belvieu TX (Amoco, Exxon, Chevron plants)
Eldon, TX (Bayer plant)
Harbor, LA

Points Referred to in Section 6(d)

Camden AR
Pine Buff AR
Fair Oaks AR
Baldwin AR
Little Rock AR
North Little Rock AR
East Little Rock AR
Forrest City, AR
Paragould AR
Dexter MO

EXHIBIT B

TERM SHEET FOR UP/SP-BNSF PROPORTIONAL RATE AGREEMENT COVERING I-5 CORRIDOR

Concept

BNSF trackage rights in the "I-5" corridor will allow BNSF to handle traffic on a single line basis that currently moves via joint BN-SP routes. This Agreement will enable UPSP to compete with BNSF for that traffic and to make rates, using the proportional rates, to and from all points UP/SP serves in the covered territory described below.

Covered Territory

Traffic moving between the following areas north of Portland, Oregon and west of Billings and Havre, Montana:

- Canadian interchanges in Vancouver area
- Points north of Seattle and west of Cascades
- Points south of and including Seattle and west of Cascades
- Washington points east of Cascades and west of and including Spokane
- Points east of Spokane and west of Billings and Havre

and points in

- Arizona,
- California,
- Colorado,
- New Mexico,
- Nevada,
- Oregon,
- Utah,
- Texas west of Monahans and Sanderson, and
- connections to Mexico at El Paso and to the west.

Traffic Covered

Traffic covered will be all commodities (carload, intermodal and bulk) moving both southbound and northbound. All cars loaded or made empty on BNSF lines in the Covered Territory (including reloads) and cars received in interchange.

Proportional Rates

A third party, such as a major accounting firm or other established transportation consultant (the "consultant"), will be employed to compute the proportional rates. The mileage prorate shall be the ratio of (a) BNSF miles between areas north of Portland or interchange north of Portland and SP interchange at Portland to (b) BNSF single-line miles from BNSF origin or interchange to BNSF destination or interchange.

The consultant will develop a table of net ton mile rates (net of refunds, allowances, and rebates). This table will be in matrix form based on commodity, car type, and area north of Portland, Oregon. The rates shown in the matrix will be by commodity at the 3-digit STCC level and by car type for movement between each of the areas north of Portland, Oregon, and the Portland interchange. The net ton mile rates will be based on movements between each of the areas north of Portland and the group of states (including connections to Mexico) listed above. The initial rates will be derived based on the BN-SP portion of BN-SP interline rates (net of refunds, allowances, and rebates) in effect in the quarter preceding acquisition of SP by UP.

The net ton mile rate for each commodity/car type shall be a weighted average of the rates applicable to movements of each such commodity/car type between the points listed above. An example of this computation is attached.

New rates will be derived each subsequent quarter. In subsequent quarters, the rates will include a prorate of both SP-BNSF interline rates (net of refunds, allowances, and rebates) and BNSF single-line rates (net of refunds, allowances, and rebates). At such time as a rate can be developed for a particular commodity/car type on the basis of a BNSF single-line rate then future rate adjustments for such commodity/car type shall be based solely on BNSF single-line rates. All computations of net ton mile rates will be based on rates that actually moved traffic.

UP/SP agree that any rate it publishes will reflect the proportional rate from the latest quarterly study and BNSF's division shall be that amount. Movements using proportional rates shall be interline BNSF-UP/SP movements and will be billed accordingly. Proportional rates used by UP/SP in contracts will be escalated on the same basis as UP/SP's rates are escalated. BNSF and UP/SP will establish procedures to ensure that in settling interline accounts UP/SP's and BNSF's revenue south of Portland is not disclosed to the other.

Application

The net ton mile rates in each cell of the matrix will be applied to the BN mileage and the associated net tons from areas north of Portland to Portland interchange to develop the proportional rate to the Portland interchange.

Service

BNSF shall accept, handle, switch and deliver traffic moving under this Agreement without any discrimination in promptness, quality of service, or efficiency in favor of comparable traffic moving in BNSF's account. UP/SP has the right to provide equipment. BNSF will work with UP/SP to establish and provide trackage for strategically located car distribution points in BN territory. To the extent justified by business volumes, BNSF will continue operating Vancouver, BC-Portland (SP interchange) trains comparable to BN Nos. 111 and 112. BNSF will cooperate with UP/SP to establish necessary blocks to provide efficient and competitive service on traffic moving under the proportional rate.

Third Party Consultant

The third party consultant shall be jointly employed by UP/SP and BNSF. The parties will share equally in the expense of employing such third party consultant. Both UP/SP and BNSF shall have the right to audit the work of the third party consultant and agree to share in any irregularities found in this work and cooperate to work with the third party consultant to establish procedures to promptly correct those deficiencies. The third party consultant shall be required to remain impartial between UP/SP and BNSF. Any breach of the impartiality requirement shall result in the termination of such third party consultant and the selection of a new consultant by the parties.

Example of Revenue Per Ton Mile
Calculation by Origin-Destination Cell
Cell Includes Car Type and Commodity

	Assumption:	Move 1	Move 2
1.	BNSF Revenue Per Car From O/D Areas North of Portland to Destination States	$5000	$2000
2.	BNSF Miles From O/D Areas North of Portland to Destination States	1000	500
3.	BNSF Net Tons From O/D Areas North of Portland to Destination States	100	50
4.	BNSF Number of Carloads From O/D Areas North of Portland to Destination States	10	5
5.	BNSF Miles Between Actual Point of Origin to Interchange and Portland	300	200

A. Revenue/NTM Factor (Computed by Consultant for Each Call in Matrix)

$$\frac{\sum(1) \times (4)}{\frac{(2) \times (3)}{\sum(4)}} \quad \text{(for all moves)}$$

$$\frac{\frac{5000 \times 10}{1000 \times 100} + \frac{2000 \times 5}{500 \times 50}}{10 + 5} = \$0.06/\text{NTM}$$

B. Compute BNSF Division on a Specific Move

(A) x (5) x (3)
$0.06 x 300 x 100 = $1800
$0.06 x 200 x 50 = $ 600

EXHIBIT C

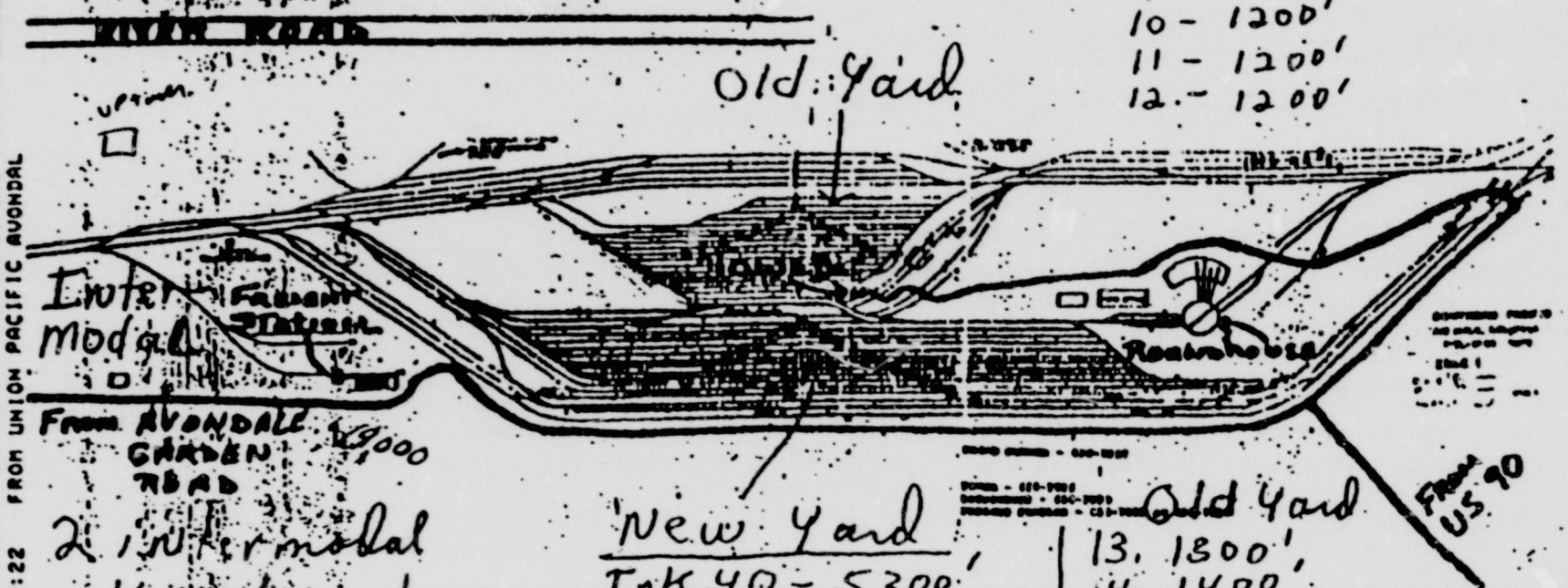
6660-3582
342-2280

S.P. Avondale Yard

needs Rehab

Old Yard Capacity

4- 7900' (Thru X-overs)
5- 7800' (" ")
6- 1900'
7- 2500'
8- 2100'
9- 1100'
10- 1200'
11- 1200'
12.- 1200'



2 Intermodal 16-40' each

New Yard

Trk. 40- 5300'
37-39- 4000'
30-36- 2000'
29 - 1500'
28 - 1200'
27 - 1150'
26 - 1100'
25 - 900'

Old Yard

13. 1800'
14. 1400'
15. 1800'
16. 1700'
17. 1600'
18. 1500'
19. 1400'
20 1300'
21 1200'
22 1100'
23.) 1000'
24.) 900'

Not to scale
All rights reserved

EXHIBIT C

EXHIBIT D

April 24, 1996

BNSF - UP/SP DISPATCHING PROTOCOLS

As agreed: Dave Clifton - BNSF
Hank Jay - SP
Steve Barkley - UP

1. **Scope**: These protocols apply on all rail line segments where Burlington Northern Railroad Company or The Atchison, Topeka & Santa Fe Railway Company (which will be referred to jointly or individually as "BNSF") has trackage rights over tracks of the entity or entities resulting from the merger of the rail affiliates of Union Pacific Corporation and Southern Pacific Rail Corporation (which will be referred to jointly or individually as "UP/SP") and on all rail line segments where UP/SP has trackage rights over tracks of BNSF. All such rail lines will be referred to as "joint trackage and will include all current joint line trackage rights."

2. **Purpose**: To ensure that BNSF and UP/SP trains operating on joint trackage are given equal dispatch without any discrimination in promptness, quality of service or efficiency and that the competitiveness of tenant operations on joint trackage is not adversely affected by the fact that the other railroad owns the track.

3. **General Instructions**: BNSF and UP/SP will issue written instructions to all personnel (including supervisors) responsible for train dispatching on joint trackage that trains of the tenant are to be dispatched exactly as if they were trains of the same class of the owner and given equal treatment with trains of the owner. These instructions will be issued at agreed intervals or at the request of either party.

4. **Monitoring Systems**: At the request and expense of the tenant, the owner will make available computer terminals, facilities or capabilities comparable to those available to its own dispatchers showing joint trackage it dispatches so that the tenant can monitor the handling of its trains by the owner.

5. **Train Information**: The tenant will provide to the owner, and regularly update, information about its expected train operations and schedules (including priorities, time commitments, horsepower per trailing ton, etc.) over joint trackage, preferably using electronic data interchange. Parties will establish run time standards by train category based on expected train volumes for each line segment. If train volumes are different than expected then adjustments to run time standards will be made by mutual agreement. The tenant will provide reliable and current information about trains approaching joint trackage, including train arrival time and train characteristics, preferably by providing at its expense computer terminals, facilities or capabilities showing trains approaching joint trackage, sufficiently in advance to allow dispatchers to plan for them. The owner will provide to the tenant advance notice of planned maintenance-of-way projects, line closures and train or equipment restrictions. BNSF and UP/SP will cooperate to develop a process for discussing maintenance windows in advance and agree upon so as not to adversely affect schedules of one carrier more than the other.

6. **Specific Instructions:** The owner will permit the tenant to transmit instructions regarding the requirements of specific trains and shipments to designated dispatching center employees responsible for handling those trains.

7. **Train Priorities/Run Time Standards:** BNSF and UP/SP will at all times provide to each other current procedures for assigning dispatching priorities or rankings to their trains and information sufficient to show how those procedures are applied to their own trains. The tenant will assign priorities or rankings to its trains operating on joint trackage using the owner's procedures, and the owner will dispatch tenant trains in accordance with those priorities or rankings. It is understood that technological advances in computer aided dispatching might result in changes to priority assignment methodologies. The parties agree to discuss technological changes which might affect priority assignment methodologies prior to implementation. The Joint Service Committee will be responsible for reviewing these assignments to ensure that they are applied equitably by both railroads. It is agreed that a three member panel from each carrier will make up the Joint Service Committee. Suggestions for three member panel are representatives from Joint Facilities, VP Transportation, and Joint Trackage Rights Operations.

8. **Entry to Joint Trackage:** At points where tenant trains enter joint trackage, entry will be provided by the owner on a first-come, first-served basis, taking into consideration the relative priorities of affected trains and the specific needs and operating characteristics of individual trains of both railroads. [If operating circumstances make strict application of this principle difficult or uncertain, BNSF and UP/SP may jointly establish standards for determining sequence of entry to joint trackage.] Parties will communicate daily on any conflicts concerning entry to joint trackage to gain resolution.

9. **Communications:** BNSF and UP/SP will provide to each other, and keep current, lists of dispatching personnel responsible for dispatching each segment of joint trackage and contact numbers. For each segment, BNSF and UP/SP will designate supervisory employees to serve as the day-to-day contacts for communications about operating changes, service requests and concerns. Where feasible and economical, dedicated phone lines or computer links will be established for these communications.

10. **Access to Dispatching Centers:** Appropriate officials of either railroad will be admitted at any time to dispatching facilities and personnel responsible for dispatching joint trackage to review the handling of trains on joint trackage and will be provided an office in the other railroad's dispatching center (although both railroads will take reasonable steps to prevent disclosure of proprietary information not relevant to that review). In order to support BNSF operations over UP/SP trackage rights granted in connection with the UP/SP merger, UP/SP will pay BNSF an amount equal to the reasonable and conventional salary of one supervisory employee to be placed by BNSF at UP/SP's Harriman dispatching center. It is understood that management and supervision of dispatching operations is the responsibility of the owning carrier.

11. **Performance Measurement**: BNSF and UP/SP will cooperate to develop train performance evaluation methods under which train performance of tenant trains on joint trackage segments can be compared to train performance of the owner's trains on the same segments for the same train category and priority.

12. **Personnel Incentives and Evaluation**: In evaluating the performance of employees and supervisors responsible for dispatching joint trackage, both BNSF and UP/SP will consider train performance of tenant trains and effectiveness in cooperating with tenant personnel and meeting tenant service requirements in the same manner as such factors are considered with respect to the owner's trains, personnel and requirements. If bonuses, raises or salaries of those persons are affected by performance of the owner's trains, performance of the tenant's trains shall be considered on the same basis to the extent feasible.

13. **Disagreements**: The designated contact supervisors are expected to raise questions, disagreements, concerns or disputes about compliance with these protocols promptly as and when any such matters arise and to use their best efforts to resolve them. If a matter is not resolved to the satisfaction of both parties, it will be presented to the Joint Service Committee. If a satisfactory resolution cannot be achieved by the Joint Service Committee, the matter will be submitted to binding summary arbitration before a neutral experienced railroad operating official within fourteen days. The parties will agree in advance on the sanctions available to the arbitrator to address failures to comply with these protocols.

14. **Modifications**: As the ultimate objective of these protocols is the equal, flexible and efficient handling of all trains of both railroads on joint trackage, these protocols may be modified at any time by mutual agreement, consistent with that objective.

EXHIBIT E

2-To-1 Point Identification Protocol

As a condition of the Surface Transportation Board's (STB) approval of the consolidation of Union Pacific Railroad Company (UP) and Southern Pacific Transportation Company (SP), The Burlington Northern and Santa Fe Railway Company (BNSF) was granted the right to serve all shipper facilities, that as of September 25, 1995, were open to both UP and SP, and no other railroad, whether via direct service, reciprocal switching, joint facility or other arrangements. Since the consolidation was consummated, BNSF and UP have been working to identify a complete list of 2-to-1 shipper facilities to which BNSF is entitled to access. The purpose of this protocol is to establish procedures and mechanisms for further identifying 2-to-1 shipper facilities open to BNSF as a result of the conditions imposed in the UP/SP merger. Those procedures and mechanisms are as follows:

1. BNSF shall submit to UP, by written or electronic communication, the name and address of any facility to which access is sought. In addition to the name and address of the facility, BNSF shall furnish any additional information relating to the facility's identity and location that is in BNSF's possession when the request for access is made. BNSF shall also provide any information in its possession at such time pertaining to the rail service options that were available to the facility on or before September 25, 1995. UP will handle for BNSF any traffic en route to the facility pending UP's determination of BNSF's right to access the facility in question. If UP determines that BNSF is not entitled to access a particular facility, BNSF will terminate any BNSF direct routing of traffic to that facility. UP shall be compensated for any traffic en route in accordance with the method of compensation set forth in Paragraph 7, below.

2. UP shall have five (5) business days from the date of such communication to respond by written or electronic communication to any request for access, provided that, if BNSF shall request a determination on more than five shipper facilities on a single day or, if a single request pertains to more than five (5) shipper facilities, BNSF shall identify the five (5) shipper facilities that need immediate attention, and the five (5) business day requirement shall apply to those shipper facilities, with the remaining shipper facilities request or requests to be responded to within ten (10) business days after the date of the request(s).

3. If UP fails to respond to an access request by the close of business of the fifth business day or, in the case of requests for which UP has ten business days to respond, by the close of the tenth business day, BNSF shall be deemed to have access to such facility or facilities as set forth in Paragraph 4 below, and UP shall be deemed to have waived any claims that BNSF is not entitled to serve the facility or facilities.

4. If UP approves BNSF's request for access, BNSF shall immediately be authorized to serve the facility either directly, through reciprocal switching, or, with UP's prior approval, a third party contractor, as provided for in the UP/BNSF Settlement Agreement dated September 25, 1995, as amended. No less than five (5) business days prior to the date that BNSF proposes to begin service to a facility, BNSF shall elect the mode of service that it intends to utilize and shall notify UP in writing or electronically of its election. BNSF shall have the right, upon 180 days prior written notice to UP, to change its election; provided, however, that BNSF shall (i) not change its election more often than once every five years, and (ii) shall reimburse UP for any costs incurred by UP in connection with such changed election. UP may not reverse a prior decision approving

BNSF's request for access to a facility without either BNSF's consent or approval by the STB.

5. If UP declines to approve a BNSF request for access to any facility, and BNSF believes that UP has an insufficient or inappropriate reason to decline access, BNSF may so notify UP, either in writing or by electronic communication, of the reasons why BNSF believes it is entitled to such access, and upon such notice, may seek an order from the STB finding that BNSF was entitled to access to that facility.

6. UP shall approve all such requests where, on the basis of all available information, UP concludes that a particular facility was open to service by both UP and SP, either directly or through reciprocal switching, joint facility or other arrangements and by no other rail carrier, as of September 25, 1995. If UP declines to approve a BNSF request for access to any facility, UP shall provide as part of its notification to BNSF a statement in writing or by electronic communication of its reasons and of the specific evidence supporting its determination that BNSF should not have access to the facility. A statement that UP lacks sufficient information to make a determination as to whether a facility is a 2-to-1 facility is not an adequate reason to deny a BNSF request for access to a facility. At any time after UP's notification, BNSF may request UP to reconsider its decision declining to approve BNSF's request for access.

7. If BNSF transports traffic to or from a shipper facility pursuant to paragraph 1 above and it is later determined that BNSF is not entitled to access to that facility, BNSF shall compensate UP for the movement of such traffic as follows: If a joint through rate is available, then UP is entitled to $3 per car mile for the loaded move from the applicable junction in the price document. If multiple junctions are available, BNSF

receives its longest haul and UP receives $3 per car mile beyond that junction. If no joint through rate exists, BNSF receives its longest haul via junctions in existence between UP and BNSF, prior to the date of UP control over SP, September 11, 1996, and UP receives $3 per car mile beyond. UP must file a claim with BNSF to recover revenues under this section making reference on the claim to this section of the joint 2-to-1 Point Identification Protocol.

8. BNSF and UP shall identify an individual or individuals within their respective organizations as the person or persons to whom all communications pursuant to this protocol shall be directed.

9. The parties agree to submit any disputes under this protocol to the STB for resolution or, with the consent of both parties, to arbitration, as described in the UP/BNSF Settlement Agreement dated September 25, 1995, as amended.

AGREED TO AND ACCEPTED BY:

UNION PACIFIC RAILROAD COMPANY

John H. Ransom

Date: June 24, 1998

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Peter J. Rickershauser

Date: June 26, 1998

EXHIBIT F

EXHIBIT F

LIST OF OVERHEAD TRACKAGE RIGHTS

1. Western Trackage Rights

   A. UP/SP shall grant BNSF Overhead Trackage Rights on SP's Valley Subdivision between MP 141.9 near Binney Junction, CA and Roseville, CA in the vicinity of SP's Valley Subdivision MP 106.6.

2. South Texas Trackage Rights

   A. UP/SP shall grant BNSF Overhead Trackage Rights on the following lines:

      a) SP's Port Lavaca Branch, between Placedo, TX in the vicinity of MP 14.2, and a point of build-in along said branch in the vicinity of MP 6.93 at Kamey, TX; and

      b) UP's line between Round Rock, TX, in the vicinity of UP's Austin Subdivision Milepost 161.79, and McNeil, TX, in the vicinity of UP's Austin Subdivision Milepost 166.1.

3. Eastern Texas – Louisiana Trackage Rights

   A. UP/SP shall grant BNSF Overhead Trackage Rights on UP's Beaumont Subdivision between MP 458.69 in the vicinity of Beaumont, TX and MP 377.98 (Gulf Coast Junction) in the vicinity of Houston, TX.

4. Additional Rights

   A. UP/SP shall grant BNSF Overhead Trackage Rights on SP's Martinez Subdivision between approximately MP 2 in the vicinity of Oakland, CA and approximately MP 13 in the vicinity of Richmond, CA.

5. Rights to Omnibus Points

   A. UP/SP shall grant BNSF Overhead Trackage Rights over UP/SP's Jefferson City Subdivision between MP 34.8 near Pacific, MO and MP 43.8 near Labadie, MO.

RED-LINED VERSION OF THE JULY 25, 2001 PROPOSED RESTATED AND AMENDED BNSF SETTLEMENT AGREEMENT

[03/01/02]

RESTATED AND AMENDED AGREEMENT

This Restated and Amended Agreement ("Agreement") is entered into this ~~{_____}~~[___] day of ~~{July, 2001}~~ **[March, 2002]**, between UNION PACIFIC RAILROAD COMPANY ("UP"), a Delaware corporation, and THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY ("BNSF"), a Delaware corporation.

WITNESSETH:

WHEREAS, UP and BNSF entered into an agreement dated September 25, 1995, as amended by supplemental agreements dated November 18, 1995, and June 27, 1996 (collectively, the "1995 Agreement"), in connection with UP's acquisition of Southern Pacific Rail Corporation and its affiliates ("SP") in Finance Docket No. 32760, Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company -- Control and Merger -- Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company;

WHEREAS, the Surface Transportation Board ("STB") approved the common control and merger of UP and SP in Decision No. 44 in Finance Docket No. 32760 (served August 12, 1996) and in so doing imposed certain conditions on UP and SP, including, as modified by the STB, the April 18, 1996 settlement agreement among UP, BNSF and the Chemical Manufacturers Association (the "CMA Agreement");

WHEREAS, as a part of its oversight of the UP/SP merger in Finance Docket Nos. 32760, 32760 (Sub-No. 21), and 32760 (Sub-No. 26), the STB has modified and clarified certain of the conditions it imposed in Decision No. 44;

WHEREAS, UP and BNSF entered into a Term Sheet Agreement dated February 12, 1998 (the "Term Sheet Agreement"), pursuant to which UP and BNSF agreed to the joint ownership of the line of railroad between Dawes, TX and Avondale, LA, which joint ownership was effected by separate agreement dated September 1, 2000 (the "TX-LA Line Sale Agreement");

WHEREAS, UP and BNSF have reached agreement with respect to the implementation of the conditions imposed by the STB on the UP/SP merger, as modified and clarified, and certain other matters relating to their rights and obligations under the 1995 Agreement, the CMA Agreement, the Term Sheet Agreement and the TX-LA Line Sale Agreement; and

WHEREAS, UP and BNSF now wish to amend and restate the 1995 Agreement to incorporate the conditions imposed by the STB on the UP/SP merger (including the CMA Agreement, as modified by the STB) and the agreements they have reached relating to those conditions and other related matters.

NOW, THEREFORE, the parties agree to amend and restate the 1995 Agreement as follows:

DEFINITIONS

For purposes of this Agreement, the following definitions and terms shall apply:

Shipper Facilities shall mean all existing or new shipper or receiver facilities, including transload facilities as well as rail car storage and car service and repair facilities not owned, leased or operated by UP.

~~[BNSF and UP do not agree on the definition of "2-to-1" Points.~~

~~BNSF Alternative:~~

~~"2-to-1" Points shall mean all geographic locations that were commonly served by both UP and SP, whether via direct service or via reciprocal switching, joint facility or other~~

~~arrangements, and no other railroad when the 1995 Agreement was executed, regardless of how long before such date shippers or receivers at a geographic location may have shipped or received any traffic via UP or SP, or whether any shippers or receivers at a geographic location were open to or served by both UP and SP prior to September 25, 1995. Such points include, without limitation, the points listed in Section 8(i) of and on Exhibit A to this Agreement. Six-digit Standard Point Location Codes ("SPLCs"), in effect on September 25, 1995, shall be used to identify geographic locations that qualify as "2-to-1" Points, and such locations shall be deemed to include all areas within the switching limits of the locations as described in Section 9(g) of this Agreement.~~

~~UP Alternative:]~~

"2-to-1" Points shall mean all geographic locations at which at least one "2-to-1" Shipper Facility is located. Such points include, without limitation, the points listed in Section 8(i) of and on Exhibit A to this Agreement. The boundaries for such "2-to-1" Points shall be deemed to include all areas within the switching limits of the locations as described in Section 9(g) of this Agreement.

"2-to-1" Shipper Facilities shall mean all Shipper Facilities that were open to both UP and SP, whether via direct service or via reciprocal switching, joint facility or other arrangements, and no other railroad when the 1995 Agreement was executed, regardless of how long ago the shipper or receiver at that facility may have shipped or received, or whether the shipper or receiver at that facility ever shipped or received, any traffic via either UP or SP. The "2-to-1 Point Identification Protocol" between the parties attached hereto as Exhibit E shall govern the process for identifying "2-to-1" Shipper Facilities open to BNSF as a result of the conditions imposed on the UP/SP merger.

New Shipper Facilities shall mean: (i) existing Shipper Facilities constructing trackage for accessing rail service for the first time; and (ii) newly constructed rail-served Shipper Facilities. ~~{, including New Transload Facilities}~~ New Shipper Facilities shall also mean previously-served Shipper Facilities that begin to ship by rail again where (i) there has been a change of owner or lessee, and (ii) the use of the facility is actually different in nature and purpose from the facility's prior use (e.g., there has been a change in the type of products shipped from or received at the facility). New Shipper Facilities shall not include expansion of or additions to an existing rail-served Shipper Facility, but do include (1) Shipper Facilities which, on September 25, 1995, were being developed or for which land had been acquired for that purpose in contemplation of receiving rail service by both UP and SP, and (2) ~~{New}~~ Transload Facilities located after September 11, 1996, including those owned or operated by BNSF.

Trackage Rights Lines shall mean the lines over which BNSF has been granted trackage rights pursuant to this Agreement, but shall not include any other lines over which UP/SP grants BNSF trackage rights ("Overhead Trackage Rights") solely (i) to facilitate the parties' operation over Trackage Rights Lines, (ii) to permit BNSF's operation between a mutually-agreed upon BNSF junction point and points listed or described in Section 8(i) of this Agreement, or (iii) to permit BNSF's operation between a mutually-agreed upon BNSF junction point and a build-in/build-out line pursuant to Sections 4(a), 6(c) and 8(l) of this Agreement. The mutually-agreed upon junction point will be selected with the objective of minimizing the operating inconvenience to UP, consistent with ensuring that BNSF can provide competitive service. BNSF acknowledges that it shall not have the right to serve any existing or New Shipper Facility on a line over which BNSF has been granted Overhead Trackage Rights unless such right is specified in this Agreement or in any agreement implementing the Overhead Trackage Rights or

unless BNSF has the right to serve a build-in/build-out line on such Overhead Trackage Rights line pursuant to the CMA Agreement or the conditions imposed on the UP/SP merger. All Overhead Trackage Rights Lines, as of the date of the execution hereof, are listed in Exhibit F to this Agreement, which exhibit may be amended and replaced from time to time by a new exhibit signed and dated by the parties. New Shipper Facilities shall be deemed to be "on" a Trackage Rights Line if the facility is either (1) adjacent to a Trackage Rights Line or (2) adjacent to a spur, an industrial track, or a yard that is itself served by such Trackage Rights Line. New Shipper Facilities are not "on" a Trackage Rights Line if they can be accessed only via a 49 U.S.C. 10901 "line of railroad" which is not a Trackage Rights Line.

~~{BNSF and UP do not agree on whether a definition of Existing Transload Facilities is necessary. BNSF believes that such definition is necessary while UP believes otherwise.~~

~~BNSF Alternative:~~

~~Existing}~~

Transload Facilities shall mean ~~{(a)~~ Shipper ~~{Facility,}~~ **[Facilities]** other than automotive or intermodal facilities or team tracks **[where freight is transferred from one railcar to another or from one mode to another (short term incidental storage may also occur) as defined by the STB in its decisions in Finance Docket No. 32760. An "Existing Transload Facility" is a Transload Facility which was]** in existence on September 25, 1995.~~{(i) that provides services to a single shipper/receiver or to the general shipping public on a for-hire basis to ship or receive freight, including, but not limited to, facilities of commonly recognized transload service providers, (ii) where freight is transferred from one railcar to another or from one mode to another (short term incidental storage may also occur), (iii) leased, owned or continuously operated by the same transload operator for at least twelve (12) months, (iv) on~~

which improvements have been constructed that permit its use as a transload operation, and (v) which incurs operating costs above and beyond the costs that would be incurred in providing direct rail service.

BNSF and UP do not agree on the definition of New Transload Facilities.

BNSF Alternative:

New Transload Facilities shall mean a Shipper Facility other than automotive or intermodal facilities or team tracks (i) that provides services to a single shipper/receiver, or to the general shipping public on a for-hire basis, to ship or receive freight, including, but not limited to, facilities of commonly recognized transload service providers, (ii) where freight is transferred from one railcar to another or from one mode to another (short term incidental storage may also occur), (iii) that requires the construction of improvements to provide transloading services, and (iv) which incurs operating costs above and beyond the costs that would be incurred in providing direct rail service. By way of example, BNSF would not be able to construct a truck transload facility adjacent to an exclusively served coal mine and then truck the coal a short distance (e.g., 100 feet) from the mine to the facility.

UP Alternative:

New Transload Facilities shall mean a Shipper Facility, other than automotive or intermodal facilities or team tracks (i) that requires the construction of improvements to provide transloading services, including, but not limited to, facilities of commonly recognized transload service providers, (ii) where freight is transferred from one railcar to another or from one mode to another (short term incidental storage may also occur), (iii) the operator of which has no ownership of the product being transloaded, and (iv) which incurs operating costs above and beyond the costs that would be incurred in providing direct rail service. By way of example,

~~BNSF would not be able to construct a truck transload facility adjacent to an exclusively served coal mine and then truck the coal a short distance (e.g., 100 feet) from the mine to the facility)~~

1. **Western Trackage Rights**

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

- SP's line between Denver, CO and Salt Lake City, UT;
- UP's line between Salt Lake City and Ogden, UT;
- SP's line between Ogden and Little Mountain, UT;
- UP's line between Salt Lake City and Alazon, NV;
- UP's and SP's lines between Alazon and Weso, NV;
- SP's line between Weso, and Oakland, CA via SP's line between Sacramento, CA and Oakland referred to as the "Cal-P" (subject to traffic restrictions as set forth in Section 1(g));
- Overhead Trackage Rights on SP's line between Binney Junction, CA and Roseville, CA in the vicinity of SP MP 106.6;

~~{BNSF and UP do not agree as to whether BNSF's trackage rights over SP's line between Elvas (Elvas Interlocking) and Stockton, CA should be Overhead Trackage Rights.~~

~~BNSF Alternative:}~~

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

~~{UP Alternative:~~

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

- UP's line between Weso and Stockton, CA; and
- SP's line between Oakland and San Jose, CA.

(b) The trackage rights granted under this section shall be bridge rights for the movement of overhead traffic only, except for the local access specified herein. BNSF shall receive access on such lines only to (i) "2-to-1" Shipper Facilities and Existing Transload Facilities at points listed on Exhibit A to this Agreement, (ii) any New Shipper Facilities located subsequent to UP's acquisition of control of SP at points listed on Exhibit A to this Agreement, and (iii) any New Shipper Facilities located subsequent to UP's acquisition of control of SP on the Trackage Rights Lines. ~~{; [UP Alternative if BNSF's trackage rights between Elvas (Elvas Interlocking) and Stockton, CA are Overhead Trackage Rights: PROVIDED, HOWEVER, that BNSF shall have the right to serve Willamette Industries at Lik Grove, CA and Southdown Cement at Polk, CA]~~ ~~{]}~~ BNSF shall also have the right to establish and exclusively serve intermodal and auto facilities at points listed on Exhibit A to this Agreement and at points identified or described in Section 8(i) of this Agreement. BNSF shall also receive the right to interchange with: the BHP Nevada Railroad Company at Shafter, NV; the Utah Railway Company at Utah Railway Junction, UT; Grand Junction, CO; and Provo, UT; the Utah Central Railway Company at Ogden; the Salt Lake, Garfield and Western at Salt Lake City; and the Salt Lake City Southern Railroad Company at Salt Lake City. BNSF shall also receive the right to

utilize in common with UP/SP, for normal and customary charges, SP's soda ash Transload Facilities in Ogden and Salt Lake City. BNSF shall also have the right to access any shipper-owned soda ash Transload Facilities in Ogden and Salt Lake City and to establish its own soda ash ~~{New}~~ Transload Facilities along the Trackage Rights Lines. BNSF shall have the same access as UP to all "2-to-1" Shipper Facilities and "2-to-1" Points between Salt Lake City, UT, and SP MP 755.1 north of Woods Cross, UT.

(c) Access to Shipper Facilities at points listed on Exhibit A to this Agreement open to BNSF shall be direct or through reciprocal switch, or, with UP/SP's prior agreement, through a third party contractor. Access to New Shipper Facilities open to BNSF on the Trackage Rights Lines shall be (i) direct; (ii) with UP/SP's prior agreement, through haulage for the shortest period of time necessary to allow BNSF to establish its own direct operating access after initiating service to a New Shipper Facility, but not to exceed the later to occur of 90 days or the date upon which UP completes the construction of and accepts for service any connections, sidings or other support facilities to be paid for by BNSF that UP is then obligated to construct pursuant to this Agreement or the trackage rights agreements executed pursuant to Section 9(f) of this Agreement; (iii) with UP/SP's prior agreement, reciprocal switching where, at the time BNSF service is to commence, UP/SP already provides reciprocal switching on the portion of the Trackage Rights Line upon which the turnout to the facility is to be located; or (iv) with UP/SP's prior agreement, the use of a third party contractor; PROVIDED, HOWEVER, that it shall be UP/SP's sole decision whether BNSF's service will be provided by either haulage or reciprocal switching; and PROVIDED, FURTHER, that in no case shall UP/SP be required to initiate any new local service or increase its level of service to accommodate the level of service proposed by BNSF. New Shipper Facilities open to BNSF under this Agreement shall be open to both UP/SP

and BNSF, subject to the terms of Section 9(c)(v) of this Agreement. The geographic limits within which (x) New Shipper Facilities shall be open to BNSF service at points listed on Exhibit A to this Agreement and (y) BNSF shall have the right to establish and exclusively serve intermodal and auto facilities at points listed in Section 8(i) of and on Exhibit A to this Agreement shall generally correspond to the territory within which, prior to the merger of UP and SP, a new shipper or receiver 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, such districts (as described in Section 9(g)) shall be presumed to establish these geographic limitations.

(d) At least forty-five (45) days before initiating service to (i) a Shipper Facility open to BNSF at a point listed or described on Exhibit A to or in Section 8(i) of this Agreement, or (ii) any New Shipper Facility on a Trackage Rights Line, BNSF shall notify UP of its election, subject to Section 1(c) above, of the manner by which it proposes such service be provided and the specifics of its operating plan over UP/SP trackage. Within thirty (30) days of its receipt of BNSF's proposed operating plan, UP shall notify BNSF of its approval or disapproval of BNSF's plan. UP's approval of such plan shall not be unreasonably withheld. In the event UP disapproves of BNSF's proposed plan, UP shall provide an explanation in writing to BNSF of its reasons for disapproval, and UP shall propose an alternative operating plan that would be acceptable to UP and also be no more onerous than the operating plan that UP would establish for service provided by UP. If UP approves BNSF's plan but establishes conditions on that approval, those conditions shall be set forth in writing and shall be no more onerous than UP would establish for service provided by UP. BNSF shall have the right, upon one hundred eighty (180) days' prior written notice to UP/SP, to change its election; PROVIDED, HOWEVER, that

BNSF shall not change any such election more often than once every five (5) years. BNSF shall reimburse UP/SP for any costs incurred by UP/SP in connection with any changed election.

(e) For Reno area intermodal traffic, BNSF may use SP's intermodal ramp at Sparks, NV with UP/SP providing intermodal terminal services to BNSF for normal and customary charges. If expansion of SP's Sparks intermodal facility is required to accommodate the combined needs of UP/SP and BNSF, then the parties shall share in the cost of such expansion on a pro rata basis allocated on the basis of the relative number of lifts for each party in the 12-month period preceding the date construction begins. If for any reason UP/SP vacates its Sparks intermodal facility, BNSF (i) may vacate the facility and independently establish one of its own, or (ii) shall be permitted by UP/SP to continue to occupy the Sparks facility upon entry into an agreement with UP/SP containing normal and customary terms and conditions (including, without limitation, rental) for the use of similar facilities. If UP elects to offer the Sparks intermodal ramp property for sale to a third party and/or receives an offer UP is willing to accept, UP will offer to sell the property to BNSF on the same terms and conditions as are applicable to the third party. BNSF shall have thirty (30) days in which to advise UP whether or not it will buy the property on those terms. In the event BNSF declines to buy the property on those terms or fails to advise UP of its intentions within thirty (30) days, BNSF's right of first refusal will be extinguished, and UP may sell the property to the third party. BNSF will then be required to vacate the property within six (6) months, and UP's obligation to furnish BNSF with intermodal terminal services and access to a UP intermodal facility in the Sparks/Reno area will be extinguished.

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

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

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

cost associated with providing employees such as lodging or crew transportation expense. BNSF must also give UP/SP reasonable advance notice of its need for employees in order to allow UP/SP time to have adequate trained crews available. All UP/SP employees engaged in or connected with the operation of BNSF's trains shall, solely for purposes of standard joint facility liability, be deemed to be "sole employees" of BNSF. If UP/SP adds to its labor force to comply with a request or requests from BNSF to provide employees, then BNSF shall be responsible for any labor protection, guarantees or reserve board payments for such incremental employees resulting from any change in BNSF operations or traffic levels.

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

(j) If BNSF desires to operate domestic high cube double stacks over Donner Pass, then BNSF shall be responsible to pay for the cost of achieving required clearances. UP/SP shall pay BNSF one-half of the original cost of any such work funded by BNSF (including per annum interest thereon calculated in accordance with section 9(c)(v) of this Agreement) if UP/SP subsequently decides to begin moving domestic high cube double stacks over this route. If UP/SP initiates and funds the clearance program, then BNSF shall pay one half of the original cost (including per annum interest thereon calculated in accordance with section 9(c)(v) of this Agreement) at such time as BNSF begins to use the line for domestic high cube double stacks.

(k) BNSF agrees to waive its right under Section 9 of the Agreement dated April 13, 1995, and agreements implementing that agreement to renegotiate certain compensation terms of such agreement in the event of a merger, consolidation or common control of SP by UP. BNSF

also agrees to waive any restrictions on assignment in the 1990 BN-SP agreement covering trackage rights between Kansas City and Chicago.

2. **I-5 Corridor**

(a) UP/SP shall sell to BNSF UP's line between Bieber and Keddie, CA. UP/SP shall retain the right to use the portion of this line between MP 0 and MP 2 for the purpose of turning equipment. UP/SP shall pay BNSF a normal and customary trackage rights charge for this right.

(b) BNSF shall grant UP/SP overhead trackage rights on BN's line between Chemult and Bend, OR for rail traffic of all kinds, carload and intermodal, for all commodities.

(c) The parties will, under the procedures established in Section 9(f) of this Agreement, establish a proportional rate agreement incorporating the terms of the "Term Sheet for UP/SP-BNSF Proportional Rate Agreement Covering I-5 Corridor" attached hereto as Exhibit B.

3. **Southern California Access**

(a) UP/SP shall grant access to BNSF to serve all "2-to-1" Shipper Facilities in Southern California at the points listed on Exhibit A to this Agreement.

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

- UP's line between Riverside and Ontario, CA; and
- UP's line between Basta, CA and Fullerton and La Habra, CA.

(c) The trackage rights granted under this section shall be bridge rights for the movement of overhead traffic only, except for the local access specified herein. BNSF shall receive access on such lines only to (i) "2-to-1" Shipper Facilities and Existing Transload Facilities at points listed on Exhibit A to this Agreement, (ii) any New Shipper Facility located subsequent to UP's acquisition of control of SP at points listed on Exhibit A to this Agreement,

and (iii) any New Shipper Facility located subsequent to UP's acquisition of control of SP on the Trackage Rights Lines. BNSF shall also have the right to establish and exclusively serve intermodal and auto facilities at points listed on Exhibit A to this Agreement and at points identified or described in Section 8(i) of this Agreement.

(d) Access to Shipper Facilities at points listed on Exhibit A to this Agreement open to BNSF shall be direct or through reciprocal switch, or, with UP/SP's prior agreement, through a third party contractor. Access to New Shipper Facilities open to BNSF on the Trackage Rights Lines shall be (i) direct; (ii) with UP/SP's prior agreement, through haulage for the shortest period of time necessary to allow BNSF to establish its own direct operating access after initiating service to a New Shipper Facility, but not to exceed the later to occur of 90 days or the date upon which UP completes the construction of and accepts for service any connections, sidings or other support facilities to be paid for by BNSF that UP is then obligated to construct pursuant to this Agreement or the trackage rights agreements executed pursuant to Section 9(f) of this Agreement; (iii) with UP/SP's prior agreement, reciprocal switching where, at the time BNSF service is to commence, UP/SP already provides reciprocal switching on the portion of the Trackage Rights Line upon which the turnout to the facility is to be located; or (iv) with UP/SP's prior agreement the use of a third party contractor; PROVIDED, HOWEVER, that it shall be UP/SP's sole decision whether BNSF's service will be provided by either haulage or reciprocal switching; and PROVIDED, FURTHER, that in no case shall UP/SP be required to initiate any new local service or increase its level of service to accommodate the level of service proposed by BNSF. New Shipper Facilities open to BNSF under this Agreement shall be open to both UP/SP and BNSF, subject to the terms of Section 9(c)(v) of this Agreement. The geographic limits within which (x) New Shipper Facilities shall be open to BNSF service at points listed on Exhibit

A to this Agreement and (y) BNSF shall have the right to establish and exclusively serve intermodal and auto facilities at points listed in Section 8(i) of and on Exhibit A to this Agreement shall generally correspond to the territory within which, prior to the merger of UP and SP, a new shipper or receiver 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, such districts (as described in Section 9(g)) shall be presumed to establish these geographic limitations.

(e) BNSF shall grant UP/SP overhead trackage rights on Santa Fe's line between Barstow (including both legs of the wye) and Mojave, CA.

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

(g) UP/SP shall work with BNSF to facilitate access by BNSF to the Ports of Los Angeles and Long Beach, CA. Other than as legally precluded, UP/SP shall (a) extend the term of the present agreement dated November 21, 1981, to continue until completion of Alameda Corridor, (b) amend that agreement to apply to all carload and intermodal traffic, and (c) grant BNSF the right to invoke such agreement to provide loop service utilizing UP's and Santa Fe's lines to the Ports at BNSF's option to allow for additional operating capacity. UP/SP's commitment is subject to available capacity. Any incremental capacity related projects necessary to accommodate BNSF traffic shall be the sole responsibility of BNSF.

(h) At least forty-five (45) days before initiating service to (i) a Shipper Facility open to BNSF at a point listed or described on Exhibit A to or in Section 8(i) of this Agreement, or (ii) any New Shipper Facility on a Trackage Rights Line, BNSF shall notify UP of its election,

subject to Section 3(d) above, of the manner by which it proposes such service be provided and the specifics of its operating plan over UP/SP trackage. Within thirty (30) days of its receipt of BNSF's proposed operating plan, UP shall notify BNSF of its approval or disapproval of BNSF's plan. UP's approval of such plan shall not be unreasonably withheld. In the event UP disapproves of BNSF's proposed plan, UP shall provide an explanation in writing to BNSF of its reasons for disapproval, and UP shall propose an alternative operating plan that would be acceptable to UP and also be no more onerous than the operating plan that UP would establish for service provided by UP. If UP approves BNSF's plan but establishes conditions on that approval, those conditions shall be set forth in writing and shall be no more onerous than UP would establish for service provided by UP. BNSF shall have the right, upon one hundred eighty (180) days' prior written notice to UP/SP, to change its election; PROVIDED, HOWEVER, that BNSF shall not change any such election more often than once every five (5) years. BNSF shall reimburse UP/SP for any costs incurred by UP/SP in connection with any changed election.

4. **South Texas Trackage Rights and Purchase**

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

- UP's line between Ajax and San Antonio, TX;
- UP's line between Houston (Algoa) and Brownsville, TX (with parity and equal access to the Mexican border crossing at Brownsville);
- UP's line between Odem and Corpus Christi, TX;
- UP's line between Ajax and Sealy, TX;
- SP's line between San Antonio and Eagle Pass, TX (with parity and equal access to the Mexican border crossing at Eagle Pass);

- UP's line between Craig Junction and SP Junction, TX (Tower 112) via Track No. 2 through Fratt, TX;
- SP's line between SP Junction (Tower 112) and Elmendorf, TX;
- **[• SP's line in San Antonio between SP Tower 105 and SP Junction (Tower 112);]**
- Overhead Trackage Rights on SP's Port Lavaca Branch, between Placedo and Port Lavaca, TX, for the purpose of reaching a point of build-in/build-out to/from Union Carbide Corporation's ("UCC") facility at North Seadrift, TX. UP/SP shall permit BN/Santa Fe or UCC to construct and connect to the Port Lavaca Branch, at their expense, a build-in/build-out line. BN/Santa Fe or UCC shall have the right to purchase for net liquidation value all or any part of the Port Lavaca Branch that UP/SP may abandon;
- UP's line between Kerr (connection to Georgetown RR) and Taylor, TX;
- Overhead Trackage Rights on UP's line between Round Rock and McNeil, TX for the purpose of interchanging with the Capital Metro Transit Authority, its successors or agent;
- UP's line between Temple and Waco, TX;
- UP's line between Temple and Taylor, TX;
- UP's line between Taylor and Smithville,TX; and
- SP's line between El Paso and Sierra Blanca, TX.

(b) The trackage rights granted under this section shall be bridge rights for the movement of overhead traffic only, except for the local access specified herein. BNSF shall

receive access on such lines only to (i) "2-to-1" Shipper Facilities and Existing Transload Facilities at points listed on Exhibit A to this Agreement and ~~{the Elmendorf facilities of the}~~ City Public Service Board of San Antonio, ~~{TX ("CPSB")}~~ **[Texas Elmendorf facilities listed on Exhibit A to this Agreement]**, (ii) any New Shipper Facility located subsequent to UP's acquisition of control of SP at points listed on Exhibit A to this Agreement, and (iii) any New Shipper Facility located subsequent to UP's acquisition of control of SP on the Trackage Rights Lines. BNSF shall also have the right to establish and exclusively serve intermodal and auto facilities at points listed on Exhibit A to this Agreement and at points identified or described in Section 8(i) of this Agreement. BNSF shall also have the right to interchange with: the Texas Mexican Railway Company at Corpus Christi and Robstown, TX; the Georgetown Railroad at Kerr; Transportacion Ferroviaria Mexicana ("TFM") at Brownsville (Matamoros, Mexico); Ferrocarril Mexicano ("FXE") at Eagle Pass; and the operator of SP's former line between Giddings and Llano at McNeil, TX. BNSF's access and interchange rights at Corpus Christi and Brownsville shall be at least as favorable as SP had on September 25, 1995. BNSF shall have direct access to the Port of Brownsville, the Brownsville and Rio Grande International Railroad, and the TFM. UP will designate a yard in Brownsville for sale to BNSF at such time as BNSF establishes its own trackage rights operations into Brownsville and at such time as the connection between UP and SP as a part of the Brownsville relocation project is completed. In the event UP/SP determines to cease operations in the SP East Yard at San Antonio, TX, UP/SP will give first consideration to BNSF for taking over operation of the East Yard pursuant to a mutually-agreeable arrangement.

(c) Access to Shipper Facilities at points listed on Exhibit A to this Agreement open to BNSF shall be direct or through reciprocal switch, or, with UP/SP's prior agreement, through a

third party contractor. Access to New Shipper Facilities open to BNSF on the Trackage Rights Lines shall be (i) direct; (ii) with UP/SP's prior agreement, through haulage for the shortest period of time necessary to allow BNSF to establish its own direct operating access after initiating service to a New Shipper Facility, but not to exceed the later to occur of 90 days or the date upon which UP completes the construction of and accepts for service any connections, sidings or other support facilities to be paid for by BNSF that UP is then obligated to construct pursuant to this Agreement or the trackage rights agreements executed pursuant to Section 9(f) of this Agreement; (iii) with UP/SP's prior agreement, reciprocal switching where, at the time BNSF service is to commence, UP/SP already provides reciprocal switching on the portion of the Trackage Rights Line upon which the turnout to the facility is to be located; or (iv) with UP/SP's prior agreement, the use of a third party contractor; PROVIDED, HOWEVER, that it shall be UP/SP's sole decision whether BNSF's service will be provided by either haulage or reciprocal switching; and PROVIDED, FURTHER, that in no case shall UP/SP be required to initiate any new local service or increase its level of service to accommodate the level of service proposed by BNSF. New Shipper Facilities open to BNSF under this Agreement shall be open to both UP/SP and BNSF, subject to Section 9(c)(v) of this Agreement. The geographic limits within which (x) New Shipper Facilities shall be open to BNSF service at points listed on Exhibit A to this Agreement and (y) BNSF shall have the right to establish and exclusively serve intermodal and auto facilities at points listed in Section 8(i) of and on Exhibit A to this Agreement shall generally correspond to the territory within which, prior to the merger of UP and SP, a new shipper or receiver 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, such districts (as described in Section 9(g)) shall be presumed to establish these geographic limitations.

(d) At least forty-five (45) days before initiating service to (i) a Shipper Facility open to BNSF at a point listed or described on Exhibit A to or in Section 8(i) of this Agreement, or (ii) any New Shipper Facility on a Trackage Rights Line, BNSF shall notify UP of its election, subject to Section 4(c) above, of the manner by which it proposes such service be provided and the specifics of its operating plan over UP/SP trackage. Within thirty (30) days of its receipt of BNSF's proposed operating plan, UP shall notify BNSF of its approval or disapproval of BNSF's plan. UP's approval of such plan shall not be unreasonably withheld. In the event UP disapproves of BNSF's proposed plan, UP shall provide an explanation in writing to BNSF of its reasons for disapproval, and UP shall propose an alternative operating plan that would be acceptable to UP and also be no more onerous than the operating plan that UP would establish for service provided by UP. If UP approves BNSF's plan but establishes conditions on that approval, those conditions shall be set forth in writing and shall be no more onerous than UP would establish for service provided by UP. BNSF shall have the right, upon one hundred eighty (180) days' prior written notice to UP/SP, to change its election; PROVIDED, HOWEVER, that BNSF shall not change any such election more often than once every five (5) years. BNSF shall reimburse UP/SP for any costs incurred by UP/SP in connection with any changed election.

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

(f) In lieu of BNSF's conducting actual trackage rights operations between Houston, Corpus Christi, Harlingen and Brownsville, TX (including TFM interchange), UP/SP agrees,

upon request by BNSF, to handle BNSF's business on a haulage basis for the fee called for by Section 8(m) of this Agreement. UP/SP shall accept, handle, switch and deliver traffic moving under haulage without any discrimination in promptness, quality of service, or efficiency in favor of comparable traffic moving in UP/SP's account.

(g) UP/SP shall sell to BNSF UP's line between Dallas and Waxahachie, TX with UP retaining trackage rights to exclusively serve local industries on the Dallas-Waxahachie line.

(h) Upon the effectiveness of the trackage rights to Eagle Pass under this section, BNSF's right to obtain haulage services from UP/SP to and from Eagle Pass pursuant to the agreement between BNSF and SP dated April 13, 1995 and subsequent haulage agreement between those parties shall no longer apply, provided BNSF shall continue to have the right to use trackage at or near Eagle Pass as specified in that agreement for use in connection with trackage rights under this Agreement.

5. **Eastern Texas - Louisiana Trackage Rights and Purchase**

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

- SP's line between Houston and Iowa Junction in Louisiana, which trackage rights have been amended by the Term Sheet Agreement and the TX-LA Line Sale Agreement implementing UP's and BNSF's joint ownership of SP's line between Dawes, TX and Avondale, LA;
- SP's line between Beaumont and Port Arthur, TX;
- SP's line between Dayton and Baytown and East Baytown, TX;
- SP's Channelview Spur which connects to the SP's line between Houston and Iowa Junction near Sheldon, TX for the purpose, inter alia, of reaching a point of build-in/build-out to/from the facilities of Lyondell

Petrochemical Company and Arco Chemical Company at Channelview, TX. UP/SP shall permit BN/Santa Fe or one or both shippers to construct and connect to SP's Channelview Spur, at their expense, a build-in/build-out line. BN/Santa Fe or the shippers shall have the right to purchase for net liquidation value all or any part of the Channelview Spur that UP/SP may abandon;

- SP's line between Mallard Junction and Harbor, LA;
- SP's line near Avondale (SP MP 14.94 and West Bridge Junction (SP MP 9.97);
- UP's Main Line No. 1 from UP MP 14.29 to MP 14.11 including crossover to SP's main line and UP's MP 10.38 to MP 10.2; and
- UP's line between West Bridge Junction (UP MP 10.2) and UP's Westwego, LA intermodal facility (approximately UP MP 9.2).

(b) The trackage rights granted under this section shall be bridge rights for the movement of overhead traffic only, except for the local access specified herein. BNSF shall receive access on such lines only to (i) "2-to-1" Shipper Facilities and Existing Transload Facilities at points listed on Exhibit A to this Agreement, (ii) any New Shipper Facility located subsequent to UP's acquisition of control of SP at points listed on Exhibit A to this Agreement, and (iii) any New Shipper Facility located subsequent to UP's acquisition of control of SP on the Trackage Rights Lines. BNSF shall also have the right to establish and exclusively serve intermodal and auto facilities at points listed on Exhibit A to this Agreement and at points identified or described in Section 8(i) of this Agreement. BNSF shall also have the right to handle traffic of shippers open to all of UP, SP and KCS at Lake Charles, Rose Bluff and West

Lake, LA, and traffic of shippers open to SP and KCS at West Lake Charles. BNSF shall also have the right to interchange with: the Acadiana Railway Company at Crowley, LA; and the Louisiana & Delta Railroad, Inc. at Lafayette, Raceland and Schreiver, LA. BNSF shall also have the right to interchange with and have access over the New Orleans Public Belt Railroad at West Bridge Junction, LA.

(c) Access to Shipper Facilities at points listed on Exhibit A to this Agreement open to BNSF shall be direct or through reciprocal switch, or, with UP/SP's prior agreement, through a third party contractor. Access to New Shipper Facilities open to BNSF on the Trackage Rights Lines shall be (i) direct; (ii) with UP/SP's prior agreement, through haulage for the shortest period of time necessary to allow BNSF to establish its own direct operating access after initiating service to a New Shipper Facility, but not to exceed the later to occur of 90 days or the date upon which UP completes the construction of and accepts for service any connections, sidings or other support facilities to be paid for by BNSF that UP is then obligated to construct pursuant to this Agreement or the trackage rights agreements executed pursuant to Section 9(f) of this Agreement; (iii) with UP/SP's prior agreement reciprocal switching where, at the time BNSF service is to commence, UP/SP already provides reciprocal switching on the portion of the Trackage Rights Line upon which the turnout to the facility is to be located; or (iv) with UP/SP's prior agreement, the use of a third party contractor; PROVIDED, HOWEVER, that it shall be UP/SP's sole decision whether BNSF's service will be provided by either haulage or reciprocal switching; and PROVIDED, FURTHER, that in no case shall UP/SP be required to initiate any new local service or increase its level of service to accommodate the level of service proposed by BNSF. New Shipper Facilities open to BNSF under this Agreement shall be open to both UP/SP and BNSF, subject to the terms of Section 9(c)(v) of this Agreement. The geographic limits

within which (x) New Shipper Facilities shall be open to BNSF service at points listed on Exhibit A to this Agreement and (y) BNSF shall have the right to establish and exclusively serve intermodal and auto facilities at points listed in Section 8(i) of and on Exhibit A to this Agreement shall generally correspond to the territory within which, prior to the merger of UP and SP, a new shipper or receiver 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, such districts (as described in Section 9(g)) shall be presumed to establish these geographic limitations.

(d) At least forty-five (45) days before initiating service to (i) a Shipper Facility open to BNSF at a point listed or described on Exhibit A to or in Section 8(i) of this Agreement, or (ii) any New Shipper Facility on a Trackage Rights Line, BNSF shall notify UP of its election, subject to Section 5(c) above, of the manner by which it proposes such service be provided and the specifics of its operating plan over UP/SP trackage. Within thirty (30) days of its receipt of BNSF's proposed operating plan, UP shall notify BNSF of its approval or disapproval of BNSF's plan. UP's approval of such plan shall not be unreasonably withheld. In the event UP disapproves of BNSF's proposed plan, UP shall provide an explanation in writing to BNSF of its reasons for disapproval, and UP shall propose an alternative operating plan that would be acceptable to UP and also be no more onerous than the operating plan that UP would establish for service provided by UP. If UP approves BNSF's plan but establishes conditions on that approval, those conditions shall be set forth in writing and shall be no more onerous than UP would establish for service provided by UP. BNSF shall have the right, upon one hundred eighty (180) days' prior written notice to UP/SP, to change its election; PROVIDED, HOWEVER, that

BNSF shall not change any such election more often than once every five (5) years. BNSF shall reimburse UP/SP for any costs incurred by UP/SP in connection with any changed election.

(e) UP/SP shall grant BNSF the right to use SP's Bridge 5A at Houston, Texas.

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

(g) UP/SP shall sell to BNSF UP's Main Line No. 1 between MP 14.11 and 10.38, UP's Westwego intermodal terminal, SP's old Avondale Yard (together with the fueling and mechanical facilities located thereon) as shown on Exhibit C; and SP's Lafayette Yard.

6. **Houston, TX-Valley Junction, IL Trackage Rights**

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

- SP's line between Houston, TX and Fair Oaks, AR via Cleveland and Pine Bluff, AR;
- UP's line between Fair Oaks and Bridge Junction, AR;
- SP's line between Brinkley and Briark, AR;
- UP's line between Pine Bluff and North Little Rock, AR
- UP's line between Houston and Valley Junction, IL via Palestine, TX;
- SP's line between Fair Oaks and Illmo, MO via Jonesboro, AR and Dexter Junction, MO; and
- UP's line between Fair Oaks and Bald Knob, AR.

(b) In lieu of conducting actual operations between Pine Bluff and North Little Rock, AR, UP/SP agrees, upon request of BNSF, to handle BNSF's business on a haulage basis for the fee called for by Section 8(m) of this Agreement.

(c) BNSF shall have the right to transport ~~{empty and loaded}~~ **[unit]** coal trains **[(i) over the Trackage Rights Lines]** to and from a point of build-in/build-out to and from Entergy Services, Inc.'s plant at White Bluff, AR if and when such a build-in/build-out line is constructed by an entity other than UP/SP to connect such plant with an SP line**[, and (ii) to and from Entergy Services, Inc.'s plant at White Bluff (1) by entering and exiting the Trackage Rights Lines at Jonesboro and Hoxie, AR, respectively, and/or (2) by utilization of BNSF's line via Memphis, TN.]** ~~{BNSF and UP do not agree as to whether BNSF's rights to use UP's and SP's lines north of Bald Knob and Fair Oaks, AR and UP's and SP's lines between Memphis and Valley Junction, IL should be restricted. BNSF believes that there should be no restrictions on its rights to use those lines. UP believes that, with modifications, the restrictions contained in the original BNSF Settlement Agreement should remain in place.}~~

(d) The trackage rights granted under this section shall be bridge rights for the movement of overhead traffic only, except for the local access specified herein. BNSF shall receive access on such lines only to (i) "2-to-1" Shipper Facilities and Existing Transload Facilities at points listed on Exhibit A to this Agreement, (ii) any New Shipper Facility located subsequent to UP's acquisition of control of SP at points listed on Exhibit A to this Agreement, and (iii) any New Shipper Facility located subsequent to UP's acquisition of control of SP on the Trackage Rights Lines. BNSF shall also have the right to establish and exclusively serve intermodal and auto facilities at points listed on Exhibit A to this Agreement and at points identified or described in Section 8(i) of this Agreement. ~~{[BNSF Alternative: Except as provided in Section 9l of this Agreement,}~~ **[In addition to the other restrictions and limitations set forth herein, as to UP's and SP's lines between Memphis and Valley Junction, IL: (1)]** BNSF shall not have the right to enter or exit at intermediate points ~~{on UP's~~

~~and SP's lines between Memphis and Valley Junction, IL. Traffic to be handled over the UP and SP lines between Memphis and Valley Junction, IL.}~~ **[north of Bald Knob and Fair Oaks, AR; and (2) BNSF traffic]** is limited to traffic that moves through, originates in, or terminates in Texas or Louisiana**[**. ~~**{except that traffic originating or terminating at points listed on Exhibit A under the caption "Points Referred to in Section 6c" may also be handled over these lines.] [UP Alternative: Except as provided in Section 9l of this Agreement, BNSF shall not have the right to enter or exit at intermediate points north of Bald Knob and Fair Oaks, AR on UP's and SP's lines between Memphis and Valley Junction, IL. Traffic to be handled over the UP and SP lines between Memphis and Valley Junction, IL is limited to traffic that moves through, originates in, or terminates in Texas or Louisiana, except that traffic originating or terminating at points listed on Exhibit A under the caption "Points Referred to in Section 6(d)" may also be handled over these lines.]}**~~ **These two restrictions do not apply to traffic moving to or from Shipper Facilities in the Houston-Memphis-St. Louis Corridor to which BNSF has access pursuant to this Section 6(d) or Section 8(i) below. The two restrictions also do not apply to the traffic that BNSF is permitted to handle pursuant to the remaining provisions of this Section 6(d), which remains subject to all other conditions and restrictions.]** BNSF shall also have the right to handle traffic of shippers open to all of UP, SP and KCS at Texarkana, TX/AR, and Shreveport, LA, to and from the Memphis BEA (BEA 73), but not including proportional, combination or Rule 11 rates via Memphis or other points in the Memphis BEA. In the Houston-Memphis-St. Louis corridor, BNSF shall have the right to move some or all of its traffic via trackage rights over either the UP line or the SP line, at its discretion, for operating convenience. BNSF shall also have the right to interchange: with the Little Rock and Western Railway at Little Rock, AR; the Little Rock Port

Authority at Little Rock, AR; KCS at Shreveport, LA and Texarkana, TX/AR, for movements of traffic originated by KCS at or delivered by KCS to shippers or receivers at Lake Charles, West Lake, or West Lake Charles, LA; with KCS (y) at Shreveport, LA for movements of loaded and empty coal trains moving to and from Texas Utilities Electric Company's Martin Lake generating station, and (z) at Texarkana, TX/AR for movements of empty coal trains returning from Texas Utilities Electric Company's Martin Lake generating station; and with the Texas Northeastern Railroad at Texarkana, TX for the sole purpose of moving BNSF traffic to and from Shipper Facilities at Defense, TX.

(e) Access to Shipper Facilities at points listed on Exhibit A to this Agreement open to BNSF shall be direct or through reciprocal switch, or, with UP/SP's prior agreement, through a third party contractor. Access to New Shipper Facilities open to BNSF on the Trackage Rights Lines shall be (i) direct; (ii) with UP/SP's prior agreement, through haulage for the shortest period of time necessary to allow BNSF to establish its own direct operating access after initiating service to a New Shipper Facility, but not to exceed the later to occur of 90 days or the date upon which UP completes the construction of and accepts for service any connections, sidings or other support facilities to be paid for by BNSF that UP is then obligated to construct pursuant to this Agreement or the trackage rights agreements executed pursuant to Section 9(f) of this Agreement; (iii) with UP/SP's prior agreement, reciprocal switching where, at the time BNSF service is to commence, UP/SP already provides reciprocal switching on the portion of the Trackage Rights Line upon which the turnout to the facility is to be located; or (iv) with UP/SP's prior agreement, the use of a third party contractor; PROVIDED, HOWEVER, that it shall be UP/SP's sole decision whether BNSF's service will be provided by either haulage or reciprocal switching; and PROVIDED, FURTHER, that in no case shall UP/SP be required to initiate any

new local service or increase its level of service to accommodate the level of service proposed by BNSF. New Shipper Facilities open to BNSF under this Agreement shall be open to both UP/SP and BNSF, subject to the terms of Section 9(c)(v) of this Agreement. The geographic limits within which (x) New Shipper Facilities shall be open to BNSF service at points listed on Exhibit A to this Agreement and (y) BNSF shall have the right to establish and exclusively serve intermodal and auto facilities at points listed in Section 8(i) of and on Exhibit A to this Agreement shall generally correspond to the territory within which, prior to the merger of UP and SP, a new shipper or receiver 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, such districts (as described in Section 9(g)) shall be presumed to establish these geographic limitations.

(f) At least forty-five (45) days before initiating service to (i) a Shipper Facility open to BNSF at a point listed or described on Exhibit A to or in Section 8(i) of this Agreement, or (ii) any New Shipper Facility on a Trackage Rights Line, BNSF shall notify UP of its election, subject to Section 6(e) above, of the manner by which it proposes such service be provided and the specifics of its operating plan over UP/SP trackage. Within thirty (30) days of its receipt of BNSF's proposed operating plan, UP shall notify BNSF of its approval or disapproval of BNSF's plan. UP's approval of such plan shall not be unreasonably withheld. In the event UP disapproves of BNSF's proposed plan, UP shall provide an explanation in writing to BNSF of its reasons for disapproval, and UP shall propose an alternative operating plan that would be acceptable to UP and also be no more onerous than the operating plan that UP would establish for service provided by UP. If UP approves BNSF's plan but establishes conditions on that approval, those conditions shall be set forth in writing and shall be no more onerous than UP

would establish for service provided by UP. BNSF shall have the right, upon one hundred eighty (180) days' prior written notice to UP/SP, to change its election; PROVIDED, HOWEVER, that BNSF shall not change any such election more often than once every five (5) years. BNSF shall reimburse UP/SP for any costs incurred by UP/SP in connection with any changed election.

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

(h) BNSF shall grant to UP/SP overhead trackage rights on BN's line between West Memphis and Presley Junction, AK. UP/SP shall be responsible for upgrading this line as necessary for its use. If BNSF uses this line for overhead purposes to connect its line to the trackage rights lines, BNSF shall share in one-half of the upgrading cost.

7. **St. Louis Area Coordinations**

(a) UP/SP agree to cooperate with BNSF to facilitate efficient access by BNSF to other carriers at and through St. Louis via The Alton & Southern Railway Company ("A&S"). If BNSF requests, UP/SP agree to construct or cause to be constructed for the use of both BNSF and UP/SP a faster connection between the IN and UP lines at Grand Avenue in St. Louis, MO and a third track from Grand Avenue to near Gratiot Street Tower at the sole cost and expense of BNSF. Upon completion of such construction, UP/SP shall grant to BNSF overhead trackage rights on UP's line between Grand Avenue and Gratiot Street.

(b) UP wishes to secure dispatching authority for the MacArthur Bridge across the Mississippi River at St. Louis. Dispatching is currently controlled by the Terminal Railroad Association of St. Louis ("TRRA"). BNSF agrees that it will cause its interest on the TRRA Board or any shares it owns in the TRRA to be voted in favor of transferring dispatching control of the MacArthur Bridge to UP if such matter is presented to the TRRA Board or its shareholders

for action. Such dispatching shall be performed in a manner to ensure that all users are treated equally.

(c) If BNSF desires to use the A&S Gateway Yard, upon transfer of MacArthur Bridge dispatching to UP, UP/SP shall assure that charges assessed by the A&S to BNSF for use of Gateway Yard are equivalent to those assessed other non-owners of A&S.

(d) UP/SP and BNSF agree to provide each other reciprocal detour rights between Bridge Junction-West Memphis and St. Louis in the event of flooding, subject to the availability of sufficient capacity to accommodate the detour.

(e) UP/SP shall provide BNSF Overhead Trackage Rights over UP/SP's Jefferson City Subdivision between MP 34.8 near Pacific, MO and MP 43.8 near Labadie, MO for the purpose of accessing Ameren UE's facility at Labadie. BNSF shall have the right to serve all "2-to-1" Shipper Facilities, New Shipper Facilities and Existing Transload Facilities at Labadie.

8. **Additional Rights**

(a) UP/SP shall grant BNSF overhead trackage rights on SP's line between Richmond and Oakland, CA for rail traffic of all kinds, carload and intermodal, for all commodities to enable BNSF to connect via SP's line with the Oakland Terminal Railroad ("OTR") and to access the Oakland Joint Intermodal Terminal ("JIT"), or similar public intermodal facility, at such time as the JIT is built. BNSF shall pay 50% of the cost (up to $2,000,000 maximum) for upgrading to mainline standards and reverse signaling of SP's No. 1 track between Emeryville (MP 8) and Stege, CA (MP 13.1). Compensation for these trackage rights shall be at the rate of 3.48 mills per ton mile for business moving in the "I-5 Corridor," 3.1 mills per ton mile on all other carload and intermodal business, and 3.0 mills per ton mile for bulk business (as defined in Section 9(a) of this Agreement) escalated in accordance with the

provisions of Section 12 of this Agreement. UP/SP shall assess no additional charges against BNSF for access to the JIT and the OTR.

(b) BNSF shall waive any payment by UP/SP of the Seattle Terminal 5 access charge.

(c) BNSF shall grant to UP overhead trackage rights on BN's line between Saunders, WI and access to the MERC dock in Superior, WI.

(d) BNSF shall grant UP the right to use the Pokegama connection at Saunders, WI (i.e., the southwest quadrant connection at Saunders including the track between BN MP 10.43 and MP 11.14).

(e) BNSF shall waive SP's requirement to pay any portion of the Tehachapi tunnels clearance improvements pursuant to the 1993 Agreement between Santa Fe and SP.

(f) BNSF shall allow UP to exercise its rights to use the Hyundai lead at Portland Terminal 6 without any contribution to the cost of constructing such lead.

(g) BNSF shall allow UP/SP to enter or exit SP's Chicago-Kansas City-Hutchinson trackage rights at Buda, Earlville, and west of Edelstein, IL. UP/SP shall be responsible for the cost of any connections required.

(h) BNSF will amend the agreement dated April 13, 1995, between BNSF and SP to allow UP/SP to enter and exit Santa Fe's line solely for the purposes of permitting UP/SP or its agent to pick up and set out interchange business, including reciprocal switch business at Newton, KS, and switching UP industries at that point.

(i) It is the intent of the parties that this Agreement result in the preservation of competition by two rail carriers for (a) all "2-to-1" Shipper Facilities at points listed on Exhibit A to this Agreement and (b) all other shippers who had direct competition or competition by means of siting, transload or build-in/build-out from only UP and SP pre-merger.

The parties recognize that some "2-to-1" Shipper Facilities, Existing Transload Facilities, and New Shipper Facilities at "2-to-1" Points will not be able to avail themselves of BNSF service by virtue of the trackage rights and line sales contemplated by this Agreement. For example, "2-to-1" Shipper Facilities, Existing Transload Facilities, and New Shipper Facilities located at points between Niles Junction and the end of the joint track near Midway (including Livermore, CA, Pleasanton, CA, Radum, CA, and Trevarno, CA), Lyoth, CA, Lathrop, CA, Turlock, CA, South Gate, CA, Tyler, TX, Defense, TX, College Station, TX, Great Southwest, TX, Victoria, TX, Sugar Land, TX, points on the former Galveston, Houston & Henderson Railroad served only by UP and SP, Opelousas, LA and Herington, KS are not accessible under the trackage rights and line sales covered by this Agreement. Accordingly, UP/SP and BNSF agree to enter into arrangements under which, through trackage rights, haulage, ratemaking authority or other mutually acceptable means, BNSF will be able to provide competitive service to "2-to-1" Shipper Facilities, Existing Transload Facilities, and New Shipper Facilities at the foregoing points and at other "2-to-1" Points not along a Trackage Rights Line.

(j) BNSF shall have the right to interchange with any short-line railroad which, prior to the Effective Date of this Agreement, could interchange with both UP and SP and no other railroad.

(k) BNSF shall also have the right to interchange with any short-line railroad that constructs a new line to and establishes an interchange on a Trackage Rights Line subsequent to UP's acquisition of control of SP; PROVIDED, HOWEVER, that the short-line railroad must be a Class II or Class III railroad neither owned nor operated by BNSF or any BNSF affiliate. In addition, the new rail line must be either (i) an extension of an existing Class II or Class III carrier that does not connect with UP or (ii) a new Class II or Class III carrier. BNSF shall not

be entitled to interchange traffic with a Class II or Class III carrier at such a new interchange on a Trackage Rights Line if the traffic originates or terminates at a Shipper Facility that is now served solely by UP unless the Shipper Facility qualifies as a New Shipper Facility or unless the new line qualifies as a build-in or build-out under this Agreement.

(l) In addition to the right to serve build-in/build-out lines specified in Sections 4(a), 5(a) and 6(c) of this Agreement, BNSF shall have the right to serve a new build-in/build-out line constructed to reach a facility that was, prior to September 11, 1996, solely served by either UP or SP and would be open to two railroad service upon construction of the build-in/build-out line (i) to a point on lines owned by SP on September 11, 1996, in the case of facilities solely served by UP, or (ii) to a point on lines owned by UP on September 11, 1996, in the case of facilities solely served by SP. UP shall grant BNSF Overhead Trackage Rights necessary for BNSF to reach the build-in/build-out line. The routing of such trackage rights shall seek to minimize the operating inconvenience to UP, consistent with ensuring that BNSF can provide competitive service.

(m) Where this Agreement authorizes BNSF to utilize haulage to provide service, the fee for such haulage shall be $.50 per car mile plus a handling charge to cover handling at the haulage junction with BNSF and to or from a connecting railroad or third party contract switcher. The handling charge shall be $50 per loaded or empty car for intermodal and carload and $25 per loaded or empty car for unit trains with unit train defined as 67 cars or more of one commodity in one car type moving to a single destination and consignee. UP/SP shall bill BNSF the $50 per car handling charge for all cars and, upon receipt of appropriate documentation from BNSF demonstrating that business assessed the $50 per car handling fee was a unit train, adjust prior billings by $25 per car for each car BNSF demonstrates to have been eligible for the $25 per car

handling charge for unit trains. Where UP/SP is providing reciprocal switching services to BNSF at "2-to-1" Shipper Facilities as provided for in Section 9(i) of this Agreement, the per car handling charge shall not be assessed at the point where such reciprocal switch charge is assessed. The haulage fee and handling charge set forth above as of September 25, 1995, shall be adjusted upwards or downwards in accordance with Section 12 of this Agreement.

(n) In the event, for any reason, any of the trackage rights granted under this Agreement cannot be implemented because of the lack of sufficient legal authority to carry out such grant, then UP/SP shall be obligated to provide an alternative route or routes, or means of access of commercially equivalent utility at the same level of cost to BNSF as would have been provided by the originally contemplated rights.

(o) In the event UP determines to terminate or not renew a lease to an Existing Transload Facility to which BNSF gained access as a result of this Agreement or the conditions imposed on the UP/SP merger and BNSF has previously entered into a contract to provide transportation services to the Existing Transload Facility, UP shall extend the lease for the remaining period of such transportation contract or for a period not to exceed 24 months, whichever period is shorter.

~~[BNSF and UP do not agree on whether BNSF should be able to purchase or lease team tracks at "2-to-1" Points no longer used by UP.~~

~~(p) BNSF Alternative:~~

~~If UP no longer uses a team track at a "2-to-1" Point, it agrees to sell or lease the track to BNSF at normal and customary costs and charges.~~

~~UP Alternative:~~

~~It is UP's position that BNSF's proposed provision should not be added to the Settlement Agreement.~~

9. **Trackage Rights - General Provisions**

(a) The compensation for operations under this Agreement shall be set at the levels shown in the following table as subsequently indexed under the 1995 Agreement:

Table I
Trackage Rights Compensation
(mills per ton-mile)

	Keddie-Stockton/Richmond	All Other Lines
Intermodal and Carload	3.48	3.1
Bulk (67 cars or more of one commodity in one car type)	3.0	3.0

These rates shall apply to all equipment moving in a train consisting including locomotives. The rates shall be escalated in accordance with the procedures described in Section 12 of this Agreement. The owning line shall be responsible for maintenance of its line in the ordinary course including rail relay and tie replacement. The compensation for such maintenance shall be included in the mills per ton mile rates received by such owning line under this Agreement.

(b) BNSF and UP/SP will conduct a joint inspection to determine necessary connections and sidings or siding extensions associated with connections, necessary to implement the trackage rights granted under this Agreement. The cost of such facilities shall be borne by the party receiving the trackage rights which such facilities are required to implement. Either party shall have the right to cause the other party to construct such facilities. If the owning carrier decides to utilize such facilities constructed by it for the other party, it shall have the right to do so upon payment to the other party of one-half (½) the original cost of constructing such facilities.

(c) Capital expenditures on the Trackage Rights Lines and on lines over which BNSF is granted Overhead Trackage Rights will be handled as follows:

(i) UP/SP shall bear the cost of all capacity improvements that are necessary to achieve the benefits of its merger as outlined in the application filed with the ICC for authority for UP to control SP. The operating plan filed by UP/SP in support of the application shall be given presumptive weight in determining what capacity improvements are necessary to achieve these benefits.

(ii) Any capacity improvements other than those covered by subparagraph (i) above shall be shared by the parties based upon their respective usage of the line in question, except as otherwise provided in subparagraph (iii) below. That respective usage shall be determined by the 12 month period prior to the making of the improvement on a gross ton mile basis.

(iii) For 18 months following UP's acquisition of control of SP, BNSF shall not be required to share in the cost of any capital improvements under the provision of subparagraph (ii) above.

(iv) BNSF and UP/SP agree that a capital reserve fund of $25 million, funded out of the purchase price listed in Section 10 of this Agreement, shall be established. This capital reserve fund shall, with BNSF's prior consent which will not unreasonably be withheld, be drawn down to pay for capital projects on the Trackage Rights Lines that are required to accommodate the operations of both UP/SP and BNSF on those lines, but in any event shall not be used for expenditures covered by subparagraph

(i) above. Any disputes over whether a project is required to accommodate the operation of both parties shall be referred to binding arbitration under Section 15 of this Agreement.

(v) If both UP/SP and BNSF intend to serve New Shipper Facilities located subsequent to UP's acquisition of control of SP as authorized by Sections 1(b), 3(c), 4(b), 5(b), 6(d), and 8(i) of this Agreement, they shall share equally in any capital investment in such connections and sidings and siding extensions or other support facilities required by both UP and BNSF to provide rail service to such New Shipper Facility. If only one railroad initially provides such service, the other railroad may elect to provide service at a later date, but only after paying to the railroad initially providing such service 50% of any capital investment (including per annum interest thereon) made by the railroad initially providing rail service to the New Shipper Facility. Per annum interest shall be 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 the other railroad 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 access to such industry or industries. Each annual adjustment shall be

subject, however, to a "cap" (up or down) of two percentage points more or less than the prior year's interest rate.

(d) Subject to the terms of the Dispatching Protocols attached hereto as Exhibit D and incorporated herein, the management and operation of the lines over which the parties have granted trackage rights to each other pursuant to this Agreement ("Joint Trackage") shall be under the exclusive direction and control of the owning carrier, and the owning carrier shall have the otherwise unrestricted power to change the management and operations on and over Joint Trackage as in its judgment may be necessary, expedient or proper for the operations thereof intended. Trains of the parties utilizing Joint Trackage shall be given equal dispatch without any discrimination in promptness, quality of service, or efficiency in favor of comparable traffic of the owning carrier. Trains operating in the Houston terminal shall be routed over the most efficient routes as necessary to avoid delays and congestion, even routes over trackage over which the operating carrier has no operating rights.

The owning carrier shall keep and maintain the Joint Trackage at no less than the track standard designated in the current timetable for the applicable lines subject to the separate trackage rights agreement. The parties agree to establish a joint service committee to regularly review operations over the Joint Trackage lines.

In the event the owning carrier determines to sell or remove from service a Joint Trackage line and/or any associated facilities, the owning carrier shall provide the other carrier with reasonable written notice of such determination. Any such sale to a third party shall be expressly made subject to the terms and conditions of this Agreement, and the owning carrier shall remain responsible as to the obligations imposed on it herein in the event the third party purchaser does not fulfill those obligations.

(e) Each party shall be responsible for any and all costs relating to providing employee protection benefits, if any, to its employees prescribed by law, governmental authority or employee protective agreements where such costs and expenses are attributable to or arise by reason of that party's operation of trains over Joint Trackage. To the extent that it does not violate existing agreements, for a period of three years following acquisition of control of SP by UP, BNSF and UP/SP shall give preference to each other's employees when hiring employees needed to carry out trackage rights operations or operate lines being purchased. The parties shall provide each other with lists of available employees by craft or class to whom such preference shall be granted. Nothing in this Section 9(e) is intended to create an obligation to hire any specific employee.

(f) The trackage rights grants described in this Agreement and the purchase and sale of line segments shall be included in separate trackage rights and line sale agreement documents respectively of the kind and containing such provisions as are normally and customarily utilized by the parties, including exhibits depicting specific rail line segments, and other provisions dealing with maintenance, improvements, and liability, subject to more specific provisions described for each grant and sale contained in this Agreement and the general provisions described in this section. BNSF and UP/SP shall elect which of their constituent railroads shall be a party to each such trackage rights agreement and line sale and shall have the right to assign the agreement among their constituent railroads. The parties shall use their best efforts to complete such agreements by June 1, 1996. If agreement is not reached by June 1, 1996 either party may request that any outstanding matters be resolved by binding arbitration with the arbitration proceeding to be completed within sixty (60) days of its institution. In the event such agreements are not completed by the date the grants of such trackage rights are to be effective, it

is intended that operations under such grants shall be commenced and governed by this Agreement.

(g) All locations referenced herein shall be deemed to include all areas within the switching limits of the location designated by tariff, clarified to the extent necessary by publicly-available information, in effect as of September 25, 1995, and access to such locations shall include the right to locate and serve new auto and intermodal facilities at such locations.

(h) The tenant carrier on the Joint Trackage shall have the right to construct, or have constructed for it, for its sole use exclusively owned or leased facilities, including, without limitation, automobile and intermodal facilities, storage in transit facilities, team tracks and yards along the Joint Trackage pursuant to the following terms and conditions:

(i) The party wishing to construct such exclusively owned facilities for its sole use shall submit its plans to the other party for its review and approval, which approval shall not be unreasonably withheld or delayed;

(ii) **[In the case of the construction of team tracks and ancillary facilities, including loading facilities and necessary track connections, the parties shall work cooperatively with each other to enable such construction;**

(iii)] Such exclusively owned or leased and used facilities shall not (i) impair the other party's use of the Joint Trackage, (ii) prevent or unduly hinder the other party's access to existing or future customers or facilities served from the Joint Trackage, or (iii) impair access to other exclusively owned facilities then in existence; and

~~{(iii)}~~

[(iv)] If jointly owned or leased and used property is to be used for the construction of such exclusively owned or leased and used facilities, the party so constructing such exclusively owned or leased and used facilities shall reimburse the other party for its ownership of the jointly owned property so utilized at 50% of its then current fair market value. If the tenant carrier uses property of the owning carrier for the construction of exclusively owned or leased and used facilities, the tenant carrier shall reimburse the owning carrier for its ownership of the property at 100% of its then current fair market value.

(i) Where UP/SP provides reciprocal switching services to BNSF under this Agreement, UP/SP will do so at a rate of no more than $130 per car as of September 25, 1995, adjusted pursuant to Section 12 of this Agreement**[, and all such reciprocal switching services shall be provided on an impartial basis]**. In the event BNSF's access to a Shipper Facility pursuant to this Agreement is effected by means of a third party contractor, (i) any associated third party switch fee shall be paid by UP/SP, (ii) BNSF shall pay to UP/SP the applicable reciprocal switch fee established between the parties to this Agreement, and (iii) BNSF shall neither be entitled to become an assignee of UP/SP nor become eligible to enter into a separate agreement with the shipper so served.

(j) It is the intent of the parties that BNSF shall, where sufficient volume exists, be able to utilize its own terminal facilities for traffic handled by BNSF under the terms of this Agreement. These locations include Salt Lake City, Ogden, Brownsville and San Antonio, and other locations where such volume develops. Facilities or portions thereof presently utilized by UP or SP at such locations shall be acquired from UP/SP by lease or purchase at normal and

customary charges. Upon request of BNSF and subject to availability and capacity, UP/SP shall provide BNSF with terminal support services including fueling, running repairs and switching. UP/SP shall also provide intermodal terminal services at Salt Lake City, Reno, and San Antonio. UP/SP shall be reimbursed for such services at UP's normal and customary charges. Where terminal support services are not required, BNSF shall not be assessed additional charges for train movements through a terminal. BNSF shall also have equal access, along with UP/SP, to all SP Gulf Coast storage in transit facilities ("SIT") (i.e., those SP facilities at Dayton, East Baytown, and Beaumont, TX), on economic terms no less favorable than the terms of UP/SP's access, for storage in transit of traffic handled by BNSF under the terms of this Agreement, including, but not limited to, traffic to or from Shipper Facilities to which BNSF gained access under the terms of this Agreement. UP/SP agree to work with BNSF to locate additional SIT facilities on the Trackage Rights Lines and on lines over which BNSF is granted Overhead Trackage Rights to serve a build-in/build-out line as necessary.

(k) BNSF may, subject to UP/SP's consent, use agents for limited feeder service on the Trackage Rights Lines and on lines over which BNSF is granted Overhead Trackage Rights to serve a build-in/build-out line.

(l) BNSF shall have the right to inspect the UP and SP lines over which it obtains trackage rights under this Agreement and require UP/SP to make such improvements under this section as BNSF deems necessary to facilitate its operations at BNSF's sole expense. Any such inspection must be completed and improvements identified to UP/SP within one year of the effectiveness of the trackage rights.

(m) BNSF shall have the right to connect, for movement in all directions, with its present lines (including existing trackage rights) at points where its present lines (including

existing trackage rights) intersect with Trackage Rights Lines or lines it will purchase pursuant to this Agreement. UP/SP shall have the right to connect, for movement in all directions, with its present lines (including existing trackage rights) at points where its present lines (including existing trackage rights) intersect with lines over which it will receive trackage rights pursuant to this Agreement. **[BNSF shall also have the right, at the option of the City Public Service Board of San Antonio, TX, to connect for movement to and from Elmendorf, TX, where BNSF's 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.]**

(n) In the event UP/SP institute directional operations over any Trackage Rights Line or on lines over which BNSF is granted Overhead Trackage Rights, (i) UP/SP shall provide BNSF with reasonable notice of the planned institution of such operations and shall adjust, as appropriate, the trackage rights granted to BNSF pursuant to this Agreement **[so as to avoid impairing BNSF's ability to provide competitive service on a Trackage Rights Line]**, and (ii) BNSF shall operate in accordance with the flow of traffic established by such directional operation; PROVIDED, HOWEVER, that any rights granted to BNSF as a result of UP/SP's institution of directional operations shall be Overhead Trackage Rights only, and PROVIDED FURTHER that BNSF shall have the right, on any Trackage Rights Line over which directional operations have been instituted (including lines on which BNSF received Overhead Trackage Rights to serve a point listed or described in Section 8(i) of this Agreement or a build-in/build-out line), to operate against the flow of traffic if it is reasonably necessary to do so for BNSF to provide competitive service to shippers on the line which are accessible to BNSF (including service to New Shipper Facilities and build-in/build-out lines) over such line including but not

limited to circumstances where UP operates against the flow of traffic with trains of the same or similar type for the same shipper(s) or for shipper(s) in the same general area.

10. **Compensation for Sale of Line Segments**

(a) BNSF shall pay UP/SP the following amounts for the lines it is purchasing pursuant to this Agreement:

Line Segment	Purchase Price
Keddie-Bieber	$ 30 million
Dallas-Waxahachie	20 million
Iowa Jct.-Avondale MP 16.9 (includes UP's Westwego intermodal yard; SP's old Avondale yard; and SP's Lafayette yard)	100 million

(b) The purchase shall be subject to the following terms:

(i) the condition of the lines at closing shall be at least as good as their current conditions as reflected in the current timetable and slow orders (slow orders to be measured by total mileage at each level of speed restrictions).

(ii) includes track and associated structures together with right-of-way and facilities needed for operations.

(iii) indemnity for environmental liabilities attributable to UP/SP's prior operations.

(iv) standard provisions for sales of this nature involving title, liens, encumbrances other than those specifically reserved or provided for by this Agreement.

(v) assignment of associated operating agreements (road crossings, crossings for wire and pipelines, etc.). Non-operating agreements shall not be assigned.

(vi) removal by UP/SP, from a conveyance, within 60 days of the closing of any sale, of any non-operating real property without any reduction in the agreed upon purchase price.

(vii) the purchase will be subject to easements or other agreements involving telecommunications, fiber optics or pipeline rights or operations in effect at the time of sale.

BNSF shall have the right to inspect the line segments and associated property to be sold and records associated therewith for a period of ninety days from the Effective Date of this Agreement to determine the condition and title of such property. At the end of such period, BNSF shall have the right to decline to purchase any specific line segment or segments. In such event, UP/SP shall grant BNSF overhead trackage rights on any such segment with compensation to be paid, in the case of Avondale-Iowa Junction on the basis of the charges set forth in Section 9(a) of this Agreement, and in the case of Keddie-Bieber on a typical joint facility basis with maintenance and operating costs to be shared on a usage basis (gross ton miles used to allocate usage) and annual interest rental equal to the depreciated book value times the then current cost of capital as determined by the ICC times a usage basis (gross ton miles). In the case of Dallas-Waxahachie, operations would continue under the existing trackage rights agreement.

(c) Prior to closing the sale of SP's Iowa Jct.-Avondale line (the "IJA Line"), representatives of UP/SP and BNSF shall conduct a joint inspection of the IJA Line to consider

whether its condition at closing meets the standard established in Section 10(b)(i) of this Agreement. If the representatives of the parties are unable to agree that the condition of the IJA Line meets this standard, then BNSF shall place $10.5 million of the purchase price in escrow with a mutually agreed upon escrow agent, and closing shall take place. After closing the parties shall mutually select an independent third party experienced in railroad engineering matters (the "Arbitrator") who shall arbitrate the dispute between the parties as to whether the condition of the IJA Line is in compliance with Section 10(b)(i) of this Agreement. Arbitration shall be conducted pursuant to Section 15 subject to the foregoing qualification that the Arbitrator be experienced in railroad engineering matters. If the Arbitrator finds the IJA Line is below the standard, the Arbitrator shall determine the amount (which shall not exceed $10.5 million) required to bring it in compliance with the standard and authorize the payment of such amount out of the escrow fund to BNSF with the balance, if any, paid to UP/SP. Any amount so paid to BNSF out of the escrow fund to bring the IJA Line into compliance with the standard shall be used by BNSF exclusively to that end (or to reimburse BNSF for funds previously expended to that end) and UP/SP shall not, as a tenant on the IJA Line be billed for any work undertaken by BNSF pursuant to the provisions of this Section 10(c).

11. **Term**

This Agreement shall be effective upon execution (which occurred on September 25, 1995) (the "Effective Date") for a term of ninety-nine years, PROVIDED, HOWEVER, that the grants of rights under Section 1 through 8 shall be effective only upon UP's acquisition of control of SP, and provided further that BNSF may terminate this Agreement by notice to UP/SP given before the close of business on September 26, 1995, in which case this Agreement shall have no further force or effect. This Agreement and all agreements entered into pursuant or in relation hereto shall terminate, and all rights conferred pursuant thereto shall be canceled and

deemed void ab initio, if, in a Final Order, the application for authority for UP to control SP has been denied or has been approved on terms unacceptable to the applicants, PROVIDED, HOWEVER, that if this Agreement becomes effective and is later terminated, any liabilities arising from the exercise of rights under Sections 1 through 8 during the period of its effectiveness shall survive such termination. For purposes of this Section 11, "Final Order" shall mean an order of the STB, any successor agency, or a court with lawful jurisdiction over the matter which is no longer subject to any further direct judicial review (including a petition for writ of certiorari) and has not been stayed or enjoined.

12. **Adjustment of Charges**

All trackage rights charges under this Agreement shall be subject to adjustment upward or downward July 1 of each year by the difference in the two preceding years in UP/SP's system average URCS costs for the categories of maintenance and operating costs covered by the trackage rights fee. "URCS costs" shall mean costs developed using the Uniform Rail Costing System.

The rates for reciprocal switching services established in Section 9(i) and for haulage service established in Section 8(m) shall be adjusted upward or downward each July I of each year to reflect fifty percent (50%) of increases or decreases in Rail Cost Adjustment Factor, not adjusted for changes in productivity ("RCAF-U") published by the Surface Transportation Board or successor agency or other organizations. 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 15 of this Agreement.

The parties will agree on appropriate adjustment factors if not covered herein for switching, haulage and other charges.

Upon every fifth anniversary of the effective date of this Agreement, either party may request on ninety (90) days notice that the parties jointly review the operation 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 15 of this Agreement. It is the intention of the parties that rates and charges for trackage rights and services under this Agreement reflect the same basic relationship to operating costs as upon execution of this Agreement (September 25, 1995).

13. **Assignability**

This Agreement and any rights granted hereunder may not be assigned in whole or in part without the prior consent of the other parties except as provided in this section. No party may permit or admit any third party to the use of all or any of the trackage to which it has obtained rights under this Agreement, nor under the guise of doing its own business, contract or make any arrangement to handle as its own trains, locomotives, cabooses or cars of any such third party which in the normal course of business would not be considered the trains, locomotives, cabooses or cars of that party. In the event of an authorized assignment, this Agreement and the operating rights hereunder shall be binding upon the successors and assigns of the parties. This Agreement may be assigned by either party without the consent of the other only as a result of a merger, corporate reorganization, consolidation, change of control or sale of substantially all of its assets.

14. **Government Approvals**

The parties agree to cooperate with each other and make whatever filings or applications, if any, are necessary to implement the provisions of this Agreement or of any separate agreements made pursuant to Section 9(f) and whatever filings or applications may be necessary to obtain any approval that may be required by applicable law for the provisions of such

agreements. BNSF agrees not to oppose the primary application or any related applications in Finance Docket No. 32760 (collectively the "control case"), and not to seek any conditions in the control case, not to support any requests for conditions filed by others, and not to assist others in pursuing their requests. BNSF shall remain a party in the control case, but shall not participate further in the control case other than to support this Agreement, to protect the commercial value of the rights granted to BNSF by this Agreement, and to oppose requests for conditions by other parties which adversely affect BNSF; PROVIDED, HOWEVER, that BNSF agrees to reasonably cooperate with UP/SP in providing testimony to the ICC necessary to demonstrate that this Agreement and the operations to be conducted thereunder shall provide effective competition at the locations covered by the Agreement. UP/SP agree to support this Agreement and its implementation and warrant that it has not entered into agreements with other parties granting rights to other parties granted to BNSF under this Agreement. UP/SP agree to ask the ICC to impose this Agreement as a condition to approval of the control case. During the pendency of the control case, UP and SP shall not, without BNSF's written consent, enter into agreements with other parties which would grant rights to other parties granted to BNSF or inconsistent with those granted to BNSF under this Agreement which would substantially impair the overall economic value of rights to BNSF under this Agreement.

15. **Arbitration**

Except as otherwise provided by any decision of the STB or by separate agreement, unresolved disputes and controversies concerning any of the terms and provisions of this Agreement or the application of charges hereunder shall be submitted for binding arbitration under Commercial Arbitration Rules of the American Arbitration Association which shall be the exclusive remedy of the parties.

16. **Further Assurances**

The parties agree to execute such other and further documents and to undertake such acts as shall be reasonable and necessary to carry out the intent and purposes of this Agreement.

17. **No Third Party Beneficiaries**

This Agreement is intended for the sole benefit of the signatories to this Agreement. Nothing in this Agreement is intended or may be construed to give any person, firm, corporation or other entity, other than the signatories hereto, their permitted successors and permitted assigns, and their affiliates any legal or equitable right, remedy or claim under this Agreement.

UNION PACIFIC RAILROAD COMPANY

By:_____
Title:_____

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

By:_____
Title:_____

---------- REVISION LIST ----------

The bracketed numbers refer to the Page and Paragraph for the start of the paragraph in both the old and the new documents.

[1:1 1:1] Add Para	"03/01/02"
[1:2 1:3] Changed	"_____ " to "___ "
[1:2 1:3] Changed	"July, 2001" to "March, 2002"
[3:4 2:8] Del Paras	"BNSF and UP do ... UP Alternative:"
[4:2 3:2] Changed	"Facilities. ... Facilities." to "Facilities."
[4:2 3:2] Changed	"(2) New Transload" to "(2) Transload"
[5:1 4:1] Del Paras	"BNSF and UP do ... BNSF Alternative:"
[5:3 4:1] Changed	"Existing Transload" to "Transload"
[5:3 4:1] Changed	"mean a Shipper Facility," to "mean Shipper Facilities"
[5:3 4:1] Changed	"tracks in" to "tracks where ... which was in"
[5:3 3:3] Changed	"1995 (i) that ... service. " to "1995"
[6:1 4:1] Del Paras	"BNSF and UP do ... UP Alternative:"
[6:5 4:1] Changed	"New Transload ... facility." to "."
[7:10 5:10] Del Paras	"BNSF and UP do ... BNSF Alternative:"
[8:1 5:11] Del Paras	"UP Alternative: ... this Agreement);"
[8:5 5:13] Changed	"Lines; [UP ... Polk, CA.]" to "Lines."
[8:5 5:13] Changed	"CA.] BNSF" to "Lines. BNSF"
[8:5 5:13] Changed	"ash New Transload" to "ash Transload"
[18:3 15:7] Add Para	"· SP's line in ... Junction (Tower 112);"
[18:10 16:5] Changed	"and the Elmendorf ... of the City" to "and City"
[18:10 16:5] Changed	"TX ("CPSB")" to "Texas Elmendorf ... Agreement"
[26:13 24:3] Changed	"empty and loaded " to "unit "
[26:13 24:3] Changed	"trains to" to "trains (i) ... Rights Lines to"
[26:13 24:3] Changed	"." to ", and (ii) ... Memphis, TN."
[27:1 24:3] Del Para	"BNSF and UP do ... remain in place."
[27:2 24:4] Changed	"[BNSF Alternative: ... Agreement, " to "In addition ... Junction, IL: (1) "
[27:2 24:4] Changed	"points on ... Junction, IL is" to "points north ... traffic is"
[27:2 24:4] Changed	"except that ... these lines.] " to ". These two ... restrictions. "
[36:1 33:1] Del Paras	"BNSF and UP do ... Settlement Agreement."
[42:1 38:4] Changed	"(ii) Such" to "(ii) In the ... construction;"
[42:1 38:5] Changed	"(ii) Such" to "(iii) Such"
[42:2 39:1] Changed	"(iii) " to "(iv) "
[42:3 39:2] Changed	"Agreement." to "Agreement, ... impartial basis."
[44:1 40:3] Changed	"rights pursuant ... Agreement." to "rights pursuant ... Antonio, TX."
[44:2 41:1] Changed	"Agreement," to "Agreement ... Rights Line,"

EXHIBIT A

EXHIBIT A

LIST OF "2-TO-1" POINTS

Points Referred to in Section 1(b)

Provo UT
Salt Lake City UT
Ogden UT
Ironton UT
Gatex UT
Pioneer UT
Garfield/Smelter/Magna UT (access to Kennecott private railway)
Geneva UT
Clearfield UT
Woods Cross UT
Relico UT
Evona UT
Little Mountain UT
Weber Industrial Park UT
North Salt Lake City UT
American Fork UT
Orem UT
Points on paired track from Weso NV to Alazon NV
Reno NV (only intermodal, automotive [BNSF must establish its own automotive facility], transloading, and new shipper facilities)
Herlong CA
Johnson Industrial Park at Sacramento CA
West Sacramento CA (Farmers Rice)
Port of Sacramento CA
Points between Oakland CA and San Jose CA (including Warm Springs CA, Freemont CA, Elmhurst CA, Shinn CA, Kohler CA, and Melrose CA)
San Jose CA

Points Referred to in Section 3(a)

Ontario CA
La Habra CA
Fullerton CA

Points Referred to in Section 4(b)

Brownsville TX
Port of Brownsville TX
Port of Corpus Christi
Harlingen TX
Corpus Christi TX
Sinton TX
San Antonio TX
[Elmendorf TX]
Halstead TX (LCRA plant)
Waco TX
Points on Sierra Blanca-El Paso line

Points Referred to in Section 5(b)

Baytown TX
Amelia TX
Orange TX
Mont Belvieu TX (Amoco, Exxon, Chevron plants)
Eldon, TX (Bayer plant)
Harbor, LA

Points Referred to in Section 6(d)

Camden AR
Pine Buff AR
Fair Oaks AR
Baldwin AR
Little Rock AR
North Little Rock AR
East Little Rock AR
Forrest City, AR
Paragould AR
Dexter MO

EXHIBIT B

EXHIBIT B

TERM SHEET FOR UP/SP-BNSF PROPORTIONAL RATE AGREEMENT COVERING I-5 CORRIDOR

Concept

BNSF trackage rights in the "I-5" corridor will allow BNSF to handle traffic on a single line basis that currently moves via joint BN-SP routes. This Agreement will enable UPSP to compete with BNSF for that traffic and to make rates, using the proportional rates, to and from all points UP/SP serves in the covered territory described below.

Covered Territory

Traffic moving between the following areas north of Portland, Oregon and west of Billings and Havre, Montana:

- Canadian interchanges in Vancouver area
- Points north of Seattle and west of Cascades
- Points south of and including Seattle and west of Cascades
- Washington points east of Cascades and west of and including Spokane
- Points east of Spokane and west of Billings and Havre

and points in

- Arizona,
- California,
- Colorado,
- New Mexico,
- Nevada,
- Oregon,
- Utah,
- Texas west of Monahans and Sanderson, and
- connections to Mexico at El Paso and to the west.

Traffic Covered

Traffic covered will be all commodities (carload, intermodal and bulk) moving both southbound and northbound. All cars loaded or made empty on BNSF lines in the Covered Territory (including reloads) and cars received in interchange.

Proportional Rates

A third party, such as a major accounting firm or other established transportation consultant (the "consultant"), will be employed to compute the proportional rates. The mileage prorate shall be the ratio of (a) BNSF miles between areas north of Portland or interchange north of Portland and SP interchange at Portland to (b) BNSF single-line miles from BNSF origin or interchange to BNSF destination or interchange.

The consultant will develop a table of net ton mile rates (net of refunds, allowances, and rebates). This table will be in matrix form based on commodity, car type, and area north of Portland, Oregon. The rates shown in the matrix will be by commodity at the 3-digit STCC level and by car type for movement between each of the areas north of Portland, Oregon, and the Portland interchange. The net ton mile rates will be based on movements between each of the areas north of Portland and the group of states (including connections to Mexico) listed above. The initial rates will be derived based on the BN-SP portion of BN-SP interline rates (net of refunds, allowances, and rebates) in effect in the quarter preceding acquisition of SP by UP.

The net ton mile rate for each commodity/car type shall be a weighted average of the rates applicable to movements of each such commodity/car type between the points listed above. An example of this computation is attached.

New rates will be derived each subsequent quarter. In subsequent quarters, the rates will include a prorate of both SP-BNSF interline rates (net of refunds, allowances, and rebates) and BNSF single-line rates (net of refunds, allowances, and rebates). At such time as a rate can be developed for a particular commodity/car type on the basis of a BNSF single-line rate then future rate adjustments for such commodity/car type shall be based solely on BNSF single-line rates. All computations of net ton mile rates will be based on rates that actually moved traffic.

UP/SP agree that any rate it publishes will reflect the proportional rate from the latest quarterly study and BNSF's division shall be that amount. Movements using proportional rates shall be interline BNSF-UP/SP movements and will be billed accordingly. Proportional rates used by UP/SP in contracts will be escalated on the same basis as UP/SP's rates are escalated. BNSF and UP/SP will establish procedures to ensure that in settling interline accounts UP/SP's and BNSF's revenue south of Portland is not disclosed to the other.

Application

The net ton mile rates in each cell of the matrix will be applied to the BN mileage and the associated net tons from areas north of Portland to Portland interchange to develop the proportional rate to the Portland interchange.

Service

BNSF shall accept, handle, switch and deliver traffic moving under this Agreement without any discrimination in promptness, quality of service, or efficiency in favor of comparable traffic moving in BNSF's account. UP/SP has the right to provide equipment. BNSF will work with UP/SP to establish and provide trackage for strategically located car distribution points in BN territory. To the extent justified by business volumes, BNSF will continue operating Vancouver, BC-Portland (SP interchange) trains comparable to BN Nos. 111 and 112. BNSF will cooperate with UP/SP to establish necessary blocks to provide efficient and competitive service on traffic moving under the proportional rate.

Third Party Consultant

The third party consultant shall be jointly employed by UP/SP and BNSF. The parties will share equally in the expense of employing such third party consultant. Both UP/SP and BNSF shall have the right to audit the work of the third party consultant and agree to share in any irregularities found in this work and cooperate to work with the third party consultant to establish procedures to promptly correct those deficiencies. The third party consultant shall be required to remain impartial between UP/SP and BNSF. Any breach of the impartiality requirement shall result in the termination of such third party consultant and the selection of a new consultant by the parties.

Example of Revenue Per Ton Mile
Calculation by Origin-Destination Cell
Cell Includes Car Type and Commodity

	Assumption:	Move 1	Move 2
1.	BNSF Revenue Per Car From O/D Areas North of Portland to Destination States	$5000	$2000
2.	BNSF Miles From O/D Areas North of Portland to Destination States	1000	500
3.	BNSF Net Tons From O/D Areas North of Portland to Destination States	100	50
4.	BNSF Number of Carloads From O/D Areas North of Portland to Destination States	10	5
5.	BNSF Miles Between Actual Point of Origin to Interchange and Portland	300	200

A. Revenue/NTM Factor (Computed by Consultant for Each Call in Matrix)

$$\frac{\sum (1) \times (4)}{\sum (2) \times (3)} \text{ (for all moves)}$$

$$\frac{\dfrac{5000 \times 10}{1000 \times 100} + \dfrac{2000 \times 5}{500 \times 50}}{10 + 5} = \$0.06/\text{NTM}$$

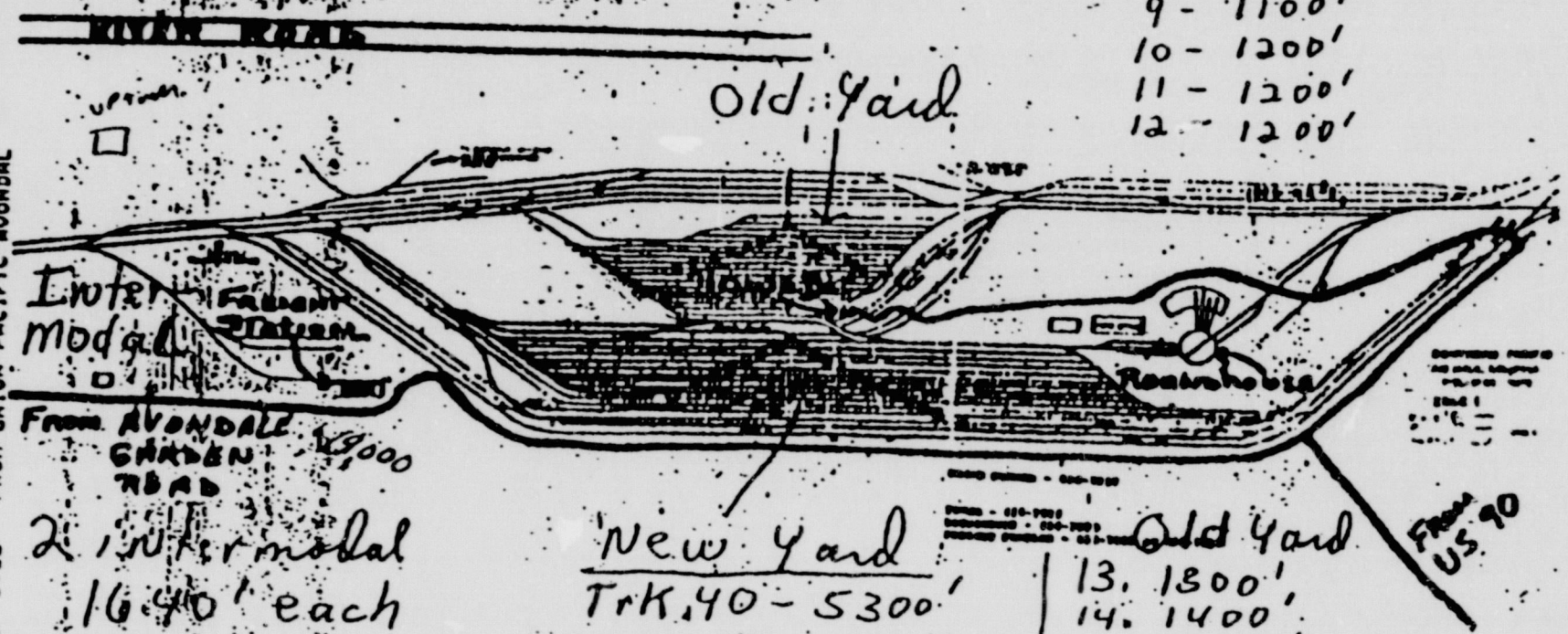
B. Compute BNSF Division on a Specific Move

(A) x (5) x (3)
$0.06 x 300 x 100 = $1800
$0.06 x 200 x 50 = $ 600

EXHIBIT C

6660-3588
342-2280

S.P. Avondale Yard



needs Rehab

Old Yard Capacity

4- 7900' (Thru X-overs)
5- 7800' (" ")
6- 1900'
7- 2500'
8- 2100'
9- 1100'
10- 1200'
11- 1200'
12- 1200'

2 Intermodal
16,400' each

New Yard

Trk. 40- 5300'
37-39- 4000'
30-36- 2000'
29 - 1500'
28 - 1200'
27 - 1150'
26 - 1100'
25 - 900

Old Yard

13. 1800'
14. 1400'
15. 1800'
16. 1700'
17. 1600'
18. 1500'
19. 1400'
20 1300'
21 1200'
22 1100'
23.) 1000'
24.) 900+

Not to scale
All calculations approximate

EXHIBIT C

EXHIBIT D

EXHIBIT D

April 24, 1996

BNSF - UP/SP DISPATCHING PROTOCOLS

As agreed: Dave Clifton - BNSF
Hank Jay - SP
Steve Barkley - UP

1. Scope: These protocols apply on all rail line segments where Burlington Northern Railroad Company or The Atchison, Topeka & Santa Fe Railway Company (which will be referred to jointly or individually as "BNSF") has trackage rights over tracks of the entity or entities resulting from the merger of the rail affiliates of Union Pacific Corporation and Southern Pacific Rail Corporation (which will be referred to jointly or individually as "UP/SP") and on all rail line segments where UP/SP has trackage rights over tracks of BNSF. All such rail lines will be referred to as "joint trackage and will include all current joint line trackage rights."

2. Purpose: To ensure that BNSF and UP/SP trains operating on joint trackage are given equal dispatch without any discrimination in promptness, quality of service or efficiency and that the competitiveness of tenant operations on joint trackage is not adversely affected by the fact that the other railroad owns the track.

3. General Instructions: BNSF and UP/SP will issue written instructions to all personnel (including supervisors) responsible for train dispatching on joint trackage that trains of the tenant are to be dispatched exactly as if they were trains of the same class of the owner and given equal treatment with trains of the owner. These instructions will be issued at agreed intervals or at the request of either party.

4. Monitoring Systems: At the request and expense of the tenant, the owner will make available computer terminals, facilities or capabilities comparable to those available to its own dispatchers showing joint trackage it dispatches so that the tenant can monitor the handling of its trains by the owner.

5. Train Information: The tenant will provide to the owner, and regularly update, information about its expected train operations and schedules (including priorities, time commitments, horsepower per trailing ton, etc.) over joint trackage, preferably using electronic data interchange. Parties will establish run time standards by train category based on expected train volumes for each line segment. If train volumes are different than expected then adjustments to run time standards will be made by mutual agreement. The tenant will provide reliable and current information about trains approaching joint trackage, including train arrival time and train characteristics, preferably by providing at its expense computer terminals, facilities or capabilities showing trains approaching joint trackage, sufficiently in advance to allow dispatchers to plan for them. The owner will provide to the tenant advance notice of planned maintenance-of-way projects, line closures and train or equipment restrictions. BNSF and UP/SP will cooperate to develop a process for discussing maintenance windows in advance and agree upon so as not to adversely affect schedules of one carrier more than the other.

6. **Specific Instructions:** The owner will permit the tenant to transmit instructions regarding the requirements of specific trains and shipments to designated dispatching center employees responsible for handling those trains.

7. **Train Priorities/Run Time Standards:** BNSF and UP/SP will at all times provide to each other current procedures for assigning dispatching priorities or rankings to their trains and information sufficient to show how those procedures are applied to their own trains. The tenant will assign priorities or rankings to its trains operating on joint trackage using the owner's procedures, and the owner will dispatch tenant trains in accordance with those priorities or rankings. It is understood that technological advances in computer aided dispatching might result in changes to priority assignment methodologies. The parties agree to discuss technological changes which might affect priority assignment methodologies prior to implementation. The Joint Service Committee will be responsible for reviewing these assignments to ensure that they are applied equitably by both railroads. It is agreed that a three member panel from each carrier will make up the Joint Service Committee. Suggestions for three member panel are representatives from Joint Facilities, VP Transportation, and Joint Trackage Rights Operations.

8. **Entry to Joint Trackage:** At points where tenant trains enter joint trackage, entry will be provided by the owner on a first-come, first-served basis, taking into consideration the relative priorities of affected trains and the specific needs and operating characteristics of individual trains of both railroads. [If operating circumstances make strict application of this principle difficult or uncertain, BNSF and UP/SP may jointly establish standards for determining sequence of entry to joint trackage.] Parties will communicate daily on any conflicts concerning entry to joint trackage to gain resolution.

9. **Communications:** BNSF and UP/SP will provide to each other, and keep current, lists of dispatching personnel responsible for dispatching each segment of joint trackage and contact numbers. For each segment, BNSF and UP/SP will designate supervisory employees to serve as the day-to-day contacts for communications about operating changes, service requests and concerns. Where feasible and economical, dedicated phone lines or computer links will be established for these communications.

10. **Access to Dispatching Centers:** Appropriate officials of either railroad will be admitted at any time to dispatching facilities and personnel responsible for dispatching joint trackage to review the handling of trains on joint trackage and will be provided an office in the other railroad's dispatching center (although both railroads will take reasonable steps to prevent disclosure of proprietary information not relevant to that review). In order to support BNSF operations over UP/SP trackage rights granted in connection with the UP/SP merger, UP/SP will pay BNSF an amount equal to the reasonable and conventional salary of one supervisory employee to be placed by BNSF at UP/SP's Harriman dispatching center. It is understood that management and supervision of dispatching operations is the responsibility of the owning carrier.

11. **Performance Measurement**: BNSF and UP/SP will cooperate to develop train performance evaluation methods under which train performance of tenant trains on joint trackage segments can be compared to train performance of the owner's trains on the same segments for the same train category and priority.

12. **Personnel Incentives and Evaluation**: In evaluating the performance of employees and supervisors responsible for dispatching joint trackage, both BNSF and UP/SP will consider train performance of tenant trains and effectiveness in cooperating with tenant personnel and meeting tenant service requirements in the same manner as such factors are considered with respect to the owner's trains, personnel and requirements. If bonuses, raises or salaries of those persons are affected by performance of the owner's trains, performance of the tenant's trains shall be considered on the same basis to the extent feasible.

13. **Disagreements**: The designated contact supervisors are expected to raise questions, disagreements, concerns or disputes about compliance with these protocols promptly as and when any such matters arise and to use their best efforts to resolve them. If a matter is not resolved to the satisfaction of both parties, it will be presented to the Joint Service Committee. If a satisfactory resolution cannot be achieved by the Joint Service Committee, the matter will be submitted to binding summary arbitration before a neutral experienced railroad operating official within fourteen days. The parties will agree in advance on the sanctions available to the arbitrator to address failures to comply with these protocols.

14. **Modifications**: As the ultimate objective of these protocols is the equal, flexible and efficient handling of all trains of both railroads on joint trackage, these protocols may be modified at any time by mutual agreement, consistent with that objective.

EXHIBIT E

2-To-1 Point Identification Protocol

As a condition of the Surface Transportation Board's (STB) approval of the consolidation of Union Pacific Railroad Company (UP) and Southern Pacific Transportation Company (SP), The Burlington Northern and Santa Fe Railway Company (BNSF) was granted the right to serve all shipper facilities, that as of September 25, 1995, were open to both UP and SP, and no other railroad, whether via direct service, reciprocal switching, joint facility or other arrangements. Since the consolidation was consummated, BNSF and UP have been working to identify a complete list of 2-to-1 shipper facilities to which BNSF is entitled to access. The purpose of this protocol is to establish procedures and mechanisms for further identifying 2-to-1 shipper facilities open to BNSF as a result of the conditions imposed in the UP/SP merger. Those procedures and mechanisms are as follows:

1. BNSF shall submit to UP, by written or electronic communication, the name and address of any facility to which access is sought. In addition to the name and address of the facility, BNSF shall furnish any additional information relating to the facility's identity and location that is in BNSF's possession when the request for access is made. BNSF shall also provide any information in its possession at such time pertaining to the rail service options that were available to the facility on or before September 25, 1995. UP will handle for BNSF any traffic en route to the facility pending UP's determination of BNSF's right to access the facility in question. If UP determines that BNSF is not entitled to access a particular facility, BNSF will terminate any BNSF direct routing of traffic to that facility. UP shall be compensated for any traffic en route in accordance with the method of compensation set forth in Paragraph 7, below.

2. UP shall have five (5) business days from the date of such communication to respond by written or electronic communication to any request for access, provided that, if BNSF shall request a determination on more than five shipper facilities on a single day or, if a single request pertains to more than five (5) shipper facilities, BNSF shall identify the five (5) shipper facilities that need immediate attention, and the five (5) business day requirement shall apply to those shipper facilities, with the remaining shipper facilities request or requests to be responded to within ten (10) business days after the date of the request(s).

3. If UP fails to respond to an access request by the close of business of the fifth business day or, in the case of requests for which UP has ten business days to respond, by the close of the tenth business day, BNSF shall be deemed to have access to such facility or facilities as set forth in Paragraph 4 below, and UP shall be deemed to have waived any claims that BNSF is not entitled to serve the facility or facilities.

4. If UP approves BNSF's request for access, BNSF shall immediately be authorized to serve the facility either directly, through reciprocal switching, or, with UP's prior approval, a third party contractor, as provided for in the UP/BNSF Settlement Agreement dated September 25, 1995, as amended. No less than five (5) business days prior to the date that BNSF proposes to begin service to a facility, BNSF shall elect the mode of service that it intends to utilize and shall notify UP in writing or electronically of its election. BNSF shall have the right, upon 180 days prior written notice to UP, to change its election; provided, however, that BNSF shall (i) not change its election more often than once every five years, and (ii) shall reimburse UP for any costs incurred by UP in connection with such changed election. UP may not reverse a prior decision approving

BNSF's request for access to a facility without either BNSF's consent or approval by the STB.

5. If UP declines to approve a BNSF request for access to any facility, and BNSF believes that UP has an insufficient or inappropriate reason to decline access, BNSF may so notify UP, either in writing or by electronic communication, of the reasons why BNSF believes it is entitled to such access, and upon such notice, may seek an order from the STB finding that BNSF was entitled to access to that facility.

6. UP shall approve all such requests where, on the basis of all available information, UP concludes that a particular facility was open to service by both UP and SP, either directly or through reciprocal switching, joint facility or other arrangements and by no other rail carrier, as of September 25, 1995. If UP declines to approve a BNSF request for access to any facility, UP shall provide as part of its notification to BNSF a statement in writing or by electronic communication of its reasons and of the specific evidence supporting its determination that BNSF should not have access to the facility. A statement that UP lacks sufficient information to make a determination as to whether a facility is a 2-to-1 facility is not an adequate reason to deny a BNSF request for access to a facility. At any time after UP's notification, BNSF may request UP to reconsider its decision declining to approve BNSF's request for access.

7. If BNSF transports traffic to or from a shipper facility pursuant to paragraph 1 above and it is later determined that BNSF is not entitled to access to that facility, BNSF shall compensate UP for the movement of such traffic as follows: If a joint through rate is available, then UP is entitled to $3 per car mile for the loaded move from the applicable junction in the price document. If multiple junctions are available, BNSF

receives its longest haul and UP receives $3 per car mile beyond that junction. If no joint through rate exists, BNSF receives its longest haul via junctions in existence between UP and BNSF, prior to the date of UP control over SP, September 11, 1996, and UP receives $3 per car mile beyond. UP must file a claim with BNSF to recover revenues under this section making reference on the claim to this section of the joint 2-to-1 Point Identification Protocol.

8. BNSF and UP shall identify an individual or individuals within their respective organizations as the person or persons to whom all communications pursuant to this protocol shall be directed.

9. The parties agree to submit any disputes under this protocol to the STB for resolution or, with the consent of both parties, to arbitration, as described in the UP/BNSF Settlement Agreement dated September 25, 1995, as amended.

AGREED TO AND ACCEPTED BY:

UNION PACIFIC RAILROAD COMPANY

John H. Ransom

Date: June 24, 1998

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Peter J. Pelland

Date: June 26, 1998

EXHIBIT F

EXHIBIT F

LIST OF OVERHEAD TRACKAGE RIGHTS

1. Western Trackage Rights

   A. UP/SP shall grant BNSF Overhead Trackage Rights on ~~{the following lines:}~~SP's Valley Subdivision between MP 141.9 near Binney Junction, CA and Roseville, CA in the vicinity of SP's Valley Subdivision MP 106.6~~{; and}~~**[.]**

~~{[SP's Fresno Line between MP 136.2 in the vicinity of Elvas (Elvas Interlocking) and MP 88.9 in the vicinity of Stockton, CA]}~~

2. South Texas Trackage Rights

   A. UP/SP shall grant BNSF Overhead Trackage Rights on the following lines:

      a) SP's Port Lavaca Branch, between Placedo, TX in the vicinity of MP 14.2, and a point of build-in along said branch in the vicinity of MP 6.93 at ~~{Karney}~~ **{Kamey}**, TX; and

      b) UP's line between Round Rock, TX, in the vicinity of UP's Austin Subdivision Milepost 161.79, and McNeil, TX, in the vicinity of UP's Austin Subdivision Milepost 166.1.

3. Eastern Texas – Louisiana Trackage Rights

   A. UP/SP shall grant BNSF Overhead Trackage Rights on UP's Beaumont Subdivision between MP 458.69 in the vicinity of Beaumont, TX and MP 377.98 (Gulf Coast Junction) in the vicinity of Houston, TX.

4. Additional Rights

   A. UP/SP shall grant BNSF Overhead Trackage Rights on SP's Martinez Subdivision between approximately MP 2 in the vicinity of Oakland, CA and approximately MP 13 in the vicinity of Richmond, CA.

5. Rights to Omnibus Points

   A. UP/SP shall grant BNSF Overhead Trackage Rights over ~~{UP'SP's}~~ **[UP/SP's]** Jefferson City Subdivision between MP 34.8 near Pacific, MO and MP 43.8 near Labadie, MO.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2002, I caused a copy of the foregoing "Joint Submission of Restated and Amended BNSF Settlement Agreement" to be served by first-class mail, postage prepaid, or by a more expeditious manner of delivery on all parties of record in Finance Docket No. 32760 (Sub-No. 21).

Michael L. Rosenthal

204685

MAYER BROWN ROWE & MAW

1909 K STREET, N.W.
WASHINGTON, D.C. 20006-1101

MAIN TEL (202) 263-3000
MAIN FAX (202) 263-3300
www.mayerbrownrowe.com

ERIKA Z. JONES
DIRECT TEL (202) 263-3232
DIRECT FAX (202) 263-5232
ejones@mayerbrownrowe.com

February 4, 2002

VIA HAND DELIVERY

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

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

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are the original and twenty-five (25) copies of the Reply of The Burlington Northern and Santa Fe Railway Company to UP's Motion to Dismiss Petition for Clarification of the Trackage Rights Fee Adjustment Mechanism (BNSF-99). Also enclosed is a disk with the text of the pleading in Word Perfect 9 format.

I would appreciate it if you would date-stamp the enclosed extra copies and return them to the messenger for our files.

Sincerely,

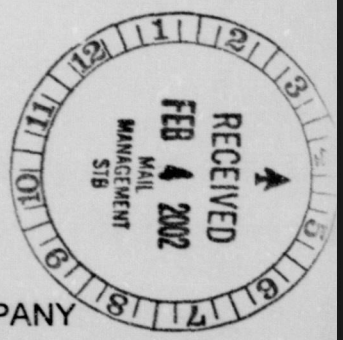
Erika Z. Jones/als

Erika Z. Jones

Enclosures

cc: All Parties of Record

BNSF-99



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

BNSF'S REPLY TO UP'S MOTION TO DISMISS PETITION FOR CLARIFICATION OF THE TRACKAGE RIGHTS FEE ADJUSTMENT MECHANISM

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

The Burlington Northern
and Santa Fe Railway Company
2500 Lou Menk Drive
Third Floor
Ft. Worth, Texas 76131-0039
(817) 352-2353 *or* (817) 352-2368

Erika Z. Jones
Adrian L. Steel, Jr.
Adam C. Sloane

Mayer, Brown, Rowe & Maw
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Attorneys for The Burlington Northern and Santa Fe Railway Company

February 4, 2002

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

BNSF'S REPLY TO UP'S MOTION TO DISMISS PETITION FOR CLARIFICATION OF THE TRACKAGE RIGHTS FEE ADJUSTMENT MECHANISM

The Burlington Northern and Santa Fe Railway Company ("BNSF") submits this Reply to "UP's Motion to Dismiss BNSF's Petition for Clarification of the Trackage Rights Fee Adjustment Provision" (UP/SP-392) ("Motion"). In its Petition for Clarification (BNSF-98), BNSF requested a clarification from the Surface Transportation Board ("Board") as to whether the base to be used for the annual adjustment of trackage rights fees under Section 12 of the BNSF Settlement Agreement should include the purchase premium that UP paid to acquire SP and certain merger-related capital expenditures that were expressly to be funded solely by UP under the terms of the Settlement Agreement. BNSF filed its Petition with the Board, notwithstanding the fact that UP has brought a claim in arbitration, because the issue is one of first impression which raises significant policy issues as to the purpose and intention of the Board's trackage rights

condition – a key condition to the Board's approval of the UP/SP merger, and it is important that other parties to the UP/SP merger proceeding be afforded the opportunity to submit their views on the issue.[1] Resolution of the issue in the pending private arbitration would not afford them that opportunity. Indeed, a number of parties have submitted replies to BNSF's Petition which provide their views on the issue and which advocate that the Board should resolve the issue.[2]

UP's Motion seeks to deny these parties the opportunity to have their views heard by the Board. Specifically, UP argues that the Petition for Clarification should be dismissed because (i) the BNSF Settlement Agreement requires arbitration of all disputes; (ii) BNSF invoked arbitration by filing a counter-request for arbitration and participating in the arbitration; and (iii) the dispute does not require Board action since BNSF is competing effectively. UP also argues that the Petition should be dismissed for failure to state a claim because BNSF failed to submit any evidentiary support for its assertions concerning the parties' intent.

As shown below, UP's Motion to Dismiss should be denied. The issue presented by BNSF's Petition is rooted in Section 7 of the CMA Agreement, and ACC, as the

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[1] In total, five issues relating to the adjustment mechanism were originally raised in the arbitration. As UP has reported in its Motion, UP and BNSF have reached agreement as to three of the five issues. UP Motion at 3. In addition to the issue presented by BNSF's Petition, the parties continue to disagree concerning whether UP has correctly reflected in the adjustment of the mill rates the changes in the gross ton mile costs associated with its declining URCS unit costs involved in trackage rights operations, which issue remains to be arbitrated.

[2] As described further below, replies in support of BNSF's Petition were filed by the American Chemistry Council ("ACC"), the successor to the Chemical Manufacturers' Association, the National Industrial Transportation League ("NIT League"), Western Coal Traffic League ("WCTL"), TXU US Holdings Company (successor to TXU Electric Company ("TUE")), and Entergy Services, Inc. and Entergy Arkansas, Inc. ("Entergy"). Over 1100 shippers are collectively represented by these replies.

successor to CMA, is entitled to be a party to and have its views considered in the resolution of the issue – an opportunity that ACC would not have in the arbitration between UP and BNSF because it is not a party to that arbitration.[3] Just as important, the intent and purpose of the Board itself in approving the change in the adjustment mechanism from one based on RCAF-U to one based on the difference in actual UP operating and maintenance costs are critical to the proper resolution of the issue. The Board's conditions were imposed as a part of its statutory responsibility to ensure that pre-merger competition is preserved and that the UP/SP merger was in the overall public interest, and the Board should not delegate to the private arbitration process its responsibility to ensure the proper implementation of its conditions.[4] Finally, the Board's conditions were imposed to protect the interests of shippers, and, as the Board has often recognized, shippers have rights under the Board's conditions and may be heard when necessary to preserve those rights – but, like ACC, the shippers, who are not parties to the arbitration, would not be afforded a full opportunity (or, perhaps, any opportunity at all) to be heard in the UP-BNSF arbitration.

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[3] Although ACC might be permitted to be a witness in a UP-BNSF arbitration, that would not be a substitute for ACC's right to participate as a full party in an adjudication of the meaning and effect of key provisions of the CMA Agreement.

[4] Although a decision in the arbitration could be appealed to the Board, the scope of the Board's review of such a decision might arguably be circumscribed – thus improperly limiting the Board's ability to make the kind of public interest decisions that it could make in the de novo proceeding sought by BNSF here and that, under its governing statutes, the Board alone is authorized to make. Moreover, even if the arbitrator's interpretation of the Board's intent in imposing the trackage right conditions were reviewed de novo, it would be wasteful for the Board to withhold its views on the public interest ramifications of the merger conditions until after the parties have litigated the issue in an arbitration.

BACKGROUND

As the Board recognized in Decision No. 44, the trackage rights granted to BNSF pursuant to the BNSF Settlement Agreement are critical to the Board's finding that the UP/SP merger was in the public interest. See Decision No. 44 at 108, 145, 180. The trackage rights are designed to remedy the competitive harm that would otherwise have resulted from the merger, and, without the grant of the trackage rights to BNSF that would enable BNSF to compete effectively with UP, pre-merger competition would not have been preserved.[5]

As the Board has also recognized, the operating terms and level of compensation for the trackage rights needed to be structured to enable BNSF to compete effectively with UP as to both rates and service and to achieve and maintain sufficient traffic density over the long term. See Decision No. 44 at 132-44. See also 49 U.S.C. § 11324(c) (1996) (Board is required to approve the operating terms and level of compensation for trackage rights imposed in a merger context). There was much debate during the UP/SP proceeding as to whether the structure of the trackage rights as set forth in the BNSF Settlement Agreement would in fact enable BNSF to do so. In the end, the Board, after having listened to and considered the views of all parties, modified the trackage rights in a number of specific ways so that BNSF's ability to provide competitive replacement service would be assured. In so doing, the Board recognized that BNSF's ability to provide such service to "2-to-1" shippers, as well as to

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[5] Indeed, the Board noted that the proposed alternative remedy of the divestiture of major portions of SP as suggested by various parties would have destroyed important efficiency benefits of the merger. Decision No. 44 at 107.

new facilities and transloads on the trackage rights lines and to build-in/build-out lines, depends on a properly-costed and adjusted level of trackage rights fees.

As relevant here, the Board approved a revision to the mechanism at issue in BNSF's Petition for Clarification which was to be used for the annual adjustment of the trackage rights fees. Specifically, the original BNSF Settlement Agreement had provided that the fees would be adjusted by reference to RCAF-U. However, various parties objected to the use of RCAF-U because it does not reflect productivity, and there was a fear that the failure to consider improvements in UP's productivity would result in trackage rights fee increases that would not accurately reflect changes in UP's actual costs. As stated by ACC,

> [The adjustment factor] was changed . . . by Section 7 of the CMA Agreement, to escalate in accordance with actual, productivity-adjusted maintenance and operating costs. The point of this change was to ensure that the 3.1 mills per gross ton mile would not escalate above actual cost inflation over the 99-year term of the BNSF settlement agreement, as it might if it were escalated in accordance with RCAF-U.

CMA-15 at 2 (emphasis in original).

UP and BNSF agreed with CMA to revise the mechanism to provide that the annual adjustments would be based on changes in UP's actual operating and maintenance costs, and language to that effect was included as Section 7 of the CMA Agreement. The Board accepted the proposed revision and noted that the revised mechanism would reflect "costs more accurately." Decision No. 44 at 142 n.169. The Board most recently reaffirmed in Decision No. 21 in the UP/SP general oversight proceeding that "it is important that the trackage rights fee adjustment mechanism work as intended, so that any increases or decreases in UP's costs are properly reflected in

the agreed-upon adjustments to the trackage rights fee." Finance Docket No. 32760 (Sub-No. 21), Decision No. 21 (served Dec. 20, 2001) at 6-7.[6]

It is against this background of involvement by a number of parties and the Board itself in the debate as to how the trackage rights fees should be adjusted each year to ensure that BNSF is able to compete effectively over the entire 99-year term of the BNSF Settlement Agreement that BNSF sought Board resolution of the issue and UP has filed its Motion to Dismiss. It is apparent on the basis of such third-party and Board involvement alone that Board resolution of the issue presented by BNSF's Petition is warranted. In addition, none of the specific reasons advanced by UP in its Motion justify dismissal of the Petition.

ARGUMENT

I. The BNSF Settlement Agreement Does Not Require Arbitration of the Issue

UP's first basis for dismissing BNSF's Petition for Clarification is that the BNSF Settlement Agreement requires that the parties' dispute concerning the proper investment base to be used in the annual adjustment mechanism must be submitted to arbitration. UP's argument fails for several reasons.[7]

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[6] The Board also expressed in Decision No. 21 its preference for a private resolution of the parties' fee adjustment dispute, but, as discussed below, the Board has also recognized that, notwithstanding the arbitration clause of the BNSF Settlement Agreement, it should and will act to resolve issues as necessary to provide guidance to the parties and to arbitrators on issues with broad implications with respect to the implementation of the Board's merger conditions.

[7] In addition to the reasons given in the text above, the arbitration provision of the Restated and Amended BNSF Settlement Agreement was revised to provide for arbitration "[e]xcept as otherwise provided by any decision of the STB". As explained in the text, the Board has indicated in various decisions that Board resolution of disputes is appropriate when it would provide guidance to the parties and arbitrators as to the intended scope of the Board's conditions.

First, the adjustment mechanism language in the BNSF Settlement Agreement comes from the CMA Agreement, and, as a party to the CMA Agreement, ACC has a right to participate in the resolution of the dispute concerning the language. ACC is not, however, a party to the pending arbitration which, while technically arising out of the BNSF Settlement Agreement, clearly centers on the language of Section 7 of the CMA Agreement. Further, there is no arbitration provision in the CMA Agreement.

Second, the Board imposed the BNSF Settlement Agreement as well as the CMA Agreement as part of its responsibility to ensure that the proposed UP/SP merger was consistent with the public interest. See Decision No. 44 at 98 ("The Act's single and essential standard of approval is that the [Board] find the [transaction] to be 'consistent with the public interest.'") (quoting Missouri-Kansas-Texas R. Co. v. United States, 632 F.2d 392, 395 (5th Cir. 1980). That responsibility requires that the Board retain and exercise the authority to determine whether the conditions it imposes on a merger or other control transaction are being properly implemented so that the public interest purpose behind each condition – here the preservation of pre-merger competition – continues to be met. Requiring that this significant policy issue be resolved through the private arbitration process would not be consistent with the Board's responsibility, and the issue should be resolved in this proceeding.[8]

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[8] In this regard, the Board's predecessor, the Interstate Commerce Commission, clarified four issues relating to the compensation to be paid with respect to the trackage rights awarded to SP as a condition to the Commission's approval of the 1982 UP/MP/WP consolidation. See St. Louis Southwestern Ry. Co. – Trackage Rights Over Missouri Pac. R.R. – Kansas City to St. Louis, Finance Docket No. 30000 (Sub-No. 16), 8 I.C.C.2d 80 (1991). Interestingly, the Commission's decision was entered in response to a petition for clarification filed by UP.

The Board has previously recognized that it has a role to play in resolving issues such as the issue presented by BNSF's Petition. Thus, in Decision No. 86, the Board indicated that clarification of issues arising under the BNSF Settlement Agreement may be appropriate to "provide guidance to the parties and to arbitrators in interpreting the intended scope" of the conditions to the UP/SP merger. See Decision No. 86 at 4. Similarly, the Board has stated that "an administrative proceeding might be preferable for the resolution of general matters with broad implications with respect to implementation of our conditions." Id. at 6. These principles strongly support Board action at this juncture in order to provide guidance to the arbitrator(s) in advance of the litigation of this dispute in arbitration.[9]

Finally, it is not just UP and BNSF (or even UP, BNSF, and ACC) that have a stake in the dispute as to whether the annual adjustment to trackage rights fees should be based on the inclusion of the purchase premium and the solely UP-funded merger-related capital expenditures. Rather, the right to have the trackage rights fees adjusted in a manner consistent with changes in actual UP operating and maintenance costs was intended to protect shippers as well. As the Board recognized in Decision No. 44 and in

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[9] Thus, as indicated in note 4, above, even though the arbitration of this dispute might not preclude the Board from weighing in on the issue – through a ruling on an appeal from the arbitration decision – it would be far preferable for the Board to declare its authoritative views on the issue now, rather than wait until after the parties have incurred the time and expense in litigating the issue in arbitration. Moreover, as also discussed in note 4, above, the scope of review of an arbitration decision on the issue raised in BNSF's Petition may be subject to dispute. To the extent that the Board would accord any deference to an arbitration decision, the requirement that the matter first be arbitrated could, in effect, limit the Board's ability to make the public interest determination at issue here – thereby implicitly delegating to an arbitrator the Board's exclusive and plenary authority under its governing statutes to determine whether the public interest requires the imposition and/or modification of conditions on a railroad merger.

a number of decisions thereafter, the merger conditions were imposed by the Board to protect the public interest in preserving pre-merger competition, and, as beneficiaries of the conditions imposed, shippers have rights independent of any rights BNSF may have under the BNSF Settlement Agreement to have the conditions implemented in a manner which will effectively preserve that competition. See Decision No. 44 at 12 n.15 (shippers at points opened up to BNSF under the BNSF Agreement have rights under the Agreement); Decision No. 72 (served May 23, 1997) at 8 n.18 ("We wish to clarify that shippers have rights under the BNSF agreement because we have imposed the terms thereof as a condition to the merger."). The Board most recently reaffirmed the rights of shippers under the Board's merger conditions in its decision ending the UP/SP general oversight proceeding:

> [W]e note that shippers have a right (independent of any rights and interests BNSF may have under the BNSF Agreement) to seek Board intervention to ensure that the conditions we imposed on the merger are implemented in a manner that effectively preserves per-merger competition. See, e.g., Union Pacific Corp.—Control & Merger—Southern Pacific Rail Corp., STB Finance Docket No. 32760, Decision No. 72 (STB served May 23, 1997) (Merger Dec. No. 72), slip op. at 8 n.18.

Finance Docket No. 32760 (Sub-No. 21), Decision No. 21 (served Dec. 20, 2001) at 6.

Because, however, shippers would not be afforded the opportunity to participate as parties to the arbitration – and, because of the streamlined nature of arbitration proceedings, might not be afforded an opportunity to participate in the arbitration at all – arbitration is not an appropriate vehicle for determining and vindicating their rights.[10]

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[10] In this regard, it is clear from the pleadings filed by the shippers in response to BNSF's Petition for Clarification that their comments on the purpose and intent of the trackage rights fee adjustment mechanism are relevant and should be considered in the resolution of the issue. For instance, ACC has advised the Board that it "was certainly

II. BNSF's Conduct in the Pending Arbitration Does Not Require Dismissal

UP also argues that the Board should dismiss BNSF's Petition because "BNSF and UP Have Already Invoked Arbitration." UP Motion at 5. This argument ignores critical facts and misstates the consistent position that BNSF has taken in the arbitration.

Contrary to UP's assertion (UP Motion at 5), BNSF did not "invoke" arbitration before it filed its Petition for Clarification. Rather, BNSF conformed to the expedited procedures provided by the American Arbitration Association's rules for the filing of answers and counterclaims and for the completion of other procedural preliminaries. In doing so, BNSF made clear that it was not conceding that arbitration was the appropriate method for resolving the issues raised by UP in its arbitration demand. Accordingly, in its November 1, 2001 letter setting forth its answer and counter-request,

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not in CMA's (now the Council's) contemplation that the 3.1 mills per gross ton mile would be adjusted upward to reflect UP's writing up of assets owing to its purchase of SP at a price above book value" and that "it was never the Council's intention that the escalation mechanism be a backdoor means, in effect, of billing BNSF for the change in book value resulting from the UP/SP corporate merger." CMA-15 at 2-3. Similarly, NIT League has indicated that BNSF's Petition should be granted because, prior to the merger, SP would not have had to bear capital costs for merger-related improvements nor would SP's rates have been impacted by any merger-related acquisition premium. January 14, 2002 Letter from Nicholas J. DiMichael to Secretary Vernon A. Williams at 1-2. Likewise, WCTL expressed the view that it was its intent during the UP/SP merger proceeding that "purchase premium costs should not be included in the URCS-based cost formulations" it presented to the Board. WCTL-27 at 4. Finally, Entergy has asserted that it has "an interest in the resolution of" the issues presented by BNSF's Petition and has argued that allowing the purchase premium to be included in determining the amount of the annual adjustment of the trackage rights fee causes an improper double count since the purchase premium is effectively embedded in the 3.1 mills base. ESI-35 at 3-4. See also TUE-26 at 5 ("TUE believes that it is fundamentally unfair for UP to require BNSF (and BNSF's customers) to pay a share of the multi-billion dollar premiums UP paid to acquire SP.")

BNSF specifically reserved the right to submit any of the issues raised in the arbitration to the Board, including, in particular, the issue relating to the proper investment base:

> BNSF reserves the right to submit any of these issues for resolution by the STB pursuant to the jurisdiction that it reserved to itself to "provide guidance to the parties and to arbitrators in interpreting the intended scope" of the conditions imposed on the merger of UP and SP. At this time, it appears that issue (1) above [the inclusion in the investment base used in the adjustment of the trackage rights charges of the purchase premium and certain merger-related expenditures which were to be funded solely by UP] fits within the STB's contemplation that "an administrative proceeding might be preferable for the resolution of general matters with broad implications with respect to implementation of our conditions."

Letter from Weston W. Marsh to Gregory M. Smith (Nov. 1, 2001) (Ex. B to UP Motion), at 3.

Thus, UP had full notice that BNSF might request that the Board adjudicate some or all of the issues raised in the arbitration, and, consequently, UP has not been (and does not even claim to have been) prejudiced by BNSF's request that the Board resolve the issues raised in BNSF's Petition. Further, as discussed above, the Board has the responsibility to ensure that the conditions it imposed on the UP/SP merger (including the revised adjustment mechanism) are being properly implemented and continue to serve the public interest. BNSF's filing of a counter-request and its related conduct in the arbitration cannot be read to negate that responsibility.

III. BNSF's Present Competitiveness Does Not Warrant Dismissal

UP's third basis for dismissal is that BNSF is competing vigorously and effectively with UP on the trackage rights lines. UP argues that BNSF's present competitiveness using the adjusted rate indicates that there is no need for Board action with respect to the trackage rights fees and that dismissal is justified.

The fact that BNSF has been relatively successful in establishing a competitive presence over the trackage rights lines has never been deemed by the Board as a basis for declining to hear a dispute about the UP/SP merger conditions. Moreover, the premise of UP's argument is misguided. BNSF's current ability to compete (despite being saddled with artificially inflated trackage rights fees) does not prove anything about BNSF's long-term competitive prospects. As the Board well knows, in the short-term, and over particular routes, a railroad may be competitive (based on its current ability to provide the particular combination of price, service, and route structure demanded by shippers) almost irrespective of the trackage rights fees it has to pay. Over the long-run, however, an unfavorable cost structure (resulting, for instance, from inflated trackage rights fees) can (and likely will) erode the railroad's ability to continue to offer competitive service.

Thus, the fact that BNSF has made competitive inroads in the face of the disability resulting from UP's inflated adjustments to the trackage rights fees does not establish that BNSF's competitiveness will survive the continuing effects of those inflated adjustments over the remainder of the 99-year term of the BNSF Settlement Agreement. As the Board noted in Decision No. 86, the conditions imposed by the Board were intended to be permanent solutions for both competitive and traffic density problems raised by the UP/SP merger. Decision No. 86 at 5. The adjustment mechanism should not be applied in a manner which will erode BNSF's continued ability to compete.

UP, however, claims that the "trackage right fees will not rise in the future because of the disputed costs." UP Motion at 7. According, to UP, "any disputed

'increase' occurred in the past" (ibid.) -- presumably, on July 1, 1998, which was the effective date of the adjustment based on the 1996 URCS (which was the last year when no premium or disputed merger-related charges were included in UP's URCS costs) and the 1997 URCS (which was the year when several billions of dollars of such charges were included in the URCS costs).

This contention is false. UP conveniently ignores the fact that the adjustment that took effect on July 1, 1998, is permanently embedded in the trackage rights fees and would, if this dispute is resolved in UP's favor, inflate those fees for the remaining years of the 99-year term of the Settlement Agreement.[11] Thus, unless the Board acts now to ensure that the adjustment mechanism is being properly implemented in a manner consistent with the intent that BNSF's competitiveness not be affected by the changes in UP's actual maintenance and operating costs, BNSF's ability to compete in the future could well be adversely affected.[12]

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[11] While BNSF does not have the information necessary to determine the exact amount by which the trackage rights fees would be increased by the inclusion of the purchase premium and the capital expenditures that UP was to solely fund, BNSF's preliminary estimates indicate that the trackage rights fees would be increased in the range of approximately 0.2 mills. When applied to the current annual BNSF trackage rights gross ton miles (approximately 13.5 billion GTM's), the total amount of increased fees BNSF (and its shippers) would pay is approximately $2.7 million annually. As explained above, this increase would not be subject to correction and would amount to over a quarter of a billion dollars over the life of the BNSF Settlement Agreement.

[12] UP also asserts that Board action is not needed because the parties have the right to renegotiate the adjustment mechanism every five years, and UP notes that BNSF has already served a request for renegotiation. UP Motion at 7. However, any such renegotiated adjustment mechanism would be effective prospectively only, and thus the embedded increase in the GTM rate resulting from the inclusion of the purchase price and the solely UP-funded merger related capital expenditures in the investment base would not be subject to correction.

IV. BNSF's Petition Properly States a Claim

UP's final basis for dismissal is its claim that, by failing to include evidentiary support for its assertions concerning the parties' intent, BNSF's Petition is deficient and should be dismissed for failure to state a claim. However, there is nothing in the Board's rules or regulations which requires the submission of verified statements or other evidence in connection with a petition for clarification. The various parties have expressed their views as to the purpose and intent of the revised adjustment mechanism, and their positions are clear. More importantly, it is the Board's purpose and intent in imposing the conditions for the protection of the public interest which, in the end, should control how the adjustment mechanism is interpreted.

If, however, the Board believes that further argument or evidentiary submissions by the parties (including other interested parties in addition to UP, BNSF and ACC) would be helpful to the Board in resolving the issue, the Board could establish a procedural schedule pursuant to which such argument or evidence could be submitted.

CONCLUSION

As NIT League advised the Board, "[i]t is essential that the terms of the BNSF agreement, and the adjustment mechanism for the trackage rights fees that are a vital component of the competitive structure, not be interpreted and applied in such a manner that, over time, BNSF is exposed to cost increases that impair its ability to replicate the lost competition from SP." NIT League January 14, 2002 Letter at 2. However, UP's interpretation of the adjustment mechanism will, as set forth above, lead to increased trackage rights fees of upwards of a quarter of a billion dollars over the life of the BNSF Settlement Agreement.

Accordingly, BNSF respectfully requests that UP's Motion to Dismiss be denied and that the Board proceed to rule on the important policy issue presented by BNSF's Petition for Clarification or, if it deems it desirable, establish an appropriate procedural schedule for the submission of additional argument or evidence on the issue.

Respectfully submitted,

Erika Z. Jones/als

Erika Z. Jones
Adrian L. Steel, Jr.
Adam C. Sloane

Mayer, Brown, Rowe & Maw
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

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

The Burlington Northern
and Santa Fe Railway Company
2500 Lou Menk Drive
Third Floor
Ft. Worth, Texas 76131-0039
(817) 352-2353 *or* (817) 352-2368

Attorneys for The Burlington Northern and Santa Fe Railway Company

February 4, 2002

CERTIFICATE OF SERVICE

I do hereby certify that copies of BNSF'S Reply to UP's Motion to Dismiss Petition for Clarification of the Trackage Rights Fee Adjustment Mechanism (BNSF-99) are being served on all parties of record.

Adrian L. Steel, Jr.

20441/2

SLOVER & LOFTUS
ATTORNEYS AT LAW
1224 SEVENTEENTH STREET, N. W.
WASHINGTON, D. C. 20036-3003

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

TELEPHONE:
(202) 347-7170
FAX:
(202) 347-3619
WRITER'S E-MAIL:
cam@sloverandloftus.com

January 14, 2002

VIA HAND DELIVERY

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

Re: Finance Docket No. 32760

Dear Mr. Williams:

Enclosed please find an original and 25 copies of the Reply of TXU US Holdings Company to Petition of The Burlington Northern and Santa Fe Railway Company for Clarification (BNSF-98). The enclosed pleading is denominated as TUE-26. A diskette containing the text of this pleading in WordPerfect 8.0 format is also enclosed.

Please acknowledge receipt of this filing by date-stamping and returning to our messenger the enclosed duplicate of this letter and the Reply.

Sincerely,

Christopher A. Mills
An Attorney for TXU
US Holdings Company

CAM:lma
Enclosures

cc: Parties of record per service list

R-5

204412

TUE-26

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

REPLY OF TXU US HOLDINGS COMPANY TO PETITION OF THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY FOR CLARIFICATION (BNSF-98)

By: John W. McReynolds
Hunton & Williams
1601 Bryan Street
30th Floor
Dallas, Texas 75201
(214) 979-3000

John H. LeSeur
Christopher A. Mills
Frank J. Pergolizzi
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for
TXU US Holdings Company

OF COUNSEL:

HUNTON & WILLIAMS
1601 Bryan Street
30th Floor
Dallas, Texas 75201

SLOVER & LOFTUS
1224 Seventeenth Street. N.W.
Washington, D.C. 20036

Dated: January 14, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

REPLY OF TXU US HOLDINGS COMPANY TO PETITION OF THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY FOR CLARIFICATION (BNSF-98)

TXU US Holdings Company, formerly TXU Electric Company ("TUE")[1] files this Reply to the Burlington Northern and Santa Fe's ("BNSF") Petition for Clarification ("BNSF Petition") served in this proceeding on December 21, 2001[2] and in support hereof stats as follows:

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[1]TXU US Holdings Comany has previously participated in this proceeding as Texas Utilities Electric Company.

[2]This BNSF Petition is denominated "BNSF-98".

I.

BACKGROUND

TUE actively participated in the Board proceedings culminating in the Board's issuance of Decision No. 44, served on August 12, 1995.[3] In Decision No. 44, the Board approved, with certain conditions, the merger of rail carriers controlled by Union Pacific Corporation ("UP") and rail carriers controlled by Southern Pacific Rail Corporation ("SP"). One condition imposed by the Board in Decision No. 44 is what is commonly referred to as the "TUE Condition." The TUE Condition directed that the BNSF agreement be modified to permit BNSF and The Kansas City Southern Railway Company ("KCS") to provide coal transportation service to TUE's Martin Lake electric generating station independent of UP/SP. Decision No. 44 state in pertinent part:

> *Texas Utilities Electric Company*. We will require that the BNSF agreement be amended to permit KCS and BNSF to interchange TUE coal trains: (a) at Shreveport, for movement by BNSF over SP's line between Shreveport and Tenaha; and (b) at Texarkana, for movement by BNSF over UP's line between Texarkana and Longview. Without this condition, all but one of TUE's PRB routings would involve UP/SP, and the one that would not would be excessively circuitous. We add that, although TUE sought only a Shreveport interchange, we

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[3] Union Pacific Corp. -- Control and Merger -- Southern Pacific R.R., 1 S.T.B. 233 (1995).

> are allowing a Texarkana interchange as well, to allow BNSF's routings of TUE coal trains to connect with the additional BNSF trackage rights provided for in the CMA agreement. This also will facilitate BNSF's directional running of these trains.

Id. at 471.

BNSF and KCS now provide unit train coal transportation service from the Wyoming Powder River Basin to TUE's Martin Lake station pursuant to a transportation contract. BNSF and KCS route these coal trains using the TUE Condition trackage rights between Shreveport and Tenaha.

In the Decision No. 44 proceedings, TUE also commented on the trackage rights fee BNSF would be required to pay UP under the BNSF agreement. TUE objected to that fee -- which, at its base level for unit train service exceeded 5 mills per revenue ton-mile -- as excessive. TUE urged the Board to adopt the lower "cost-based" fee levels proposed in the comments filed by the Western Coal Traffic League ("WCTL").[4] The STB rejected this request based upon the Board's conclusion that the compensation terms in the BNSF agreement "will allow BNSF to compete effectively." Decision No. 44, 1 S.T.B. 2d at 471.

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[4] See TUE Comments (TUE-7) at 3 (Filed March 29, 1996).

II

BNSF'S PETITION FOR CLARIFICATION

BNSF's Petition For Clarification asks the Board to resolve a dispute between BNSF and UP concerning the application of the BNSF agreement trackage rights fee adjustment mechanism. The gravamen of BNSF's Petition is that UP is applying the mechanism to pass through multi-billion dollar acquisition premium costs, and capital improvement costs, that are not properly included in the adjustment formula. BNSF asserts that pass-through of "[t]hese artificially high costs would render BNSF a less effective competitor" (BNSF Petition at 6). BNSF also asserts that the adjustment issue involves "significant policy issues" and that "it is important that other parties to the UP/SP merger be permitted to submit their views on the issue" (BNSF Petition at 3).

TUE receives transportation service from both UP[5] and BNSF. TUE has no interest in getting in the middle of any parochial disputes between BNSF and UP. However, as BNSF correctly recognizes in its Petition, the fee level dispute raises issues that effect not only BNSF and UP but coal transportation consumers, as well. Simply stated, the level of the trackage rights fee impacts BNSF's service costs which in

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[5]For example, UP currently provides coal transportation service to TUE's Monticello electric generating station.

turn impacts both its and UP's rate offerings to TXU and its other customers served via the involved trackage rights lines.

Increases in suppliers' costs are of particular concern to TUE now. TUE entered a deregulated environment in Texas on January 1, 2002. In order for TUE to effectively compete in the new market place, TUE must carefully monitor its suppliers' costs. TUE strongly opposes any federal action that would arbitrarily increase a supplier's costs, including costs incurred by BNSF under the BNSF agreement. TUE asks the Board to consider these shipper interests in addressing the issues raised by BNSF.[6]

On the merits, TUE cannot speak for BNSF or UP but only for itself. TUE believes that it is fundamentally unfair for UP to require BNSF (and BNSF's customers) to pay a share of the multi-billion dollar premiums UP paid to acquire SP. That responsibility should not fall on BNSF's customers.[7]

Also, as BNSF explains in its Petition, the adjustment methodology set forth in the BNSF agreement, and approved by the STB, was predicated on shipper-sponsored cost based adjustment proposals. TUE supported such proposals and TUE understands that the proponent of these proposals (such as the Western Coal

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[6]It is TUE's understanding that BNSF and UP attempted to solve these issues raised in BNSF's Petition via negotiations, but these negotiations proved unsuccessful.

[7]Similarly, BNSF and its customers should not be required to reimburse UP for any capital costs UP agreed to exclusively fund.

Traffic League) ("WCTL")[8] did not intend for UP purchase premium costs to be included in the BNSF agreement adjustment calculations.

CONCLUSION

For the reasons set forth herein, TUE requests the Board to grant BNSF's Petition.

Respectfully submitted,

By: John W. McReynolds
Hunton & Williams
1601 Bryan Street
30th Floor
Dallas, Texas 75201
(214) 979-3000

John H. LeSeur
Christopher A. Mills
Frank J. Pergolizzi
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for
TXU US Holdings Company

OF COUNSEL:

HUNTON & WILLIAMS
1601 Bryan Street
30th Floor
Dallas, Texas 75201

SLOVER & LOFTUS
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: January 14, 2002

[8]As noted above, in its prior Comments in this proceeding, TUE adopted and endorsed the WCTL sponsored adjustment proposals.

CERTIFICATE OF SERVICE

I certify that I have this 14th day of January, 2002, served copies of the foregoing Reply by first class mail, postage prepaid, or by more expeditious means on all parties of record in Finance Docket No. 32760.

Peter A. Pfohl

NITL-28

204409

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

Union Pacific Corporation, et al -- Control and Merger --
Southern Pacific Rail Corporation, et al

REPLY TO PETITION FOR CLARIFICATION

submitted on behalf of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

THE NATIONAL INDUSTRIAL
TRANSPORTATION LEAGUE
1700 North Moore St.
Suite 1900
Arlington, Virginia 22209

By Its Attorneys

Nicholas J. DiMichael
Frederic L. Wood
Thompson Hine LLP
1920 N St. N.W., Suite 800
Washington, D.C. 20036
(202) 331-8800

Dated: January 14, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

Union Pacific Corporation, et al -- Control and Merger --
Southern Pacific Rail Corporation, et al

REPLY TO PETITION FOR CLARIFICATION

submitted on behalf of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

INTRODUCTION

In accordance with the provisions of the Board's Rules of Practice, 49 C.F.R. § 1104.13(a), this Reply to the Petition for Clarification filed on December 17, 2002, by BNSF (BNSF-97)[1] is submitted on behalf of The National Industrial Transportation League ("League"). The League supports the relief requested by BNSF. The relief sought by BNSF is necessary for the implementation of conditions specifically imposed by the Board to protect competition that was available between UP and SP prior to their merger.

BACKGROUND

In its principal decision in this proceeding, the Board imposed a condition that preserved the competitive option available to a chemical production facility at Seadrift, Texas on the Gulf

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[1] Abbreviations used in this reply are the same as those used in Decision No. 44 in Docket No. 32760, *Union Pacific Corp., et al. — Control and Merger — Southern Pacific Rail Corp., et al.* 1 S.T.B. 233, 557 (1996) ("*UP/SP*"), *aff'd, Western Coal Traffic League v. STB*, 169 F.3d 775 (D.C. Cir. 1999).

Coast.[2] The condition imposed related to a section of the so-called BNSF Agreement that granted BNSF trackage rights over a former SP branch line (the Port Lavaca branch) that would provide a connection, by means of a build-out or a build-in, for a competitive alternative to the UP service to the Seadrift facility.[3] As discussed in *UP/SP*, 1 S.T.B. at 426 and 475, the preservation of this competitive option was expressly recognized by the applicants, who included in the BNSF agreement a specific grant to BNSF of trackage rights over the former SP Port Lavaca branch.[4] Clearly, the contractual terms and operational and economic conditions for BNSF's use of the trackage rights will be an important element in determining if the condition will ensure the availability of this competitive build-out option

In addition to the specific condition addressing the Seadrift situation, the Board's conditions on the approval of the UP/SP merger also included a broad condition, based on the CMA agreement, which requires the applicants to preserve build-in/build-out options that existed prior to the merger. *UP/SP*, 1 S.T.B. at 420. To the extent that remedy is used, again, the terms and conditions for the use of any trackage rights necessary to reach the build-in or build-out are an important element in preserving competitive alternatives for rail shippers.

Recognizing the importance of trackage rights operations to preserving the competitive viability of build-in/build-out options, the BNSF agreement includes a specific provision that states that such rights "shall seek to minimize the operating inconvenience to UP, consistent with ensuring that BNSF can provide competitive service." BNSF Agreement, Section 8(l). Thus, UP has expressly agreed to a two-part standard for assessing the operational and economic terms and conditions for use by BNSF of trackage rights over its lines under the agreement: (1) minimizes operation inconvenience to UP, while (2) ensuring competitive service.

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[2] At the time, the facility was owned and operated by Union Carbide Corporation, which is now a wholly-owned subsidiary of The Dow Chemical Company. BNSF-97 at 2, n. 3.

[3] The Board has conditionally granted an exemption authorizing BNSF to construct and operate a line from the Seadrift facility to a point of connection with the Port Lavaca branch, subject to completion of the environmental review. Finance Docket No. 34003, *Burlington-Northern and Santa Fe Ry. Co. — Construction and Operation Exemption* (served June 19, 2001).

[4] As the Board stated in *UP/SP*, 1 S.T.B. at 419, n. 177, and at 522, n. 277, it imposed all of the provisions of the BNSF agreement, as modified several times by the parties (including the CMA agreement).

The provisions of the BNSF agreement, as well as all of the other competitive conditions imposed by the Board, are to be interpreted and applied having in mind that their purpose was to "allow BNSF to replicate the competition that would otherwise be lost when SP is absorbed into UP." *UP/SP*, 1 S.T.B. at 419. As the Board recently stated in the UP/SP oversight proceeding, the contractual terms of the BNSF agreement should not "work to narrow the scope of the remedial conditions that we imposed to prevent ... competitive options from being lost." Decision No. 19, Finance Docket No. 32760 (Sub-No. 21) *Union Pacific Corp., et al. — Control and Merger — Southern Pacific Rail Corp., et al.* [General Oversight] (served Nov. 8, 2001) at 5.

Notwithstanding its contractual commitment, as well as the fundamental purpose of the conditions involved to preserve competition, UP has adopted a position that would require BNSF to prevent "any level of interference" with UP's operations over the trackage rights line. *See* UP letter dated September 24, 2001, Att. B to BNSF-97, at 2. The BNSF-97 petition sets out the detailed factual background for the current dispute.

UP is seeking to require BNSF to construct, at its expense, either a new connection at Placedo, Texas or a new passing siding on the Port Lavaca branch, or both, in order to prevent "any level of interference" with UP's operation on either the main line from Houston to Brownsville, or on the Port Lavaca branch. The BNSF petition seeks a determination by the Board that it should adopt a standard that should have the effect that BNSF would not be required to pay for or construct the improvements sought by UP. The same standard would also be applicable to the terms and conditions for other trackage rights operations by BNSF over UP in connection with a build-in or build-out to serve an existing UP customer.

THE BOARD SHOULD GRANT THE RELIEF REQUESTED BY BNSF

In the League's view, it is very clear that, under the condition imposed by the Board, BNSF should not have to construct the additional connections or sidings requested by UP. BNSF has articulated a two-part standard that comports with both the terms of the BNSF

agreement and the Board's decisions. See BNSF-97 at 8. Under that two-part standard, BNSF would not have to construct additional facilities on a trackage rights line used to provide competitive service under the Board's conditions unless:

> BNSF's operations would unreasonably and materially interfere with UP's operations and whether proposed construction remedies for such interference would be consistent with BNSF's ability to provide competitive service.

In light of the underlying purpose of the conditions at issue to replicate the competition that existed between UP and SP prior to their merger, it is essential that the Board resolve all doubtful issues in favor of providing competition between BNSF and UP whenever and wherever possible. It is worth repeating what the Board clearly stated:

> [W]e are imposing a number of broad-based conditions that augment the BNSF agreement to help ensure that the BNSF trackage rights will allow BNSF *to replicate the competition* that would otherwise be lost when SP is absorbed into UP.

UP/SP, 1 S.T.B. at 419 (emphasis added). As the Board said in Decision No. 86, interpreting another broad-based condition (the "new facilities" condition), "Our condition was intended to mitigate a general loss of competition due to the fact that shippers would have fewer two-railroad siting options by creating new options to replicate those that were lost." UP/SP, Decision 86 (served July 12, 1999) at 5. Similarly, both the broad and the specific conditions protecting build-out/build-in competition were intended to provide new options to replace those that were lost as a result of the merger. The Board should not adopt or permit any interpretation of those conditions, or the BNSF agreement itself, that limits the scope of those new options so that they are less effective than the options that were lost.

Under the first part of the test, a factual determination would have to be made about the degree of interference, if any, with UP's operations.[5] Second, as BNSF has shown with regard to the Seadrift situation, the competitive option that was lost as a result of the merger would not have had to bear the costs of the improvements ought by UP. Therefore, BNSF, under the

[5] In the event of disagreement between BNSF and UP, the issue would have to be resoved by arbtration under the BNSF agreement.

second part of the two part test, should not have to bear those costs, either, even if they might otherwise be necessary to prevent interference with UP's operations. In the pre-merger situation, SP would have adjusted its operations in order to accommodate the new movements to and from the Seadrift facility. UP can be expected to do no less, as contemplated by the BNSF agreement.

CONCLUSION

For all of the foregoing reasons, the League urges the Board to grant the relief requested in BNSF's petition for clarification by adopting the two-part test for determining when BNSF will be required make improvements to UP trackage rights lines in order to serve a new build-in or build-out.

Respectfully submitted,

THE NATIONAL INDUSTRIAL
TRANSPORTATION LEAGUE
1700 NORTH MOORE ST., SUITE 1900
Arlington, Virginia 22209

By Its Attorneys

Nicholas J. DiMichael
Frederic L. Wood
Thompson Hine LLP
1920 N St. N.W., Suite 800
Washington, D.C. 20036
(202) 331-8800

Dated: January 14, 2002

Certificate of Service

I hereby certify that I have on this 14th day of January 2002 served a copy of the foregoing Reply on all parties of record, in accordance with the Board's Rules of Practice, and have hand-served a copy of the foregoing on counsel for BNSF and Applicants.

204408

UP/SP-391

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 BNSF'S PETITION FOR CLARIFICATION REGARDING BNSF INTERFERENCE WITH UP SERVICE

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

JAMES V. DOLAN
LAWRENCE E. WZOREK
LOUISE A. RINN
Law Department
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-3897

J. MICHAEL HEMMER
MICHAEL L. ROSENTHAL
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-5578

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

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UP/SP-391

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 BNSF'S PETITION FOR CLARIFICATION REGARDING BNSF INTERFERENCE WITH UP SERVICE

BNSF asks the Board to clarify the standards for determining when BNSF must fund solutions to interference caused by build-ins under the BNSF Settlement Agreement. BNSF-97, Petition of the Burlington Northern and Santa Fe Railway Company for Clarification ("Petition"), December 17, 2001, pp. 1-3. BNSF contends that it has no duty to pay unless the interference is both "unreasonable and material." Id. at 9. BNSF also contends that, even when BNSF causes unreasonable and material interference, UP must fund the remedies if necessary to keep BNSF competitive. Id. at 12-13. Finally, BNSF asks the Board to impose an inflexible, multi-step procedure that would discourage negotiations to solve operating conflicts and shift BNSF's responsibilities for finding solutions to UP. Id. at 9-10.[1]

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[1] BNSF asserts that its Petition raises important issues of transportation policy that will determine whether it is able "to compete effectively on a level playing field" for the next century. Petition, pp. 2-3. BNSF routinely issues warnings about its ability to compete when it wants the Board to enhance its rights or minimize its investments under the BNSF Settlement (continued...)

BNSF's Petition mixes two related but distinct questions. The first is how much interference BNSF's build-ins may impose on UP, other railroads, and their customers. The second is which railroad should pay for a remedy once interference exceeds that threshold. Federal law and the BNSF Settlement Agreement answer both questions in ways that BNSF's Petition does not discuss.

As we explain in Part I, 49 U.S.C. § 10901(d) establishes the appropriate thresholds for interference. Section 10901(d) controls when BNSF constructs a build-in across UP tracks. Moreover, Section 10901 would have established the thresholds for SP and UP build-ins had the railroads not merged. By applying Section 10901's thresholds to the BNSF Settlement Agreement, the Board replicates potential build-in competition that the merger eliminated.

In Part II we address BNSF's suggestions that UP must fund infrastructure in order to keep BNSF competitive, even when BNSF causes unreasonable interference. BNSF offers no legal basis for seeking its competitor's funds. The BNSF Settlement Agreement requires BNSF to pay for facilities required to avoid interference. Moreover, shifting those costs to UP would distort pre-merger competition and require UP to subsidize its competitor.

Finally, in Part III, we explain how BNSF's rigid, one-sided procedures would discourage creative, private solutions to interference problems. They would eliminate BNSF's

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Agreement, even as it continues to compete effectively. See, e.g., BNSF-93, "BNSF's Comments on Unresolved Issues Relating to the Restated and Amended BNSF Settlement Agreement," July 25, 2001, pp. 8, 19. As the Board reaffirmed last month, BNSF mounts vigorous competition under the BNSF Settlement Agreement. Union Pac. Corp. -- Control & Merger -- Southern Pac. Corp., STB F.D. 32760 (Sub-No. 21) Decision No. 21 (STB served Dec. 20, 2001), slip. op. at 3-4.

incentive to cooperate with UP and impose on UP all of the responsibility for finding remedies for interference.

The Board should confirm that Section 10901(d)'s thresholds apply under the BNSF Settlement Agreement and that BNSF must pay for remedies when its interference exceeds those thresholds. The Board should reject BNSF's unwieldy and unfair procedures.

BACKGROUND

BNSF filed its Petition because of the parties' disagreements about interference caused by BNSF's proposed build-in to Seadrift, Texas. See maps in Attachment A. Until September 2001, the parties were discussing BNSF's use of UP facilities to reach the Seadrift build-in. Apparently viewing UP's September 24, 2001, letter as overly aggressive, BNSF stopped negotiating. A Board decision would help the parties resume negotiations.[2]

A build-in frequently requires the constructing railroad to interfere with the established railroad's operations. Building a new crossing often forces the existing railroad to suspend operations briefly. After construction, day-to-day operations cause interference when the sponsoring railroad's trains get in the way of the incumbent's trains. Additional interference is virtually inevitable when BNSF constructs a build-in under the BNSF Settlement Agreement, because BNSF not only builds across UP tracks but also uses trackage rights on UP to reach the build-in track.

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[2] BNSF and UP have successfully negotiated operating arrangements for new BNSF service throughout the West. For example, BNSF and UP successfully negotiated arrangements for BNSF service to American Soda Company's huge, new facility in Parachute, Colorado. UP/SP-384, Union Pacific's Fifth Annual Oversight Report, July 2, 2001, pp. 94-95. Last Friday BNSF and UP agreed on BNSF service to a build-in at White Bluff, Arkansas.

Operating interference increases the established carrier's costs. When a BNSF train delays a UP train, UP pays more for fuel. In some cases, it pays overtime to train crews or replaces train crews that run out of time under the Hours of Service Law. UP also pays more per diem on dozens of rail cars. It temporarily loses the use of its investments in cars and locomotives. Multiple trains may be affected. Due to signal spacing and limited capacity, delays to one train ripple up and down a line, delaying others and congesting terminals. Over the course of a year, these costs add up to substantial sums.

Operating interference also harms customers by degrading existing service. When BNSF trains block UP trains, UP's customers suffer shipping delays. For example, a unit coal train may arrive at a power plant later than expected, costing the utility overtime for unloading crews. Auto parts imported through Brownsville may be delayed en route to manufacturing plants in the U.S.

BNSF's Seadrift build-in will affect not only UP and its customers but also Tex Mex and its customers. BNSF's operating plan would require its trains to block two UP lines at an important crossing at Placedo, Texas, for almost two hours per day. One of the lines, used by Tex Mex, is among UP's most congested lines in Texas, and both railroads' trains will suffer delays. In Attachment B, we provide a more detailed description of this interference.

Although UP believes that BSNF's proposed operating plan for its Seadrift build-in would cause extensive interference, we agree with BSNF that this is not the time or place to resolve specific disputes. "BNSF does not seek a resolution of the specific dispute" over the Seadrift build-in (Petition, p. 3), and neither does UP. The Board lacks sufficient facts to resolve that dispute. In the following pages, UP addresses general principles.

ARGUMENT

I. SECTION 10901(d) SUPPLIES THE APPROPRIATE THRESHOLDS FOR INTERFERENCE

Federal law limits interference from a build-in. Section 10901(d) requires the constructing railroad to avoid specified levels of interference when it crosses another railroad's tracks. Section 10901(d) applies to BNSF's crossings of UP tracks, whether under the BNSF Settlement Agreement or otherwise. Section 10901(d) also would have governed any SP or UP build-in across the other had the UP/SP merger not occurred. The Board therefore should consistently apply Section 10901(d)'s thresholds under the BNSF Settlement Agreement whenever BNSF's build-ins cause interference. Nothing in the BNSF Settlement Agreement authorizes BNSF to impose greater delays on UP's customers or higher costs on UP and its tenant railroads.

A. The Board Should Apply the Interference Standards of Section 10901

Section 10901(d)(1) allows a railroad to build in across another railroad subject to statutory limits on interference with the established carrier's operations. The statute allows more interference during construction of the build-in than during ongoing operations. The sponsoring carrier must remedy any interference that exceeds the specified limits.

During track construction, generally a brief period, the sponsoring carrier has substantial leeway to cause interference. Construction may occur if "the construction does not unreasonably interfere with the operation of the crossed line." 49 U.S.C. § 10901(d)(1)(A).

A stricter standard limits interference with ongoing operations. Under 49 U.S.C. § 10901(d)(1)(B), one railroad may cross another only if "the operation does not materially interfere with the operation of the crossed line."[3] The proponent of a build-in cannot operate across the other carrier if its operations would cause material interference. It must avoid or remedy the interference.

BNSF proposes to apply the more liberal "unreasonable interference" threshold not only during construction but also during ongoing operations.[4] This would allow BSNF to cause forever, more interference than Section 10901(d) permits. BNSF offers no justification for departing from the statutory framework or for imposing greater interference on UP than SP or UP could have imposed on the other had they not merged.

As a matter of law, BNSF must comply with Section 10901(d) when one of its build-ins crosses a UP track. For example, BNSF plans to cross UP's tracks 12 times to build in to the Bayport Loop near Houston, and it must comply with the statute to effect those crossings.

The Board should confirm that Section 10901(d)'s thresholds apply to any interference from BNSF build-ins under the BNSF Settlement Agreement. Section 10901(d) technically applies only to rail crossings. Because of the extensive trackage rights it received in the UP/SP merger, however, BNSF's build-ins will cause interference not only at rail crossings

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[3] "Unreasonable" has a strong negative connotation and indicates action that is inconsistent with common sense. As defined in Black's Law Dictionary, "unreasonable" action is "irrational or capricious." Black's Law Dictionary 1537 (7th ed. 1999). In contrast, "material" indicates that the topic is of consequence or important. Black's defines it as "significant" or sufficient to affect decisions. Id. at 991.

[4] Under BNSF's proposal, BNSF would be responsible only if interference is both unreasonable and material.

but also at other locations on UP's lines. The statutory thresholds for interference should be consistent from one location to another for one build-in and from one build-in to another.

Applying Section 10901(d)'s standards would also implement the Board's policy goals when it imposed the build-in condition on the UP/SP merger. The Board sought to preserve potential build-in competition between SP and UP. Had the merger not occurred, SP and UP today would be required to comply with Section 10901(d) when building new tracks to serve shippers on the other carrier. BNSF should likewise shoulder its responsibilities under Section 10901(d) when it exploits the build-in condition.

B. The BNSF Settlement Agreement Does Not Authorize BNSF to Impose Unreasonable Interference

No provision of the BNSF Settlement Agreement authorizes BNSF to impose greater interference burdens on UP and its customers than Section 10901 allows. Only Section 8(*l*) of the BNSF Settlement Agreement specifically pertains to the Board's build-in condition. That provision does not define a standard for interference with UP operations.

Section 8(*l*) protects BNSF by prohibiting UP from forcing BNSF to use a circuitous or unreasonably expensive route to reach a new build-in. When existing trackage rights do not allow BNSF to reach the build-in point, Section 8(*l*) allows UP to designate BNSF's route but it bars UP from forcing BNSF to use an unreasonable route that might undermine the build-in's viability. Section 8(*l*) thus requires UP to designate a route that will "minimize the operating inconvenience to UP, consistent with ensuring that BNSF can provide competitive service." Restated and Amended BNSF Settlement Agreement, § 8(*l*). UP fully complied with that provision for the Seadrift build-in by designating a route through Placedo and requesting a connecting track.

The Board should not convert BNSF's protection against unfair costs into a weapon that allows BNSF to inflict costs on UP. According to BNSF, Section 8(*l*) "recognizes that some level of interference with UP's operations may occur" and that some interference "is inherent in any increased use of UP's lines." Petition, p. 8. UP agrees, because adding more trains to UP tracks inevitably causes some interference. Section 8(*l*) does not, however, establish any threshold for interference, much less require UP and its shippers to accept interference until it becomes unreasonable.[5]

II. UP CANNOT BE REQUIRED TO FUND INVESTMENTS TO REMEDY BNSF INTERFERENCE AND HELP BNSF COMPETE

Under the BNSF Settlement Agreement, BNSF must fund new facilities to remedy interference. Section 9 of the agreement provides that the user of the trackage rights must pay for needed facilities.[6] Had UP and SP not merged, each would have been financially

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[5] BNSF mentions, but does not embrace, Section 2(n) of the "Houston, Texas to Brownsville, Texas Trackage Rights Agreement," dated June 1, 1996. Section 2(n) does not apply to build-ins or to connections between two lines over which BNSF received trackage rights in the UP/SP merger, and BNSF does not claim that it does.

Section 2(n) applies only to BNSF's "existing lines of railroad or trackage rights lines." (Emphasis added.) See also Restated and Amended BNSF Settlement Agreement, § 9(m) (differentiating between BNSF's "present lines (including existing trackage rights)" and "Trackage Rights Lines or lines [BNSF] will purchase pursuant to [the Settlement] Agreement").

BNSF would not want Section 2(n) to apply because it requires BNSF to bear all costs and gives UP broad discretion. Section 2(n) requires BNSF to pay all of the costs if additional facilities are necessary to accommodate BNSF operations. See Houston, Texas to Brownsville, Texas Trackage Rights Agreement, § 2(n) ("[I]f sufficient trackage is not available . . . to facilitate [BNSF's] Operations, [UP] may require [BNSF] to construct additional trackage . . . the cost and expense of which shall be borne solely by [BNSF].") BNSF's Petition asks the Board to leave for arbitration or the Board the question of "how [new facilities] should be funded." BNSF-97, p. 10. Section 2(n) explicitly provides that BNSF must bear the full costs of any new facilities.

[6] If both parties will use the facilities, they share the cost.

responsible for avoiding interference by its build-ins, and the BNSF Settlement Agreement preserves that relationship. Never mentioning Section 9 of the agreement, BNSF suggests an extraordinary alternative: if necessary to help BNSF compete, UP should fund facilities to eliminate the unreasonable interference BNSF causes. BNSF bases this inequitable proposal on a misunderstanding of the Board's build-in condition.

A. The BNSF Settlement Agreement Allocates Financial Responsibility for Investments to Remedy Interference

The BNSF Settlement Agreement leaves no room for disagreement about which railroad pays for infrastructure to remedy interference. Under Section 9(b) of the BNSF Settlement Agreement, the costs of facilities needed to implement "trackage rights granted under this Agreement" are borne "by the party receiving the trackage rights which such facilities are required to implement." Thus, when BNSF uses trackage rights on UP tracks to serve a build-in, it must fund all facilities required to implement those rights. UP must share those costs only if it uses the new infrastructure: The costs "shall be shared by the parties based on their respective usage of the line in question." Restated and Amended BNSF Settlement Agreement, § 9(c)(ii). The Agreement does not modify these responsibilities in order to help one railroad compete against the other.

The Board should reject BNSF's attempt to revoke this agreement. BNSF does not discuss Section 9(b) of the Settlement Agreement or explain how the Board could override it. As the Board recently confirmed, it cannot retroactively impose new standards and obligations on a merger after consummation. Major Rail Consolidation Procedures, STB Ex Parte No. 582 (Sub-No. 1) (STB served June 11, 2001), slip op. at 45. The Board should not adopt a

clarification that would release BNSF from its responsibilities under the Settlement Agreement and impose new costs on UP.

B. BNSF Seeks an Impermissible Subsidy from Its Competitor

BNSF wants UP to pay for facilities to remedy interference whenever necessary to ensure that BNSF can use a build-in to compete against UP.[7] More simply, BNSF wants UP to subsidize BNSF's build-ins. For multiple reasons, the Board should reject BNSF's request for UP's funds.

First, as we explain above, BNSF's request conflicts with the terms of the BNSF Settlement Agreement.

Second, BNSF misconstrues the Board's build-in condition. The Board intended to preserve potential build-in competition between SP and UP. It did not intend to transform uneconomic build-ins into viable build-ins by requiring UP to subsidize them or act as an insurer. For example, the Board cannot be understood to have required UP to guarantee the competitiveness of an uneconomic BNSF build-in from Salt Lake City to Boise, Idaho, so that BNSF could carry potatoes.

Third, requiring UP to subsidize a BNSF build-in would not replicate the pre-merger competition between SP and UP. Neither SP nor UP could have sought a subsidy from the other before the merger. SP and UP would have paid all of the costs of their build-ins, including interference costs under Section 10901. Had SP or UP concluded that a build-in did not justify those costs, it would not have constructed the build-in. Nothing in the Board's

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[7] BNSF proposes to allow arbitrators to decide which railroad funds such investments. E.g., Petition, p. 10.

decisions suggests that the Board intended to relieve BNSF of the legitimate costs of a build-in, much less to force UP to pay those costs.

Fourth, BNSF's proposal is impractical. Neither UP nor the Board could evaluate "BNSF's ability to provide competitive service." Petition, p. 5. Whether BNSF's build-in service is competitive hinges on BNSF's freight rates. Indeed, BNSF could raise or lower its rates to make its build-ins appear more or less viable. Moreover, to evaluate BSNF's competitiveness, both parties would need to know the other's rates and costs. BNSF cannot legally disclose rates and costs to UP, or vice versa. Negotiations between the railroads would be impossible, and the Board would have great difficulty resolving disagreements about BNSF's ability to compete.

III. THE BOARD SHOULD REJECT BNSF'S RIGID PROCEDURES FOR RESOLVING OPERATING CONFLICTS

BNSF proposes a four-step procedure under which the railroads would process a BNSF operating plan for a build-in. Petition, pp. 9-10. BNSF also proposes two further "considerations" to influence the procedure in some unspecified way. Id. at 9. BNSF's proposals would impose a rigid, legalistic process in place of fluid negotiations in which operating personnel seek practical solutions. They also favor BNSF at every turn. They would give BNSF the power to control UP operations in violation of the BNSF Settlement Agreement and transfer to UP virtually all of BNSF's planning responsibilities for its own build-ins. The Board should reject these unwise and unfair procedures.

For convenience, we quote BNSF's proposed procedures in full. Then we enumerate UP's objections. BNSF proposes:

When BNSF presents an operating plan to UP to serve a build-in/build-out line, UP is required to approve that operating plan unless the plan will cause unreasonable and material interference with UP's operations.

If UP believes that BNSF's proposed operating plan would cause [unreasonable and material] interference, then UP must provide (i) a detailed justification in writing supporting its position, and (ii) a proposed alternative operating plan which will enable BNSF to provide competitive service to the shipper with the least additional cost.

If UP's proposed alternative operating plan would require BNSF to construct or fund new facilities or other improvements, then UP is required to provide an explanation of why the operations of the two carriers cannot be coordinated to avoid the need for the construction of new facilities.

If, at that point, UP and BNSF continue to disagree as to the need for the construction of new facilities and as to how they should be funded, then the issue "may be resolved either by arbitration or the Board" (see Decision No. 44, 1 S.T.B. at 420).

Petition, pp. 9-10.

1. BNSF's procedures would transform informal, practical dialog between operating officials into a formal legal process. Railroads cooperate in thousands of joint facilities throughout the nation without formal presentations and written justifications. BNSF's proposal would chill cooperation and replace pragmatic problem-solving by operating officials with position papers by lawyers.

2. BNSF would gain unilateral power to dictate operations by requiring UP to accept BNSF's operating plans for build-ins that do not cause unreasonable and material interference with UP's operations. BNSF could instruct UP how to operate trains -- even UP trains -- on UP's own tracks. BNSF does not attempt to justify this departure from a track

owner's normal right to control operations on its own lines.[8] BNSF could also impose unnecessary costs on its rival by designing plans that impose all delays and costs on UP and requiring UP to accept them.

3. BNSF's procedures would shift to UP the burden of identifying ways to avoid operating interference. As the proponent of a build-in, BNSF should develop an operating plan that minimizes interference with UP operations. Under BNSF's rules, however, BNSF could propose a plan that maximizes BNSF's convenience and minimizes BNSF's costs and responsibilities. UP then would bear the burdens of proposing alternatives and proving that no cheaper alternative would work. UP will cooperate with BNSF in coordinating the operations of the two carriers, but UP should not be required both to identify all of the theoretical operating alternatives and prove that they are unworkable.[9]

4. BNSF's final paragraph reveals how little its one-sided procedures would accomplish. Even after the parties follow BNSF's rules for resolving operating disputes, they would likely disagree about whether interference is excessive. The parties would return to the Board, where they would argue about not only whether new investment is needed but also

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[8] The BNSF Settlement Agreement expressly confirms that "the management and operation of the [trackage rights] shall be under the exclusive direction and control of the owning carrier." Restated and Amended BNSF Settlement Agreement, § 9(d).

[9] BNSF wants UP to develop an operating plan that will allow its competitor "to provide competitive service . . . with the least additional cost." Petition, p. 9. BNSF argues that UP or SP would have pursued a low-cost solution before the merger, so "UP should be put to a similar task." Id. at p. 11. BNSF has it backwards. Before the merger, SP and UP developed the low-cost solutions for both carriers when one of them proposed a build-in over the other's tracks. As the proponent of a build-in, BNSF must do the same.

whether the other railroad obeyed the procedural rules. BNSF's procedures would expand the issues for lawyers to fight about but do little to solve operating problems.

* * *

BNSF also proposes two "considerations" for use in evaluating interference disputes: whether railroads engage in similar operations elsewhere, and whether SP would have been required to construct a connection before the UP/SP merger. Petition, p. 9. BNSF does not explain how these considerations would interact with the thresholds for interference with existing operations. If a build-in causes "material" (or, during construction, "unreasonable") interference, the proponent should remedy the interference. If it does not cause interference, no remedy is required.

Similar operations. A rail operation that works at one point may or may not be desirable at another point. One must consider a multitude of factors at each location, including the number of trains using the facilities, priorities of the trains, available capacity, operating alternatives, difficulty of constructing new facilities, opportunities to use personnel in the area, and many other factors. Otherwise, the comparisons are meaningless.[10]

BNSF's example confirms that this "consideration" will create fertile ground for argument but contribute little to finding solutions. BNSF suggests that, because it backs trains in and out of New South Yard in Houston through T&NO Junction, similar reverse movements

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[10] Decisions under Section 10901(d) reflect this fact-specific analysis. See, e.g., Gateway Western Ry. – Construction Exemption – St. Clair County, IL, ICC F.D. No. 32158, (ICC served Nov. 28, 1994), slip op. at 7-10.

should be acceptable at Placedo. The circumstances differ in several ways.[11] Moreover, reverse movements are undesirable in both locations. UP has criticized BNSF's delay-causing reverse movements at T&NO Junction for years. UP/SP-361, "Applicants' Reply to Comments," Sept. 30, 1998, p. 66.

SP's obligations. The UP/SP merger changed western railroad operating patterns, limiting the value of considering how build-ins would have operated without the merger. BNSF reaches build-ins under the BNSF Settlement Agreement in a variety of ways. Sometimes, BNSF wants to use the same route that SP or UP would have used when building in before the merger. For example, BNSF wants to use UP's GH&H line to reach its build-in to the Bayport Loop, as UP would have before the merger. Sometimes BNSF wants to use a different route, often to its benefit. For example, BNSF will use UP's Angleton Subdivision to reach the Seadrift build-in, even though SP would have reached the build-in on a different route before the merger.[12] The new routes may cause much more interference than pre-merger routes. Pre-merger conditions will become even more difficult to discern as the western rail network evolves, making a search for pre-merger conditions ever more speculative.

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[11] At T&NO Junction, BNSF performs the reverse movements to and from the less used track merely crossing the busier track. For the Seadrift build-in, BNSF would conduct reverse movements on the more heavily used track, causing even worse delays than at T&NO Junction. At T&NO Junction, dispatchers control all switches remotely using Centralized Traffic Control. At Placedo, train crews must detrain to operate manual switches, and one of the rail lines lacks a signal system.

[12] BNSF's build-in will benefit from the UP/SP merger because BNSF gets to operate over UP's direct route between Houston and Seadrift. This route will give BNSF efficient routes to the New Orleans and Memphis gateways. SP had no such route after it abandoned its "Wharton" line.

If BNSF's second consideration applies, however, it must apply both ways. If BNSF wants to avoid investments that would be unnecessary for a separate SP, BNSF should not cause any greater delay than a separate SP's build-in would cause. BNSF argues, for example, that it should not be required to construct a connecting track at Placedo, because SP would not have needed such a connection. But SP also would not have imposed severe operating interference on UP and Tex Mex, as BNSF will. If BNSF wants to avoid investments that SP would not have needed, it must avoid interference with UP service to the same extent SP would have. The parties must adapt to a new world.[13]

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[13] BNSF also rejects responsibility for avoiding interference with Martin Marietta's use of the Port Lavaca Branch to unload rock because, BNSF speculates, SP would not have confronted that problem. This speculative assertion is probably wrong. Had the merger never occurred, SP would have been free to authorize Martin Marietta to unload rock on the branch, just as UP did several years ago. Had SP wanted to build in to Seadrift years later, as BNSF does now, SP would have had to accommodate its customers operation. Ironically, BNSF wants UP to help BNSF provide new competition at the expense of the new competition UP offered against motor carriers when it created this arrangement.

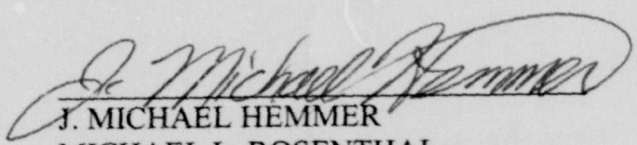
CONCLUSION

Like SP and UP before they merged, BNSF must remedy all material interference between its build-ins and existing rail service. The Board should preserve this responsibility by affirming that Section 10901(d)'s thresholds for interference apply to interference from build-ins under the BNSF Settlement Agreement. The Board also should confirm that BNSF must honor its commitment under the BNSF Settlement Agreement to fund infrastructure when it exceeds those thresholds. Finally, the Board should reject BNSF's inflexible and one-sided procedures for reviewing BNSF operating plans and instead encourage the parties to cooperate to remedy interference.

Respectfully submitted,

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

JAMES V. DOLAN
LAWRENCE E. WZOREK
LOUISE A. RINN
Law Department
Union Pacific Railroad Company
1416 Dodge Street
Omaha, Nebraska 68179
(402) 271-3897



J. MICHAEL HEMMER
MICHAEL L. ROSENTHAL
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-5578

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

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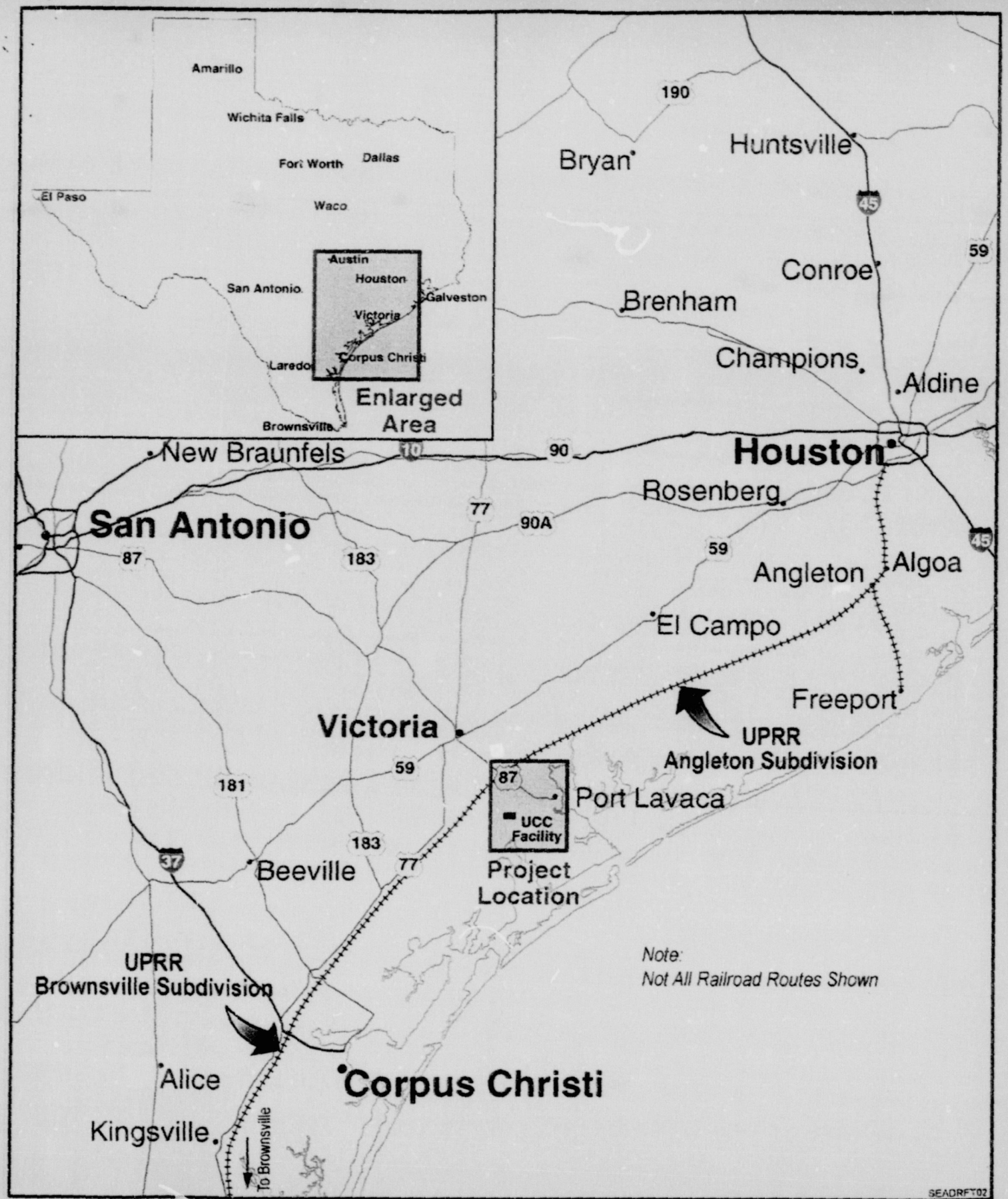
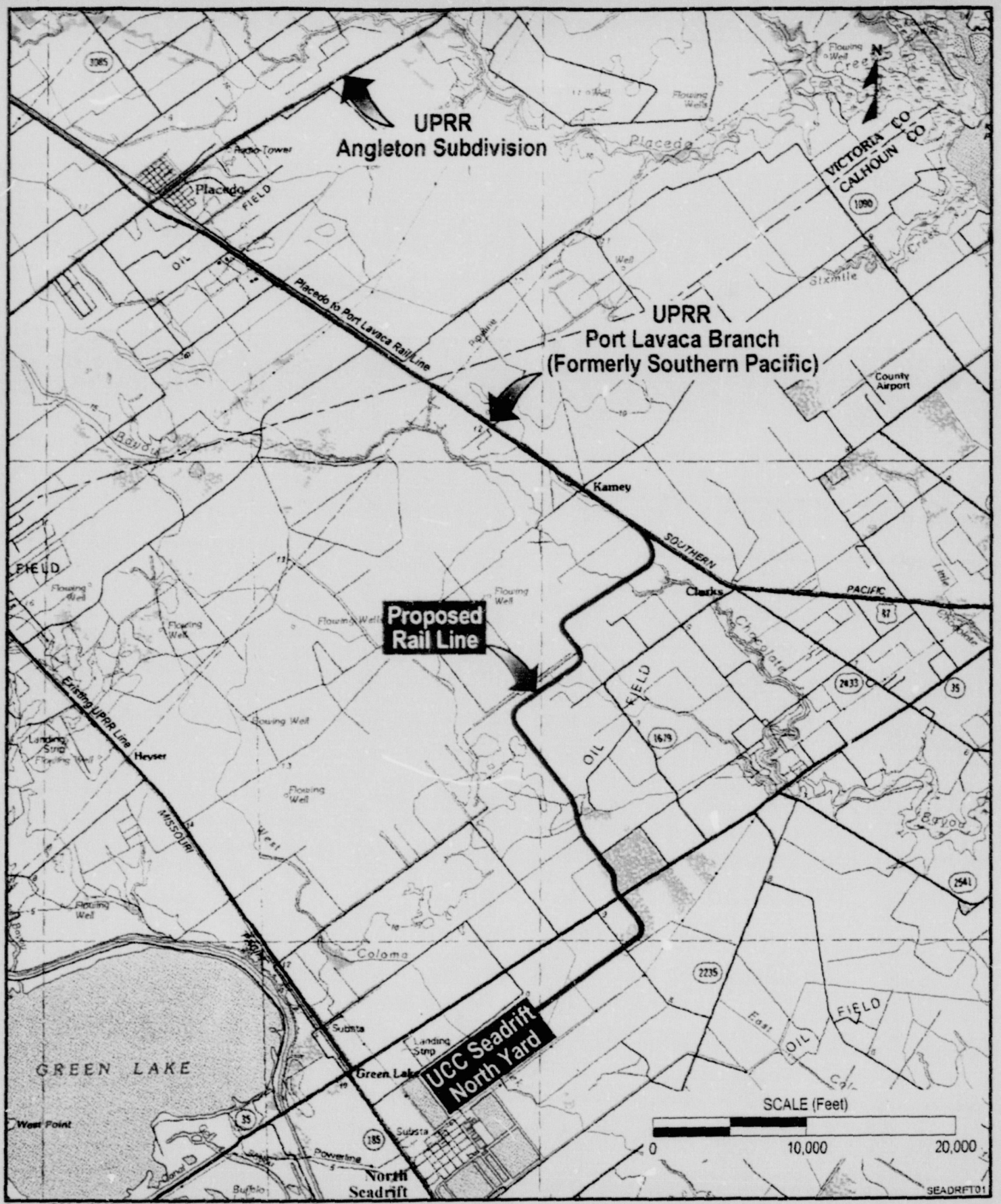


Seadrift Rail Build-In
Finance Docket No. 34003

PROJECT AREA
Figure 1-1



Source: USGS 1:100,000 Topographic Quadrangle – Port Lavaca, TX

Seadrift Rail Build-In

Finance Docket No. 34003

PROJECT LOCATION

Figure 1-2

ATTACHMENT A

ATTACHMENT B

ATTACHMENT B

As shown on BNSF's maps, which we replicate as Attachment A, BNSF plans to construct a build-in track from near Kamey, Texas, to a shipper facility at Seadrift, Texas. To serve this build-in, BNSF proposes to operate one train daily in each direction between Houston and Seadrift. The southbound trains will use UP's Angleton Subdivision from Houston to Placedo, Texas. At Placedo, the trains must transfer to the former SP Port Lavaca Branch, which runs from Placedo to Kamey and beyond. Northbound trains will follow the same route back to Houston.

BNSF's operating plan would interfere with UP service in two ways. First, BNSF would add two additional trains each day to one of UP's most congested rail lines, the Angleton Subdivision. Second, BNSF would block two UP lines twice daily for an hour at Placedo, where the Angleton Subdivision and the Port Lavaca Branch cross.

BNSF trains would block UP's lines because the infrastructure at the crossing does not include a connection in the east quadrant of the crossing. See Attachment A, p. 2. Instead, BNSF trains would need to back up over a connection in the west quadrant of the crossing. A connecting track in the east quadrant, coupled witn powered switches that a dispatcher in Houston could control, would permit BNSF trains to move expeditiously from the Angleton Subdivision onto the Port Lavaca Branch and vice versa. Without the connecting track, however, BNSF's trains must perform a cumbersome maneuver that would block both tracks.

UP estimates that each BNSF southbound train would require approximately 57 minutes to perform the following steps:

The train proceeds through the crossing and comes to a stop on the mainline. Then, after the crew contacts the dispatcher, the dispatcher turns a powered switch. The train must move backward at low speed through the switch and onto the connecting track in the west quadrant of the crossing. Because the connecting track and the branch have no signals, under FRA rules the train crew member must walk ahead of the train or ride the rear of the train to protect it against other trains. The train must stop again when it reaches the hand-thrown switch on the Port Lavaca Branch west of Placedo. The train crew member must throw that switch so that the train can back onto the branch. After the train backs beyond the switch and stops, the train crew member must walk from the rear of the train back to the switch and turn it again. The train would then proceed southeast toward Kamey, crossing the Angleton Subdivision. Each northbound train would perform the same steps in reverse.

These time-consuming movements would delay other trains on the Angleton Subdivision. This line operates near its capacity, and the segment through Placedo is the "bottleneck" segment on the line. That means that delays occur more often on this segment than on any other UP segment of the Angleton Subdivision.[1]

The segment through Placedo can handle 14.8 trains per day with acceptable delays. This is its "fluid capacity." North of Placedo, the line carries an average of 13.7 trains each day; 10.3 UP trains and 3.1 BNSF trains. Merely adding two more BNSF trains would exceed the line's fluid capacity. Because those new BNSF trains would block Placedo for an hour each, the delays would be worse than if the trains did not stop.

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[1] BNSF owns one segment included in UP's Angleton Subdivision. That segment is the most severely congested segment between Houston and the Mexican border.

Tex Mex operates two or more additional trains each day between Houston and Laredo through Placedo. Exercising trackage rights on UP, these trains use the Port Lavaca Branch northwest of Placedo and the Angleton Subdivision southwest of Placedo. They operate over the connecting track at Placedo. Tex Mex trains would be delayed while BNSF trains occupy the connection and both block UP routes. The line southwest of Placedo, with over 17 trains per day, is already well above its fluid capacity, and blocking the crossing twice daily will worsen the situation.

BNSF interference will increase UP and Tex Mex operating costs. BNSF interference will also degrade service for every UP, Tex Mex, and BNSF customer whose cars are delayed because of the BNSF operation at Placedo. UP's customers include the major auto producers, grain shippers who export to Mexico or via the Port of Corpus Christi, and petrochemical shippers along the Gulf Coast.

UP asked BNSF to install a connecting track in the east quadrant at Placedo to avoid these harms and to avoid entirely interfering with Tex Mex trains, but BNSF refused.

BNSF's proposed operating plan also will interfere with a shipper's unusual use of the Port Lavaca Branch. A few years ago, UP and Martin Marietta Corporation cooperated to divert rock movements from Texas highways and transport them by rail to the Kamey area. Martin Marietta supplies major construction projects along the Gulf Coast in that area, including construction of a new state highway. These shipments generate only modest profits for UP, so UP had to limit costs or relinquish the business to trucks. UP allowed Martin Marietta to unload trains directly from the Port Lavaca Branch because the branch had carried no other trains for years.

Martin Marietta receives a train of 50 to 60 cars of rock approximately once a week. The customer scoops the rock out of the cars and loads it directly into waiting trucks, a process that requires about 24 hours per train. If BNSF were to operate two trains daily on the branch, Martin Marietta would be required to move its train out of the way, interrupting unloading and multiplying its costs.[2] UP proposed that BNSF construct a siding for Martin Marietta, allowing BSNF trains to avoid interfering with the unloading process.

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[2] Alternatively, the customer would be required to construct a conveyor system and acquire property to store rock. BNSF suggests yet another alternative: relocating the unloading site. Petition, p. 12 n.15. This suggestion, never advanced during the negotiations, deserves study, although it would increase the shipper's costs.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of January 2002 a copy of the foregoing "UP's Reply to BNSF's Petition for Clarification Regarding BNSF Interference with UP Service" was delivered to counsel for BNSF by hand and mailed, postage prepaid, to all other parties of record in Finance Docket No. 32760 (Sub. No. 21).

J. Michael Hemmer

DAILY REPORT
Mark Kreaggor

1-25-02

Reviewed scanned docket filings on STB internet website.

Prepared and forwarded information for audit.

Processed STB subscription requests.

DAILY REPORT
Mark Kreaggor

1-28-02

Reviewed scanned docket filings on STB internet website.

Processed STB subscription requests.

20440 6

PATTON BOGGS LLP
ATTORNEYS AT LAW

2550 M Street, NW
Washington, DC 20037-1350
202-457-6000

Facsimile 202-457-6315
www.pattonboggs.com

Scott N. Stone
202-457-6335
sstone@pattonboggs.com

January 11, 2001

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, NW Suite 700
Washington, DC 20423-0001

Re: Fin. 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

Dear Secretary Williams:

Enclosed are an original and 25 copies of:

1. CMA-14, the Reply of the American Chemistry Council to BNSF-97, Petition for Clarification Regarding Costs of Accommodating BNSF Build-In/Build-Out Traffic.

2. CMA-15, the Reply of the American Chemistry Council to BNSF-98, Petition for Clarification Regarding Trackage Fee Adjustment

Also enclosed is a 3 ½" diskette containing these filings in WordPerfect 5.x for Windows.

Please stamp the additional copy with the date of receipt and return with our messenger.

Sincerely,

Scott N. Stone

R>

204406

CMA-14

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 THE AMERICAN CHEMISTRY COUNCIL TO BNSF-97, PETITION FOR CLARIFICATION REGARDING COSTS OF ACCOMMODATING BNSF BUILD-IN/BUILD-OUT TRAFFIC

The American Chemistry Council ("the Council")[1] respectfully submits this reply to BNSF-97, which seeks clarification of who should bear the expense of accommodating BNSF build-in/build-out traffic in the event such traffic interferes with UP system traffic.

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[1] The American Chemistry Council (formerly the Chemical Manufacturers Association, or CMA) represents the leading companies engaged in the business of chemistry. Council members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. The Council is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a $460 billion a year enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for 10 cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

UP takes the position that BNSF must fund new connections or other improvements to UP's system whenever BNSF's trackage rights operations "creat[e] any level of interference with the owner's operations and service to its customers." See BNSF-97 at 7. The Council emphatically agrees with BNSF that UP's position is incorrect and untenable. The operation of BNSF's trackage rights trains, by definition, creates some level of interference with UP's operations, because accommodating such trains means that UP cannot schedule its own trains based solely on its own operational convenience.

It was wholly foreseeable that conflicts between UP's traffic and BNSF's trackage rights trains would grow steadily following the merger of SP and UP. UP in its merger presentations espoused the view, strongly concurred in by Board, that the merger would result in substantial growth in traffic on the merged lines, both because UP routes would became more efficient and attract more traffic, and because the BNSF would step into the shoes of the weaker SP as the principal competitor to UP in key parts of the west, including the Gulf Coast. Part of the traffic BNSF was entitled to pursue was build-in/build-out traffic, and there had already been a strong trend towards more of this type of traffic nationwide in the previous 15 years. It was an express goal of the Council and the Board to assist BNSF to acquire a "critical density" of trackage rights traffic (by, among other means, opening up certain existing long-term contracts for bidding, and opening new facilities to BNSF), so that BNSF could provide cost-effective, competitive service more quickly. BNSF has succeeded, as the Board recently observed, in developing the trackage rights traffic "to the size and scale of a Class I railroad in its own right."[2]

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[2] Fin. Docket No. 32760 (Sub-No. 21) Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company – Control and Merger – Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and the Denver and Rio Grande Western Railroad Company [General Oversight], Dec. No. 21 (Decided: December 19, 2001) at 4.

In sum, it was within the contemplation of UP, the Board and the parties to this proceeding that there would be more trains, including BNSF trains, operating over the trackage rights lines. At the same time, as the Board has observed, rail infrastructure has been pared and rationalized by abandonments and mergers to the point that there is little excess capacity in the major rail systems.[3] It was therefore clear, or should have been clear, that the growing BNSF trackage rights operations, when combined with UP's own growing operations, would lead to some level of interference between the desired operations of UP and BNSF. Indeed, the UP, the BNSF and the Board have spent considerable time and effort finding ways of dealing with such interference or potential interference, such as the establishment of the Spring, TX dispatching center to ensure that UP and BNSF trains are afforded equal treatment by dispatchers.

As BNSF shows (BNSF-97 at 7-8), UP's "no interference" position is also inconsistent with the settlement agreements under which the BNSF trackage rights have been conducted. Those agreements call for consultation between UP and BSNF on BNSF trackage rights operations to balance two objectives: (1) minimizing the operational inconvenience to UP/SP while (2) ensuring that BNSF can provide competitive service. A fair reading of these two objectives is that BNSF's ability to compete is the higher priority, because that objective is to be ensured, while operational inconvenience to UP is only to be minimized, not avoided altogether.

Therefore, the Council agrees with BNSF that UP has no right to demand that BNSF undertake expensive capital improvement projects whenever its trackage rights trains create any interference with UP operations.

The Council also agrees with the general principles advocated by BNSF to deal with conflicts between UP and BNSF operations. In a nutshell, the goals of such principles should be

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[3] See, e.g., Ex Parte No. 582, Public Views on Major Rail Consolidations (slip op. at 6)(served March 17, 2000.

to ensure that (1) the UP and BNSF consult in a timely and cooperative manner concerning BNSF build-in/build-out traffic, (2) every effort be made to accommodate BNSF traffic through dispatching, scheduling, or other operational means, (3) where BNSF operations cannot be accommodated through dispatching, scheduling, or other operational means, that the most efficient construction solution be agreed upon or ordered by a mediator and (4) that the construction be paid for in accordance with the economic benefit it will afford to BNSF and UP, respectively. A model for the funding of any new construction would be the joint facility agreements that exist between BNSF and UP in respect of various shared railroad facilities.

The Council believes that it will not be particularly productive for BNSF and UP to attempt to define or debate the meaning of what constitutes "unreasonable and material interference," as suggested by BNSF. Rather, the more important issue is whether interference, of whatever magnitude, can be accommodated by dispatching, scheduling or other operational coordination. BNSF and UP have already shown that they are able to deal cooperatively with dispatching and other operational issues without continuous Board involvement. Even though dispatching and other operational decisions may have economic ramifications for both carriers, they should not be permitted to grow into issues requiring arbitration and Board attention. Hence, the Council would recommend telescoping the procedure suggested by BNSF to get more immediately to the issue of whether interference can be dealt with by dispatching, scheduling or other operational accommodations. If they can, then UP and BNSF should be required to work out the problems themselves. If they cannot, and capital improvements are required, then the the clarification given by the Board in this matter should provide guidance on principles for the funding of any needed capital improvements.

To make the Council's position clear, we present it below in a format roughly comparable to the procedure proposed by BNSF in the four bullet points in BNSF-97 at 9-10.

- When BNSF presents an operating plan to UP to serve a build-in/build-out line, UP is required to approve that operating plan unless UP within 60 days presents a detailed written report showing that BNSF's proposed operations would interfere with UP's operations and that the interference cannot be alleviated through the use of dispatching, scheduling, or other operational coordination. The report shall review all reasonable alternative dispatching, scheduling and operational options before concluding that none is feasible in the absence of new construction.

- The aforementioned UP report shall detail any construction of new facilities said by UP to be required, and shall outline BNSF and UP operating plans that would, at the least cost, permit BNSF to conduct its proposed operations competitively using these facilities.

- Any new facility required to be constructed shall be funded on the basis of the degree of use of the facility by UP and BNSF and/or the incremental economic benefit provided to UP and BNSF, respectively, by the facility. Models for such funding would include joint facilities agreements to which UP and/or BNSF are parties.

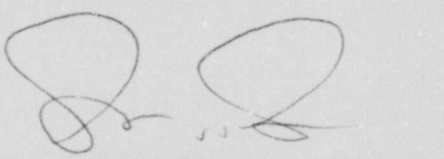
- If UP and BNSF, after good faith negotiations aimed at reaching the lowest cost solution, cannot agree on the need for a new facility, or the funding for such facility, they may submit the dispute to arbitration, or to the Board, in accordance with the above principles and the principles of ensuring BNSF's ability to provide competitive service while minimizing interference with UP operations.

The above principles, including the principle that funding of new facilities should be in accordance with use and/or economic benefits, attempt to replicate the competitive situation that existed pre-merger, while recognizing the unique nature of BNSF's operating over trackage rights on the UP system. Pre-merger, neither UP nor SP would construct a build in, or serve new traffic, if doing so did not justify the costs involved. Matching costs of new facilities against expected use of and economic benefit from new facilities is the basic free market test of whether an investment makes sense. Those costs would consist principally of the cost of constructing the build-in or build-out line, but might include costs of sidings or other facilities to allow the new build-in or build-out traffic to be accommodated on top of pre-existing traffic. The railroad

constructing the build -in or build-out would find the cheapest, most efficient way to accommodate the new traffic on its pre-existing system, examining first any dispatching or scheduling options before looking at new construction. If that meant changing its operations to find a place for a train that had previously been parked on a main line track, to permit the new traffic to be handled, that is what would have been done.

The wrinkle, post merger, is that BNSF, after obtaining new traffic by means of a build-in or build-out, must carry that traffic not over its own lines, but over trackage rights on UP's system. Hence, the BNSF and UP have partly shared and partly conflicting interests in accommodating the new traffic. Those interests are guided and tempered by the BNSF settlement agreement which contains the balancing objective mentioned above – ensuring that BSNF can provide competitive service while minimizing interference to UP's operations. The UP and BNSF interests, and the interests of shippers and the public, will best be accommodated if UP and BNSF both have incentives to avoid the construction of new facilities if they are not needed, to minimize the costs of any new facilities that are needed, to construct new facilities that will make both UP and BNSF operations more efficient, and to share the cost of the new facilities in accordance with their respective use by and economic benefit to UP and BNSF.

Respectfully submitted,



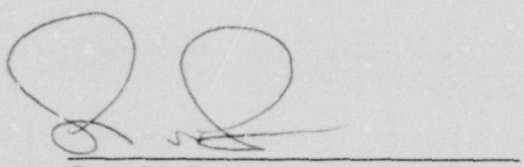
David F. Zoll
Thomas E. Schick
American Chemistry Council
Commonwealth Tower
1300 Wilson Boulevard
Arlington, VA 22209

Scott N. Stone
John L. Oberdorfer
Patton Boggs, LLP
2550 M Street, N.W.
Washington, D.C. 20037

Counsel for the American
Chemistry Council

CERTIFICATE OF SERVICE

This is to certify that I have, this 14th day of January, 2002, served copies of the foregoing filing by hand upon Washington counsel for the Burlington Northern Santa Fe and Union Pacific and by mail upon other parties of record.



Scott N. Stone

204405

PATTON BOGGS LLP
ATTORNEYS AT LAW

2550 M Street, NW
Washington, DC 20037-1350
202-457-6000

Facsimile 202-457-6315
www.pattonboggs.com

Scott N. Stone
202-457-6335
sstone@pattonboggs.com

January 11, 2001

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, NW Suite 700
Washington, DC 20423-0001

Re: Fin. 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

Dear Secretary Williams:

Enclosed are an original and 25 copies of:

1. CMA-14, the Reply of the American Chemistry Council to BNSF-97, Petition for Clarification Regarding Costs of Accommodating BNSF Build-In/Build-Out Traffic.

2. CMA-15, the Reply of the American Chemistry Council to BNSF-98, Petition for Clarification Regarding Trackage Fee Adjustment

Also enclosed is a 3 ½" diskette containing these filings in WordPerfect 5.x for Windows.

Please stamp the additional copy with the date of receipt and return with our messenger.

Sincerely,

Scott N. Stone

204405

CMA-15

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 THE AMERICAN CHEMISTRY COUNCIL TO BNSF-98, PETITION FOR CLARIFICATION REGARDING TRACKAGE FEE ADJUSTMENT

The American Chemistry Council ("the Council")[1] respectfully submits this reply to BNSF-98, which seeks clarification of whether the mechanism for adjusting trackage rights fees

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[1] The American Chemistry Council (formerly the Chemical Manufacturers Association, or CMA) represents the leading companies engaged in the business of chemistry. Council members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. The Council is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a $460 billion a year enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for 10 cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

paid by BNSF to UP should exclude the initial mark-up to capital assets occasioned by the UP's purchase of the SP at a substantial premium above book value.

The Board's instinct might be to examine previous cases in which the issue of a purchase premium has arisen in other contexts. But the Council submits that those other cases are not instructive in this instance. The issue here turns on the expectations of the parties regarding specific contractual provisions that were incorporated by the Board into its UP/SP merger conditions.

As BNSF recites in its petition (BNSF-98 at 4-5, 9-12), the BNSF Settlement Agreement contained agreed figures for trackage rights fees to be paid by BNSF to UP, most commonly 3.1 mills per gross ton mile. Those fees, negotiated by BNSF and UP, were originally to be adjusted by increases in the Rail Cost Adjustment Factor unadjusted for productivity (RCAF-U). That adjustment factor was changed, however, by Section 7 of the CMA Agreement, to escalate in accordance with actual, productivity-adjusted maintenance and operating costs. The point of this change was to ensure that the 3.1 mills per gross ton mile would not escalate above actual cost inflation over the 99-year term of the BNSF settlement agreement, as it might if it were escalated in accordance with the RCAF-U.

It was certainly not in CMA's (now the Council's) contemplation that the 3.1 mills per gross ton mile would be adjusted upward to reflect UP's writing up of assets owing to its purchase of SP at a price above book value. The Council recognizes that the literal language of Section 7 of the CMA Agreement, which adjusts the fee in accordance with "the difference in the two preceding years in UP/SP's system average URCS costs," could be read as justifying what UP has done, that is, reaching back to compare pre-merger asset values with post-merger asset values. But it was never the Council's intention that the escalation mechanism be a backdoor

means, in effect, of billing BNSF for the change in book value resulting from the UP/SP corporate merger. As BNSF notes (BNSF-98 at 12-13), under section 9c of the original BNSF Settlement Agreement, UP committed to fund all capital expenditures needed to achieve the benefits of the merger. By billing BNSF for a portion of the costs of its acquisition of SP, UP violates the letter and the spirit of that commitment.

Moreover, the Council agrees with BNSF that it is wholly anomalous, when BNSF is deemed to be "stepping into the shoes of SP" and replicating the competition offered by SP pre-merger, for BNSF to have to bear the UP's costs of the merger premium.

CONCLUSION

For the foregoing reasons – to respect the intentions of the parties in crafting the adjustment mechanism, to hold UP to it promise to pay for merger related capital costs, and to permit BNSF to stand in the shoes of the SP without the need to bear a portion of UP's merger related expense – the Board should grant BNSF the clarification requested at page 16 of BNSF-98.

Respectfully submitted,

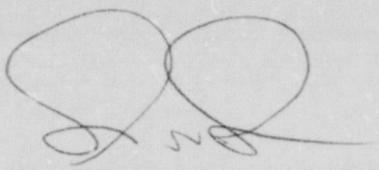
David F. Zoll
Thomas E. Schick
American Chemistry Council
Commonwealth Tower
1300 Wilson Boulevard
Arlington, VA 22209

Scott N. Stone
John L. Oberdorfer
Patton Boggs, LLP
2550 M Street, N.W.
Washington, D.C. 20037

Counsel for the American
Chemistry Council

CERTIFICATE OF SERVICE

This is to certify that I have, this 14th day of January, 2002, served copies of the foregoing filing by hand upon Washington counsel for the Burlington Northern Santa Fe and Union Pacific and by mail upon other parties of record.



Scott N. Stone

204404

SLOVER & LOFTUS
ATTORNEYS AT LAW
1224 SEVENTEENTH STREET, N. W.
WASHINGTON, D. C. 20036-3003

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

TELEPHONE:
(202) 347-7170
FAX:
(202) 347-3619
WRITER'S E-MAIL:
jhl@sloverandloftus.com

January 14, 2002

VIA HAND DELIVERY

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

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

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding please find an original and twenty-five (25) copies of the Reply to Petition of The Burlington Northern and Santa Fe Railway Company for Clarification (designated **WCTL-27**), submitted by the Western Coal Traffic League.

We have enclosed an electronic copy of this Reply on diskette and an additional hard copy to be date-stamped and returned to the bearer of this letter.

Thank you for your assistance in this matter.

Sincerely,

John LeSeur

John H. LeSeur
An Attorney for
Western Coal Traffic League

Enclosures

R-5

204404

WCTL-27

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

REPLY TO PETITION OF
THE BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY FOR CLARIFICATION (BNSF-98)

By: William L. Slover
John H. LeSeur
Peter A. Pfohl
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for
Western Coal Traffic League

OF COUNSEL:

SLOVER & LOFTUS
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: January 14, 2002

WCTL-27

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

REPLY TO PETITION OF
THE BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY FOR CLARIFICATION (BNSF-98)

The Western Coal Traffic League ("WCTL") files this reply to the petition for clarification ("Petition") served by the Burlington Northern and Santa Fe Railway Company on December 21, 2001 (BNSF-98).

I.

THE BNSF PETITION

As BNSF explains, BNSF and UP initially agreed to use an RCAF-U based method to adjust the trackage rights fees set forth in the BNSF agreement. This methodology was opposed by WCTL, the Chemical Manufactures Association ("CMA"), and other

shipping groups on the ground it was not cost-based and would serve to further inflate the already excessive base trackage rights fee levels set forth in the agreement.

According to BNSF, BNSF and UP decided to accept a cost-based adjustment mechanism as part of its settlement agreement with CMA. The CMA settlement agreement language was subsequently incorporated into the BNSF Agreement. That Agreement (in its present form) at section 12 provides that the trackage rights fee levels will be adjusted annually based upon the URCS cost charges:

> All trackage rights charges under this Agreement shall be subject to adjustment upward or downward July 1 of each year by the difference in the two preceding years in UP/SP's system average URCS costs for the categories of maintenance and operating costs covered by the trackage rights fee....
>
> It is the intention of the parties that rates and charges for trackage rights and services under this Agreement reflect the same basic relationship to operating costs as upon execution of this Agreement (September 25, 1995).

Finance Docket No. 32760 (Sub. No. 21), Joint Submission of Restated and Amended BNSF Settlement Agreement (UP/SP-386)(BNSF-92), July 25, 2001.

BNSF argues that UP has misapplied this adjustment procedure by: (1) including in the adjustments purchase premium costs UP incurred when it purchased SP and (2) including in the adjustments investment costs UP agreed to exclusively fund.

Based upon these contentions, BNSF asks the Board to clarify Decision No. 44 by finding that BNSF's interpretation of the adjustment mechanism as it applies to the two issues raised by BNSF is correct. BNSF requests that "other parties" present their views on the issues raised in BNSF's Petition. Petition at 3.

II.

WCTL COMMENTS

WCTL was one of several shipper parties that urged the STB to adopt a cost-based trackage rights fee adjustment mechanism in the BNSF agreement. The adjustment mechanism BNSF and UP are actually deploying appears to be based on the "below the wheel" cost accounting URCS formulations submitted by WCTL, CMA and other shippers.[1] See Comments of the Western Coal Traffic League (March 29, 1996) at 29-32, V.S. Crowley 20-29. (Redacted, Public Version).

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[1]WCTL and CMA used the same cost witness and presented similar testimony on the fee adjustment issues.

At the time WCTL was sponsoring URCS based cost adjustment proposals, its position and intent was that purchase premium costs should not be included in the URCS-based cost formulations it presented (and BNSF and UP appear to have adopted).[2] Thus, if, as BNSF suggests, the initial intent of BNSF and UP was to use shipper-sponsored URCS calculations, those calculations were not intended by WCTL to include acquisition premium costs.

WCTL also urges the Board to consider the practical impact of the adjustment issues. The base fee levels exceed 5 mills per revenue ton mile on most unit train movements. Id. at 29, V.S. Crowley 22. The STB found the sale to be "reasonable" under the regulatory standards it employed but, as a practical commercial matter, a 5 mill trackage rights fee -- to recover only below the wheel costs -- is extraordinarily high in the real world of competitive western coal unit train transportation.[3] This fee puts BNSF at a significant disadvantage -- which disadvantage increases by the length of the involved trackage

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[2] See Finance Docket No. 33726, Western Coal Traffic League v. Union Pacific Railroad Co., (STB Decision served May 10, 2000).

[3] Id., V.S. Weishaar 28-31. WCTL also points to the recent WPL decision. There, as disclosed in the decision, the STB found UP's below the wheel costs for the involved unit train coal traffic approximated only 2.3 mills per net revenue ton-mile. See Docket No. 42051, Wisconsin Power and Light Company v. Union Pacific Railroad Company, (STB Decision served Sept. 12, 2001) at Appendix A.

rights segments BNSF must traverse on a given movement.

Any actions taken by the Board to lessen this fee (which is what BNSF requests) will help to ameliorate the competitive disadvantage.

CONCLUSION

WCTL requests that the Board grant BNSF's Petition.

Respectfully submitted,

By: William L. Slover
John H. LeSeur
Peter A. Pfohl
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for
Western Coal Traffic League

OF COUNSEL:

SLOVER & LOFTUS
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: January 14, 2002

CERTIFICATE OF SERVICE

I certify that I have this 14th day of January, 2002, served copies of the foregoing Reply by first class mail, postage prepaid, or by more expeditious means on all parties of record in Finance Docket No. 32760.

Peter A. Pfohl

204403

Before the
Surface Transportation Board
Washington, DC 20423

In the Matter of:	)	
	)	
Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company	)	**Finance Docket No. 32760**
	)	
-- Control and Merger --	)	
	)	**Petition of The Burlington Northern and and Santa Fe Railway Company for Clarification**
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 UNION CARBIDE CORPORATION

Union Carbide Corporation ("UCC"), a wholly owned subsidiary of The Dow Chemical Company, by its attorney, respectfully submits its comments in response to the petition of The Burlington Northern and Santa Fe Railway Company ("BNSF") seeking clarification of the "build-in/build-out" condition imposed by the Board in approving the merger of the Union Pacific Railroad and Southern Pacific Railway ("UP/SP"), said petition having been filed December 17, 2001 (BNSF-97).

UCC's Seadrift, Texas plant is the subject of a build-in application filed with the Board on January 31, 2001 in Finance Docket No. 34003. Given that the issues raised by BNSF, namely under what circumstances BNSF is required to construct or fund construction of a new connection or other facilities or improvements to serve a build-in/build-out line pursuant to the UP/SP merger conditions, and the operating right of BNSF on the trackage rights line, arose in the context of the Seadrift build-in, UCC has an inherent interest in this matter.

UCC fully supports the position of BNSF and respectfully submits that UP has taken an extreme and unjustified position with regard to BNSF's rights under the build-in/build-out condition. That condition was imposed on UP/SP in order to maintain and replicate, to the maximum extent possible, the pre-merger competition between UP and SP. Consequently, BNSF was given operating rights over the lines of the UP/SP in order to maintain competitive service at points where that service otherwise would have been lost due to the merger.

UP's position that "any level of interference with [UP's] operation and service to its customers by operating rights granted in the UP/SP merger is unacceptable"[1] reflects a circularity of reasoning which is fundamentally inconsistent with the trackage rights granted to BNSF in its settlement agreement with UP and SP, as modified by the CMA Settlement and by the Board in the conditions imposed in approving the UP/SP merger. Any operation by BNSF pursuant to its trackage rights necessarily occupies UP's tracks for a period of time; and therefore, by precluding simultaneous operation, any BNSF train operation has the potential to "interfere" with UP's operations. Necessarily, therefore, BNSF's operations over UP's tracks require coordination between the owning railroad and the tenant. That coordination well may require accommodation on the part of both parties. UP, which sought out BNSF and entered into the settlement entailing extensive trackage rights and then touted the BNSF Settlement in the merger proceeding as enhancing competition in the Gulf Coast, now wants BNSF to operate in a totally subservient manner, with no accommodations by UP to BNSF's exercise of its trackage rights.[2]

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[1] Petition at Attachment B, letter of September 24, 2001 from Steve Barkley, Regional Vice President, Southern Region, UP, to Rollin Bredenberg, Vice President, Service Design & Performance, BNSF.

[2] UP also ignores the fact that the operation by BNSF to serve the Seadrift facility would offset UP's operations, thereby effectively freeing up some line capacity and reducing UP's operations in serving Seadrift via the same mainline track over which BNSF will operate.

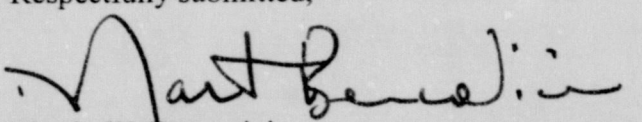
Not only is UP's position inconsistent with the Board's UP/SP merger decision, the BNSF Settlement and the CMA Settlement, but also it is inconsistent with statutory policy. That policy is reflected in three (3) provisions of the ICC Termination Act. Section 11102 provides that the Board may require one carrier to allow another to utilize terminal facilities where the Board finds such use "to be practicable and in the public interest without substantially impairing the ability of the rail carrier owning the facilities . . . to handle its own business." 49 USC §11102(a) (emphasis added). Similarly, Section 11103 requires a carrier to maintain a switch connection to enable traffic to move "to the best of its ability without discrimination in favor of or against the shipper when the connection (1) is reasonably practicable . . ." 49 USC §11103(a) (emphasis added). Thirdly, pursuant to the directly analogous circumstance of line crossing for new rail construction, "no other rail carrier may block any construction . . . by refusing to permit the carrier to cross its property if - . . . (B) the operation does not materially interfere with the operation of the crossed line . . ." 49 USC §10901(d)(1) (emphasis added). Accordingly, the statute itself establishes the criteria for intersecting carrier operations based upon reasonable accommodation (or stated alternatively, toleration of reasonable interference), rather than based upon the absolute "no interference" standard asserted by UP.

UCC further is concerned by the issue posed in UP's letter of September 24, 2001, and discussed in the BNSF petition, that UP is entitled to block BNSF's operations on the Placedo-to-Kamey line while it parks rail cars for customer unloading. Again, the trackage rights condition requires that reasonable accommodation be made. The Placedo-to-Kamey line formerly was operated by the SP; and had SP served the Seadrift plant through a build-in/build-out along the route selected by BNSF, which essentially replicates the route formerly considered by UCC and SP for a line to connect to SP, it is inconceivable that SP would have blocked its

own service to Seadrift in the manner that UP claims it is entitled to block BNSF service to Seadrift. Such an approach does not preserve or replicate the competitive opportunity that existed prior to the UP/SP merger, but rather hinders efficient operation and therefore competition.

WHEREFORE, THE PREMISES CONSIDERED, Union Carbide Corporation strongly urges the Surface Transportation Board to grant the BNSF Petition for Clarification, and to direct Union Pacific Railroad to make reasonable accommodation to The Burlington Northern and Santa Fe Railway Company to enable BNSF to render efficient and competitive service pursuant both to the trackage rights granted and to the build-in/build-out condition, particularly including their application to BNSF service to UCC's Seadrift plant.

Respectfully submitted,



Martin W. Bercovici
Keller and Heckman, LLP
1001 G Street, N.W., Suite 500W,
Washington, DC 20001
(202) 434-4144
Bercovici@khlaw.com

Attorney for Union Carbide Corporation

January 14, 2002

CERTIFICATE OF SERVICE

I, Carolina R. Moore, do hereby certify that on this 14th day of January, 2002, I have caused a copy of the foregoing Comments in Finance Docket Number 32760 to be served, by first class mail, postage paid, upon all parties of record.

Carolina R. Moore

Carolina R. Moore

204402

Before the
Surface Transportation Board
Washington, DC 20423

In the Matter of:	)	
	)	
Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company	)	**Finance Docket No. 32760**
	)	
-- Control and Merger --	)	
	)	**Petition of The Burlington Northern and**
Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and the Denver and Rio Grande Western Railroad Company	)	**and Santa Fe Railway Company for Clarification**
	)	
	)	
	)	
	)	

COMMENTS OF ATOFINA PETROCHEMICALS, INC., BASELL USA INC., EQUISTAR CHEMICALS, LP AND LYONDELL CHEMICAL COMPANY

ATOFINA Petrochemicals, Inc., Basell USA Inc., Equistar Chemicals, LP and Lyondell Chemical Company, the producer limited partners of San Jacinto Rail Limited ("SJRL") (hereinafter, the "Bayport Producers"), respectfully submit their comments in response to the petition of The Burlington Northern and Santa Fe Railway Company ("BNSF") seeking clarification of the "build-in/build-out" condition imposed by the Board in approving the merger of the Union Pacific Railroad and Southern Pacific Railway ("UP/SP"), said petition having been filed December 17, 2001 (BNSF-97).

While the operational issues serving as the genesis for the BNSF petition arose in the context of BNSF's proposed build-in to the Union Carbide facility at Seadrift, Texas, similar issues likely will arise in the context of the SJRL build-in to Bayport, Texas, pending before the

Board in Finance Docket No. 34079.[1] The issue posed by the BNSF petition is whether the position of UP that "any level of interference with [UP's] operation and service to its customers by operating rights granted in the UP/SP merger is unacceptable"[2] is consistent with the trackage rights granted to BNSF, the build-in/build-out condition imposed on UP/SP, and statutory and Board policies.

The interest of the Bayport Producers arises out of UP's "Comments on Infrastructure and Safety for the Build-out to the Bayport Loop."[3] While UP gave "lip-service" to support of the exemption petition,[4] and while UP stated it "will not attempt to delay the Bayport Loop build-out,"[5] UP then dedicated 13 of the 18 pages of its pleading to raising unwarranted questions regarding the petition, based upon erroneous facts, and by raising questions about the adequacy of the up-stream infrastructure to accommodate the handling of the traffic generated by BNSF along the SJRL line. UP's Comments were carefully calculated to raise questions concerning the exemption which UP ostensibly endorsed, and to pose additional burdens upon BNSF, both financially and operationally, which also likely could have the effect of delaying the build-in.

UP characterized the SJRL traffic projections as "unrealistic"; and based on this assessment, UP asserted its concerns about the Houston infrastructure were "heightened."[6] In

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[1] A petition for exemption from 49 U.S.C. §10901 for the Bayport build-in was filed with the Board on August 30, 2001.

[2] Petition at Attachment B, letter of September 24, 2001 from Steve Barkley, Regional Vice President, Southern Region, UP, to Rollin Bredenberg, Vice President, Service Design & Performance, BNSF..

[3] UP/SP-390, submitted jointly in the instant Docket and also in Finance Docket No. 34079, filed October 9, 2001 ("UP Comments").

[4] "As petitioners propose, the Board should grant the exemption . . . The proposal fulfills a condition imposed on the UP/SP merger to preserve pre-merger competition between SP and UP." UP Comments at 3.

[5] *Id.* at 17.

[6] *Id.* at 10.

support of this contention, UP asserted that "Industries on the loop generate some 600 carloads of petrochemicals and plastics on a typical work day."[7] Subsequently, UP argued that "BNSF would carry more traffic than [the 36 to 66 carloads that] petitioners state in the Petition."[8] As demonstrated by SJRL and BNSF, and as conceded by UP, the representation that an average of 600 carloads of traffic are generated from Bayport Loop shippers on a daily basis was erroneous and misleading. Rather, according to STB carload waybill sample analysis, the average daily number of carloads is approximately 129.[9] This is substantially below the 600 carloads cited by UP in its Comments, which gave rise to its "heightened" concern about the impact on the Houston infrastructure. At the projected level, SJLR would garner approximately 28% of Bayport traffic at startup, rising to approximately 51% (or, based upon UP's data, 24% and 44%, respectively). These percentages are quite compatible with the UP/SP estimate of competitive traffic which BNSF would secure as represented during the course of the UP/SP merger, and totally refute any implication that SJRL has provided the Board with unrealistic traffic estimates, and therefore had underestimated daily train operations.

Moreover, in its Comments UP raised a number of issues regarding rail infrastructure in the Houston area with regard to the GH&H Line with which the SJRL line would connect. UP stated that it operates 8 to 9 trains per day over the line "and cannot absorb additional trains without delaying UP service."[10] UP also cited to several upstream locations where it asserted

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[7] *Id.* at 2-3.

[8] *Id.* at 11.

[9] *See* SJRL and BNSF Reply to Union Pacific Railroad Company's "Comments on Infrastructure and Safety for the Build-out to the Bayport Loop" at 2-4 (Oct. 29, 2001); *See also* Letter from J. Michael Hemmer, Covington & Burling, to the Hon. Vernon A. Williams (Nov. 15, 2001). In his November 15 letter, Mr. Hemmer cites to "an average of over 300 cars of rail traffic, loaded and empty, on a typical day." Mr. Hemmer's figure of 300 cars loaded and empty is equivalent to 150 carloads, as the latter is commonly understood in rail transportation, a figure consistent with the SJRL/BNSF figure calculated from the waybill data.

[10] UP Comments at 14-15.

that the infrastructure currently is inadequate and would need to be upgraded to accommodate the BNSF Bayport Loop train.[11] Notably, however, with regard to operations within the Bayport Loop, UP indicated that both UP and SJRL/BNSF operations can be conducted safely through coordinated dispatching.[12] UP's contentions regarding the Houston infrastructure have been addressed in the SJRL/BNSF Reply and need not be repeated here. For the purpose of this proceeding, it is sufficient to note that considering both UP's Comments on the SJRL exemption petition and UP's September 24, 2001 "no interference with UP operations" position, it is apparent that the issues and principles addressed in the BNSF petition are germane to the Bayport build-in as well as to Seadrift.

In evaluating UP's position, it must be recognized that any additional train operations on existing track provide some limitation on UP's existing operations and therefore constitute what UP would deem to be "interference." This is elementary, since it is a basic and immutable law of physics that two objects (*e.g.*, trains) cannot occupy the same space at the same time. Consequently, UP's "no interference" position is thoroughly inconsistent with UP's voluntary grant of trackage rights to BNSF to operate over 5,000 miles of UP's lines. Such a position also undermines the Board's conditions imposed to maintain competition in the Gulf Coast, as well as the settlement between UP/SP and the Chemical Manufacturers Association.

In addition, UP's position flies in the face of statutory policy regarding the common and intersecting operations of rail carriers. That policy is reflected in three (3) provisions of the ICC Termination Act. Section 11102 provides that the Board may require one carrier to allow another to utilize terminal facilities where the Board finds such use "to be practicable and in the

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[11] *Id.* at 11-14.

[12] *Id.* at 16.

public interest without substantially impairing the ability of the rail carrier owning the facilities . . . to handle its own business." 49 USC §11102(a) (emphasis added). Similarly, Section 11103 requires a carrier to maintain a switch connection to enable traffic to move "to the best of its ability without discrimination in favor of or against the shipper when the connection (1) is reasonably practicable . . ." 49 USC §11103(a) (emphasis added). Thirdly, pursuant to the directly analogous circumstance of line crossing for new rail construction, "no other rail carrier may block any construction . . . by refusing to permit the carrier to cross its property if - . . . (B) the operation does not materially interfere with the operation of the crossed line . . ." 49 USC §10901(d)(1) (emphasis added). Accordingly, the statute itself establishes the criteria for intersecting carrier operations based upon reasonable accommodation (or stated alternatively, toleration of reasonable interference), rather than based upon the absolute "no interference" standard asserted by UP.

In conclusion, it is abundantly clear based upon both the response of UP concerning operation of the Seadrift build-in and the comments of UP with regard to the SJRL exemption petition, that there is a fundamental policy issue which the Board needs to address and resolve regarding the nature and meaning of the trackage rights and the build-in/build-out condition imposed in the UP/SP merger. The Bayport Producers respectfully urge the Surface Transportation Board to address the standards underlying the UP/SP merger conditions, and to do so in a manner which will fulfill the Board's intent to preserve the pre-merger competition between UP and SP. Those standards require mutually cooperative use of the trackage rights lines, entailing no adverse and material interference with train operations, rather than a standard of "no interference with UP's operations."

WHEREFORE, THE PREMISES CONSIDERED, the Bayport Producers respectfully urge the Surface Transportation Board to grant the BNSF Petition for Clarification, and to adopt as the guiding principles those set forth in the BNSF petition and the ICC Termination Act.

Respectfully submitted,

Martin W. Bercovici
Keller and Heckman, LLP
1001 G Street, N.W., Suite 500W,
Washington, DC 20001
(202) 434-4144
Bercovici@khlaw.com

Attorney for ATOFINA Petrochemicals, Inc., Basell USA Inc., Equistar Chemicals, LP and Lyondell Chemical Company

January 14, 2002

CERTIFICATE OF SERVICE

I, Carolina R. Moore, do hereby certify that on this 14th day of January, 2002, I have caused a copy of the foregoing Comments in Finance Docket Number 32760 to be served, by first class mail, postage paid, upon all parties of record.

Carolina R. Moore

Carolina R. Moore

COVINGTON & BURLING

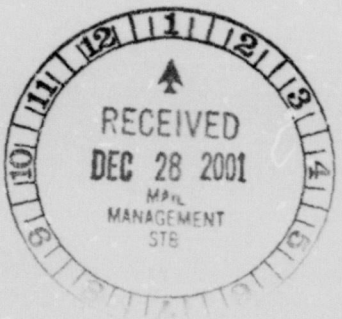
1201 PENNSYLVANIA AVENUE NW
WASHINGTON, DC 20004-2401
TEL 202.662.6000
FAX 202.662.6291
WWW.COV.COM

WASHINGTON
NEW YORK
SAN FRANCISCO
LONDON
BRUSSELS

MICHAEL L. ROSENTHAL
TEL 202.662.5448
FAX 202.778.5448
MROSENTHAL@COV.COM

204238

December 28, 2001



VIA HAND DELIVERY

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

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

Dear Secretary Williams.

We represent Union Pacific Railroad Company ("UP") in the above-captioned proceeding. We write to seek an extension of time to file UP's response the "Petition of The Burlington Northern and Santa Fe Railway Company for Clarification," dated December 21, 2001.

Under the Board's rules, a response is due on January 11, 2002. As UP explained in a previous letter, many of UP's counsel and employees who will be involved in preparing UP's response have travel and other commitments between late December and early January.

We therefore ask that the time to respond be extended until January 14, 2002.

We have discussed this matter with counsel for The Burlington Northern and Santa Fe Railway Company, and they do not object to our requested extension.

Sincerely,

Michael L. Rosenthal

cc: All Parties of Record

STB FD-32760 12-21-01 D 204173

204173

COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE NW
WASHINGTON, DC 20004-2401
TEL 202.662.6000
FAX 202.662.6291
WWW.COV.COM

WASHINGTON
NEW YORK
SAN FRANCISCO
LONDON
BRUSSELS

MICHAEL L. ROSENTHAL
TEL 202.662.5448
FAX 202.778.5448
MROSENTHAL@COV.COM

December 21, 2001

VIA HAND DELIVERY

ENTERED
Office of the Secretary
DEC 26 2001
Part of
Public Record

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

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

Dear Secretary Williams:

We represent Union Pacific Railroad Company ("UP") in the above-captioned proceeding. We write to seek an extension of time to reply to the "Petition of The Burlington Northern and Santa Fe Railway Company for Clarification," dated December 17, 2001.

Under the Board's rules, replies are due on January 7, 2002. Many of UP's counsel and employees who will be involved in preparing UP's reply have travel and other commitments between late December and early January.

We therefore ask that the time to reply be extended until January 14, 2002, so that UP will have an opportunity to file a complete and accurate reply.

We have discussed this matter with counsel for The Burlington Northern and Santa Fe Railway Company, and they do not object to our requested extension.

Sincerely,

Michael L. Rosenthal

cc: All Parties of Record

201171

UP/SP-382

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

UNION PACIFIC'S FOURTH QUARTER 2000 PROGRESS REPORT WITH RESPECT TO MERGER CONDITIONS

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

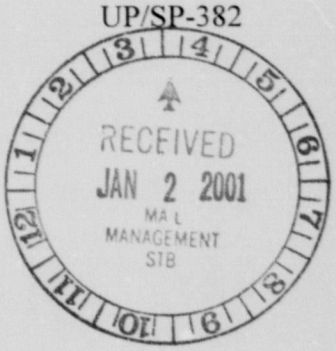
JAMES V. DOLAN
LAWRENCE E. WZOREK
LOUISE A. RINN
Law Department
Union Pacific Railroad Company
1416 Dodge Street
Room 830
Omaha, Nebraska 68179
(402) 271-3897

J. MICHAEL HEMMER
JOHN M. SCHEIB
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-5578

Attorneys for Union Pacific Corporation and
Union Pacific Railroad Company

January 2, 2001

UP/SP-382



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

UNION PACIFIC'S FOURTH QUARTER 2000 PROGRESS
REPORT WITH RESPECT TO MERGER CONDITIONS

UPC and UPRR[1] submit their fourth quarter 2000 progress report concerning the conditions the Board imposed when it approved the UP/SP merger in Decision No. 44, served August 12, 1996. Paragraph 10 of Decision No. 44 requires this progress report. See also id., p. 146 ("We require as a condition that applicants submit on or before October 1, 1996, a progress report and implementing plan regarding their compliance with the conditions to this merger, and further progress reports on a quarterly basis."); Finance Docket No. 32760 (Sub-No. 21), Decision served Nov. 29, 1999, p. 10 ("UP and BNSF shall continue to report quarterly . . . .").

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[1] We use the same acronyms as those in Appendix B of Decision No. 44.

As in our prior quarterly reports, we include items only if there have been developments since the prior report. The information in this report is more abbreviated than the more comprehensive presentation we will file in July 2001.

I. BNSF, TEX MEX AND UTAH RAILWAY CONDITIONS

A. BNSF

BNSF Trackage Rights and Haulage. BNSF continues to use its trackage rights to handle substantial volumes of traffic. As shown in Charts #1, #2, and #3 in Appendix A, BNSF averaged 887 trackage rights trains per month in September and October,[2] compared with 853 in the prior three months.[3] The monthly tonnage handled on those trains averaged about 4.7 million tons in September and October, the same as the 4.7 million tons in the prior three months. Monthly loaded and empty cars on BNSF through trackage rights trains averaged 57,879 in September and October, compared with 58,861 in the prior three months. BNSF continued to operate at least daily through train service in all major corridors.

BNSF and UTAH operated 327 local trains in September and October (average of 164 per month), handling 7,651 loaded and empty cars (average of 3,826 per

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[2] UP experienced a failure in its data collection system for the month of November. We will report November data in our April 2001 report.

[3] In the first quarter of 2000, UP began monitoring both BNSF and Tex Mex trackage rights traffic using information obtained from UP's AEI scanners, as well as information provided by BNSF and Tex Mex. UP previously relied largely on data provided by the trackage rights tenants, but it believes the new data are more accurate. As a result of this change in data collection methodology, the data presented in this report are not directly comparable with the data provided by UP prior to the first quarter of 2000, although UP believes that differences should be minor.

month) and 611,842 tons of freight (average of 303,921 per month), compared with the previous totals for the prior three months of 487 (for an average of 162 per month) trains, 12,848 (for an average of 4,283 per month) cars and 1.01 million (for an average of 335,105 per month) tons of freight.

UP's expenditures on the lines over which BNSF has trackage rights have continued to exceed substantially the fees BNSF pays. We present the latest available data, through September 30, 2000, in Appendix B.

Implementation Steps. The UP-BNSF Joint Service Committee met most recently on October 24, 2000. The Committee discussed trackage rights train performance data for both railroads, development of additional train performance measurements, operating and service issues, and the status of capital expenditures on various lines. It continued to discuss BNSF's use of former SP Gulf Coast SIT facilities.

Line Sales. UP and BNSF finalized their Houston-New Orleans line sale, under which BNSF and UP exchanged 50 percent undivided interests in BNSF's Iowa Junction-Avondale line and UP's line between Iowa Junction and Dawes, Texas. On September 1, 2000, UP and BNSF signed the operating agreement and completed the exchange of interests in the line.

Connections. UP has completed its work on connections to facilitate BNSF trackage rights operations.

Definition of "2-to-1" Points and Opening 50 Percent of Contract Traffic at "2-to-1" Points to BNSF. UP continues to respond in a timely fashion to BNSF inquiries in

accordance with the applicable protocol and continues to be in compliance with the contract reopener condition, as clarified in Decision No. 57, served Nov. 20, 1996. On October 30, 2000, the Board refused to reconsider its decision that the contract modification provision does not apply to AmerenUE.

On November 7, 2000, BNSF contacted UP regarding whether the Red River Depot and Lone Star Ammunition Plant at Defense, Texas, are "2-to-1" points. Within hours, UP researched the situation and responded to BNSF that these locations were "2-to-1" points under the BNSF Settlement Agreement.

New Facilities and Transloading Condition. UP continues to comply with this condition. UP agreed to lease two tracks to BNSF in Glenwood Springs, Colorado, to facilitate BNSF service to American Soda at Parachute, Colorado. BNSF will use those tracks while it completes construction of its own tracks on 23 acres purchased from UP. At Grand Junction, UP is cooperating with BNSF's efforts to build tracks to support local business. UP is reviewing five recent inquiries from BNSF regarding new shipper facilities in California and Texas.

Build-In/Build-Out Condition. There have been no significant Build-In/Build-Out activities during the past quarter.

I-5 Corridor Condition. Although BNSF successfully competes with UP using the Board's merger conditions, one of the Board's conditions remains unfulfilled. That condition is intended to enable UP to compete fully against BNSF in the I-5 Corridor. When it imposed the BNSF Settlement Agreement as a condition to the UP/SP merger

(Decision No. 44, p. 145), the Board expected BNSF and UP to provide effective competition in the I-5 Corridor between the Pacific Northwest and the Southwest (id. at 261). Four years after the merger was approved, UP cannot provide that competition effectively.

BNSF enjoys the full benefits of the BNSF Settlement Agreement in the I-5 Corridor. It operates the first single-line route in history connecting Vancouver, British Columbia, and most other points in the Pacific Northwest with Los Angeles, San Diego, Phoenix, and other southwestern points.[4] BNSF's traffic on this I-5 route is booming. As BNSF reported on July 1, 2000, it now operates up to six trains per day on its new I-5 route. BNSF-PR-16, Att. 1.

The Board expected UP to compete head-to-head against BNSF at most points in the Pacific Northwest using a proportional rate agreement.[5] That agreement gives UP the ability to quote joint-line rates with BNSF over the Portland gateway to and from most BNSF locations throughout Washington, northern Idaho, and western Montana, as well as interchanges in the Vancouver area. Decision No. 44, pp. 17-18. UP combines the proportional rates for the BNSF portion of the movement with UP rates for the UP portion.

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[4] UP granted trackage rights to BNSF between Stockton and Keddie, California, and it sold BNSF a former WPRR line between Keddie and Bieber, California. BNSF linked those segments with a former BN line from Bieber to the Pacific Northwest and with a former ATSF line from Stockton to Southern California and the Southwest.

[5] UP's single-line routes into the Pacific Northwest are limited. One line extends from Portland through Tacoma to Seattle. Another penetrates eastern Washington to Spokane and the Canadian border at Eastport, Idaho.

To create the proportional rates, BNSF agreed to supply information about its freight rates to an independent consultant, which consolidates the information into a matrix of proportional rate factors. BNSF Settlement Agreement, Ex. B, p. 2, in UP/SP-22, p. 344. The matrix should contain BNSF rates for each combination of commodity and car type at the same rate levels that BNSF charges its single-line customers.

The I-5 Proportional Rate Agreement is not working as intended, and UP often cannot compete effectively with BNSF. Although customers report that BNSF's rate levels in the I-5 Corridor have been declining, the BNSF rates in the proportional rate matrix are remaining steady or are climbing, pricing UP out of markets. The matrix contains no rates for many types of movements. BNSF recently acknowledged to UP that it has never developed the computer systems it contracted to provide; those systems are necessary to supply accurate rate information to the consultant. Nor can BNSF tell UP if or when those systems will be in place. UP also has found that the rate data contain frequent errors, virtually all of which competitively favor BNSF.

UP attempted to cooperate with BNSF in an informal audit of BNSF's performance under the Proportional Rate Agreement. The BNSF auditors' cooperation ceased when initial results raised serious questions about BNSF's data. UP's most recent inquiry for additional information has gone unanswered. UP recently notified BNSF that it intends to employ formal procedures under the agreement to obtain a thorough, independent audit of BNSF's performance. UP will report to the Board regarding the status of those efforts in its next quarterly report.

B. Tex Mex

Tex Mex has continued to use its trackage rights to handle significant volumes of traffic, as shown in the charts in Appendix A. Charts #4 through #9 show traffic levels reflecting Tex Mex's strong, effective competition.[6] Tex Mex averaged 61 through trains per month in September and October, the same as the 61 trains in the prior three months. The monthly tonnage on those trains averaged 359,668 tons in September and October, compared with 290,832 tons in the prior three months. Monthly loaded and empty cars on Tex Mex through trackage rights trains averaged 4,475 in September and October, compared with 3,806 in the prior three months.

On November 16, 1999, UP entered into a Memorandum of Understanding ("MOU") with Tex Mex and KCS concerning the sale of UP's Victoria-Rosenberg line and the grant of related trackage rights to Tex Mex. Tex Mex submitted a petition, which UP supported, that sought the Board's authorization or an exemption so that it could acquire the line and trackage rights. The Board approved the petition on December 11, 2000. The parties are proceeding to implement the MOU.

C. Utah Railway

UTAH has moved substantial volumes of local trains as BNSF's agent in the Utah Valley area.

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[6] See note 2, above.

II. ABANDONMENTS

There have been no significant merger-related abandonment activities during the past quarter.

III. LABOR PROTECTIVE CONDITIONS

In November, UP reached agreements with the United Transportation Union and the Brotherhood of Locomotive Engineers that address the Portland Hub, the last major UP/SP hub. UP expects the unions to ratify these agreements. UP also reached agreement with the Brotherhood of Maintenance of Way Employees and the Sheet Metal Workers International Association. UP expects the unions to ratify the agreement in 2001. As previously reported, most agreements for other crafts are in place.

IV. ENVIRONMENTAL MITIGATION CONDITIONS

We report below on steps taken, and plans for future steps, in compliance with environmental mitigation conditions. We address them in the order listed in Appendix G to Decision No. 11:

A. Systemwide Mitigation

1-9. These conditions have been satisfied, as previously reported.

10. Security Forces. As previously reported, UP extended to SP territory its policy of zero tolerance of vagrancy and trespassing on railroad property. UP is participating in a nationwide initiative by Operation Lifesaver to reduce trespassing on railroad property. UP met with the Reno Police Department regarding a zero tolerance program in late June of 1997. These discussions were put on hold pending a City of Reno legal determination, and the city has not since contacted UP.

11-13. These conditions have been satisfied, as previously reported.

B. Corridor Mitigation

14. EPA Emissions Standards. EPA promulgated national locomotive emissions rules. UP is working with locomotive industry suppliers to develop a compliance plan.

15. Consultations With Air Quality Officials. UP has held detailed discussions with environmental officials in the states of Arizona, Colorado, Illinois, Nevada, Oregon, Texas. Washington and Wyoming. UP and California officials continue to address ongoing improvement in UP/California air quality issues.

16. Noise Impacts. UP implemented a noise comment hotline, re-notified each affected county and requested comments in the first part of 1999. UP monitors the noise hotline and compiles and analyzes data to determine if a noise abatement plan is required. Through January 2, 2001, there were no calls to the noise monitoring hot line in the fourth quarter.

17. Use of Two-Way-End-of-Train Devices. This condition has been satisfied, as previously reported.

C. Rail Line Segment Mitigation

18. Priority List for Upgrading Grade Crossing Signals. UP provides train density information to states on a regular basis. They use this information to prioritize grade crossing improvements. UP provides the states of Arizona, California, Kansas,

Nevada, Oregon, Texas and Colorado with train density data for approximately 500 individual crossing improvements annually.

19. East Bay Regional Park District MOU. The MOU is being implemented in accordance with its specifications. UP is reviewing the Crockett Trail Feasibility Study and awaiting property descriptions from the District for all trails. UP met with the District on November 28, 2000 to discuss plans for the San Pablo Bay Shoreline Trail. The District will send UP a final feasibility study in the next three months.

20. Town of Truckee MOU. The MOU is being implemented in accordance with its specifications. UP has completed construction of its portion of the bridge at the I-80 Central Truckee off ramp and is working with the town on roadway approaches. The railroad continues to work with local and federal agencies to develop a Truckee River hazardous material spill response plan.

21. Placer County MOU. The MOU is being implemented in accordance with its specifications. UP continues to meet and work with the City of Roseville. UP installed train control mechanisms to facilitate passenger operations. Several improvement projects specified in the MOU have been completed, while others have been deferred or cancelled at the request of the county and/or city involved. UP has conveyed, or is in the process of conveying or leasing, other properties as specified in the MOU.

22. City of Reno. The MOU between UP and Reno is being implemented in accordance with its terms. The Environmental Impact Statement ("EIS") for the depressed trainway was released in mid-December, and comments are being solicited.

23. City of Wichita/Sedgwick County. The MOU between UP and City of Wichita/Sedgwick County is being implemented in accordance with its terms. UP has made substantial payments as requested by the city.

D. Rail Yards and Intermodal Facilities

24. Noise Abatement Plans for Rail Yards. Before UP undertakes any rail yard construction at the specified locations, UP will contact appropriate state and local officials and will report to SEA on the results of those consultations. No construction is planned for these facilities at this time.

25. Intermodal Facilities. Before any changes are made at the specified intermodal facilities, UP will contact appropriate state and local air quality officials in California and Illinois and will report to SEA on the results of those consultations. A permit application for East Los Angeles is in progress. No construction or operating changes are planned for the Chicago facilities at this time.

E. Abandonments

26-61. As UP carries out abandonments, it will comply with all conditions. UP has developed a process to ensure that contractors and railroad personnel comply with all general conditions. We report progress on specific abandonment conditions below.

40. This condition has been satisfied.

41. This condition has been satisfied, as previously reported.

42. UP has hired a contractor who is currently operating on the property.

43. This condition has been satisfied, as previously reported.

44. This condition has been satisfied, as previously reported.

47. This condition has been satisfied, as previously reported.

48. This condition has been satisfied, as previously reported.

49. This condition has been satisfied, as previously reported.

50. This condition has been satisfied. There is no bridge at this location. The line was sold to NS.

51. The new connection is in place at Girard. NHPA work will follow.

52. This condition has been satisfied, as previously reported.

55. This condition has been satisfied, as previously reported.

57. This condition has been satisfied, as previously reported.

58. Suman-Benchley, TX. UP decided to retain this line. The Board vacated the abandonment exemption for the line on June 12, 1998. This condition is no longer applicable.

59. This condition has been satisfied, as previously reported.

60. This condition has been satisfied, as previously reported.

61. This condition has been satisfied, as previously reported.

F. Construction Projects

62-108. As it carries out construction projects, UP will comply with all conditions. UP has developed a process to ensure that contractors and railroad personnel comply with all general conditions. We report progress on specific construction provisions below.

70. This condition has been satisfied, as previously reported.

78. This condition has been satisfied, as previously reported.

79. This condition has been satisfied, as previously reported.

80. This condition has been satisfied, as previously reported.

81. This condition has been satisfied, as previously reported.

83. This condition has been satisfied, as previously reported.

84. This condition has been satisfied, as previously reported.

88. This condition has been satisfied, as previously reported.

89. This condition has been satisfied, as previously reported.

92. This condition has been satisfied, as previously reported.

97. This condition has been satisfied, as previously reported.

98. This condition has been satisfied, as previously reported.

99. This condition has been satisfied, as previously reported.

100. This condition has been satisfied, as previously reported.

101. This condition has been satisfied, as previously reported.

107. This condition has been satisfied, as previously reported.

108. This condition has been satisfied, as previously reported.

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
LOUISE A. RINN
Law Department
Union Pacific Railroad Company
1416 Dodge Street
Room 830
Omaha, Nebraska 68179
(402) 271-3897

J. MICHAEL HEMMER
JOHN M. SCHEIB
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-5578

Attorneys for Union Pacific Corporation,
Union Pacific Railroad Company

January 2, 2001

Appendix A

Chart #1

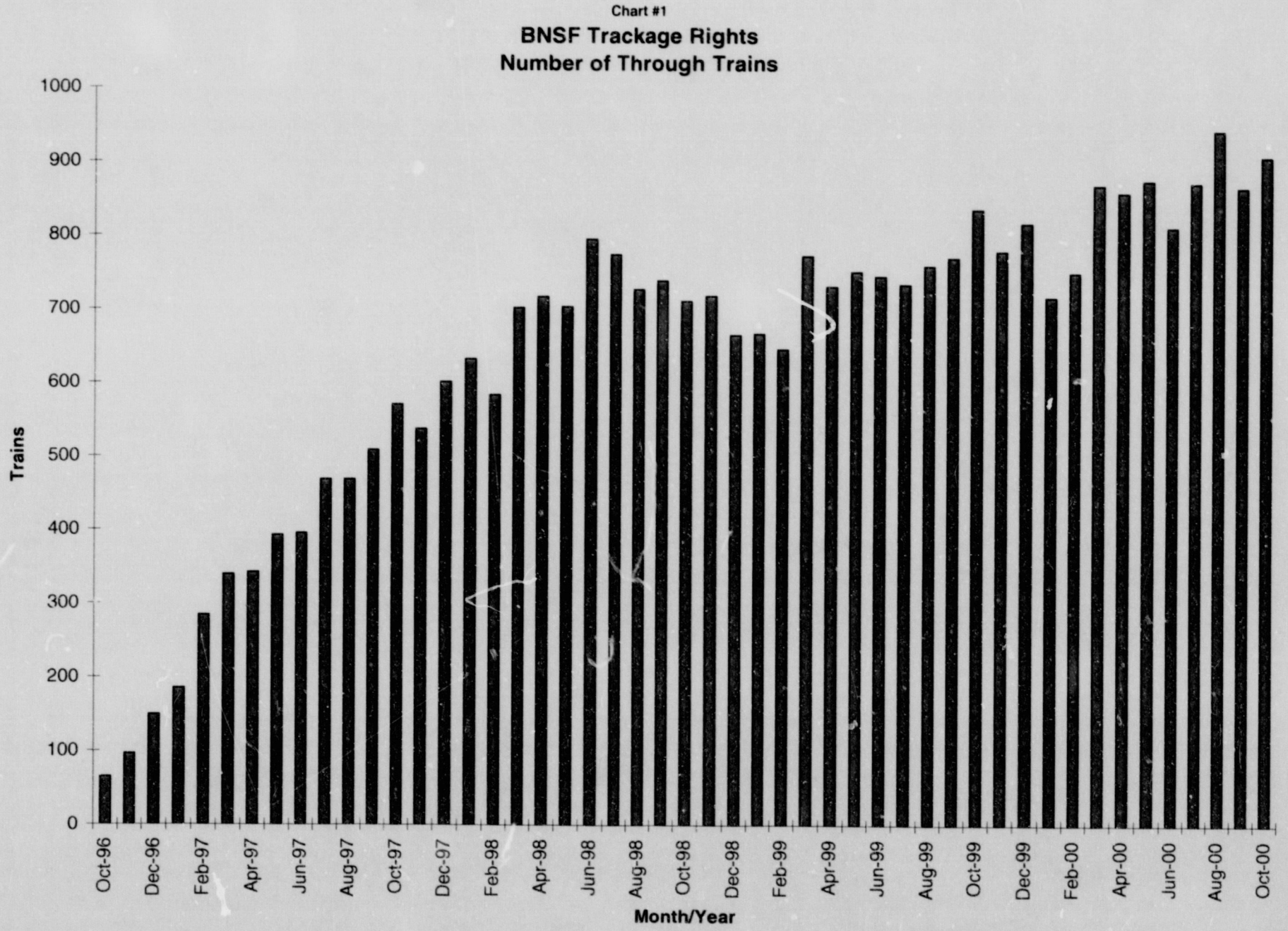

BNSF Trackage Rights
Number of Through Trains
Trains
1000
900
800
700
600
500
400
300
200
100
0
Oct-96
Dec-96
Feb-97
Apr-97
Jun-97
Aug-97
Oct-97
Dec-97
Feb-98
Apr-98
Jun-98
Aug-98
Oct-98
Dec-98
Feb-99
Apr-99
Jun-99
Aug-99
Oct-99
Dec-99
Feb-00
Apr-00
Jun-00
Aug-00
Oct-00
Month/Year

Chart #2

BNSF Trackage Rights
Number of Cars (Through Trains)

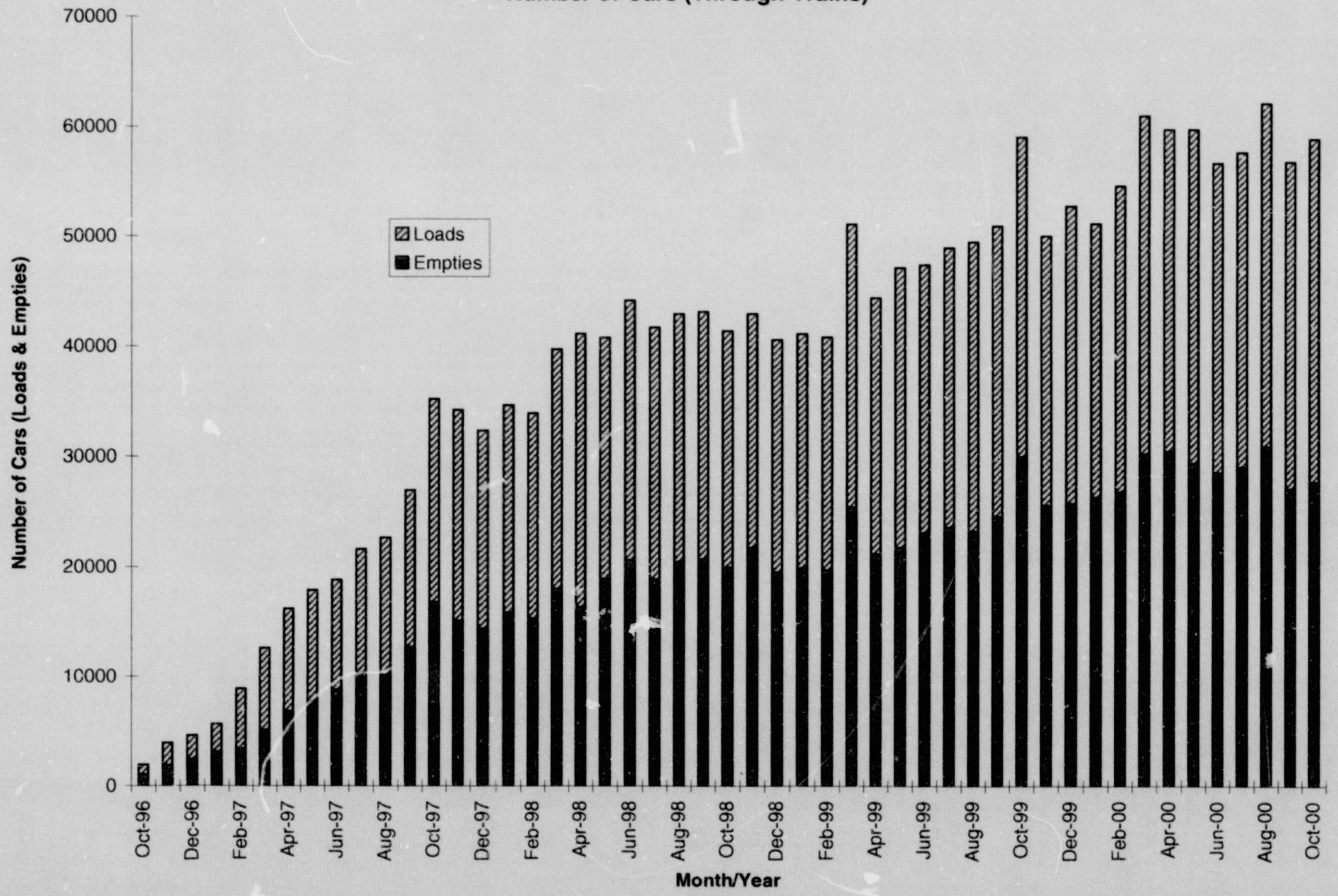


Chart #3

BNSF Trackage Rights
Gross Tons (Through Trains)

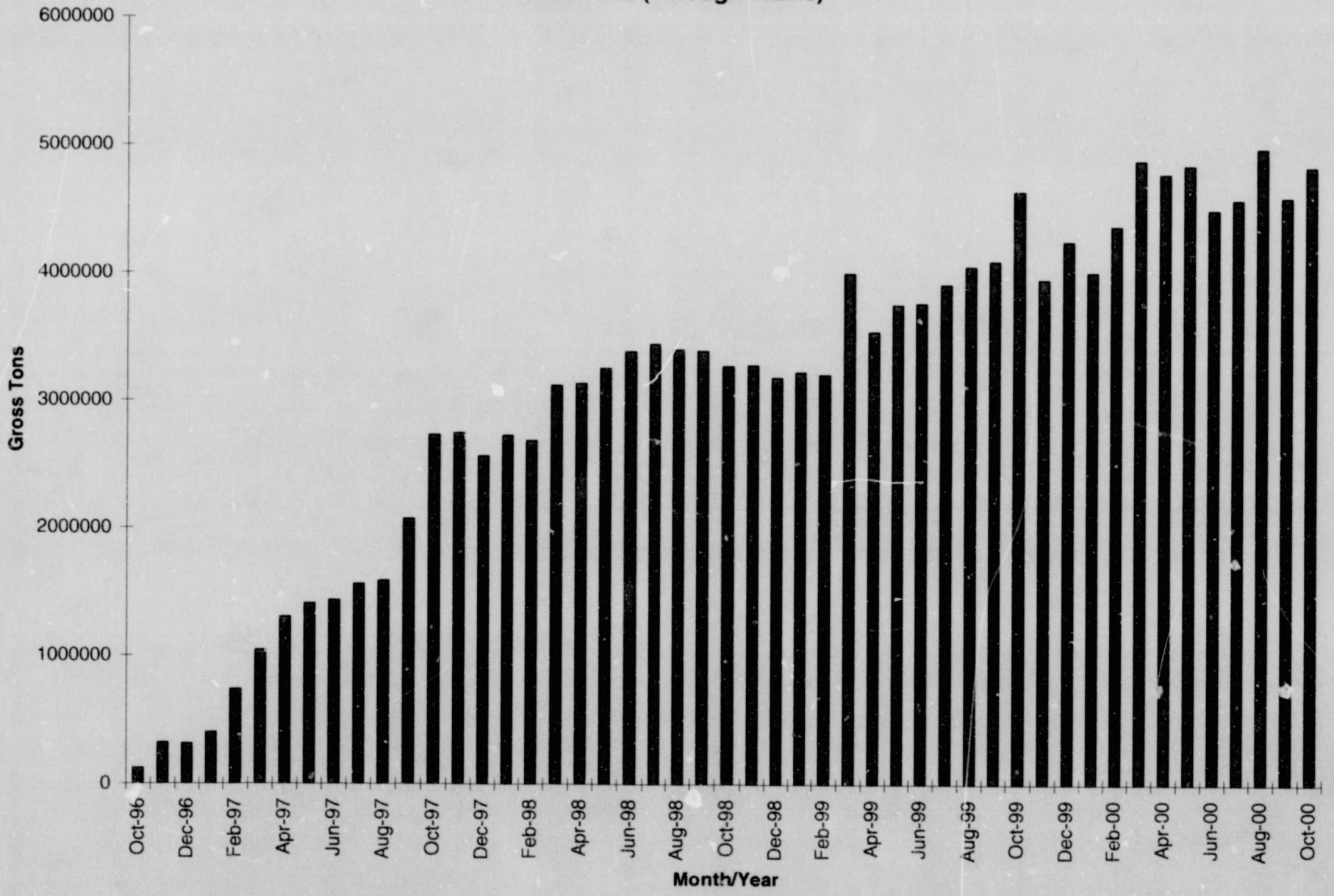


Chart #4

Tex Mex Trackage Rights
Number of Through Trains
(All Traffic Included)

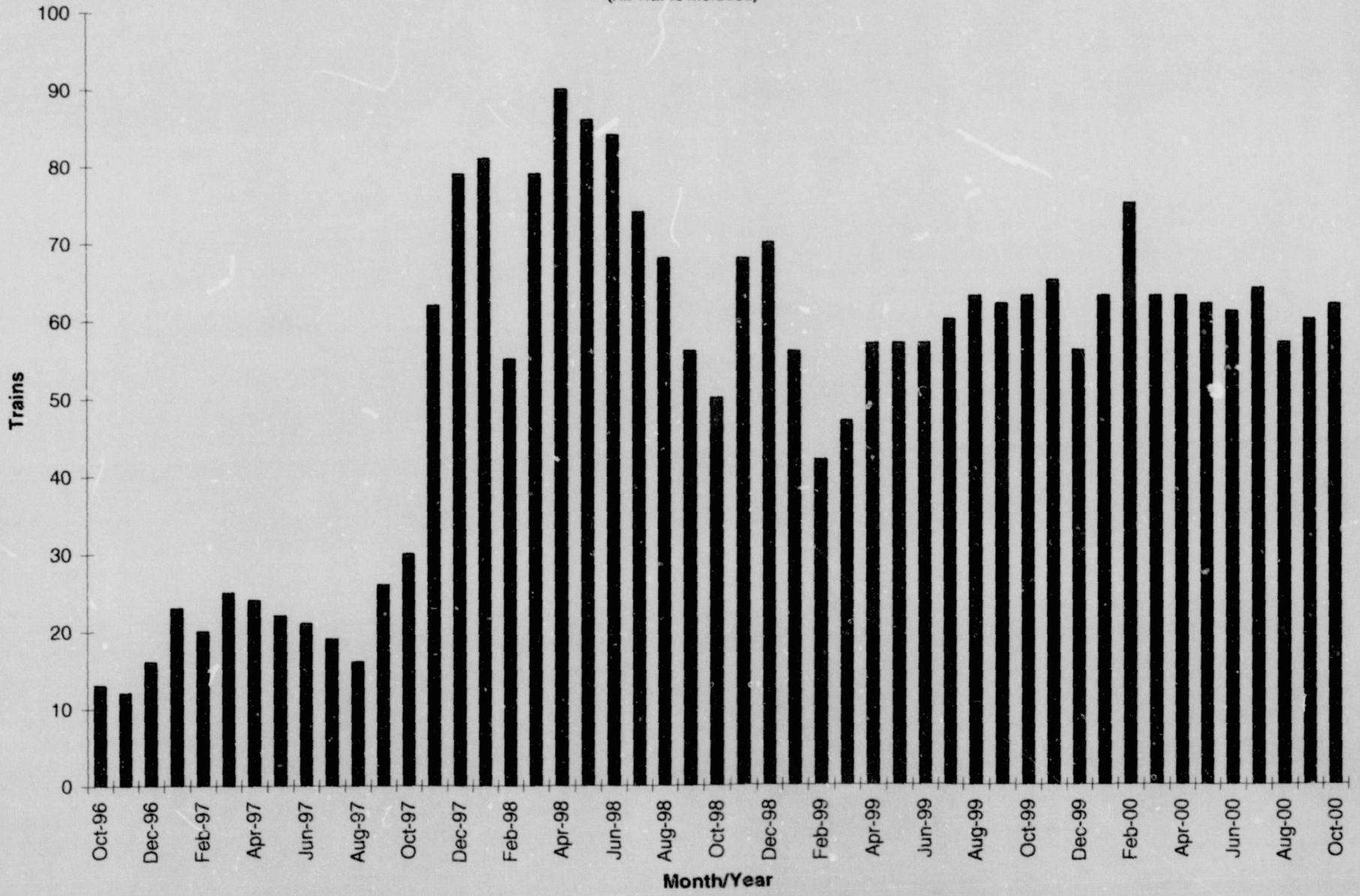


Chart #5

Tex Mex Trackage Rights
Number of Cars (Through Trains)
(All Traffic Included)

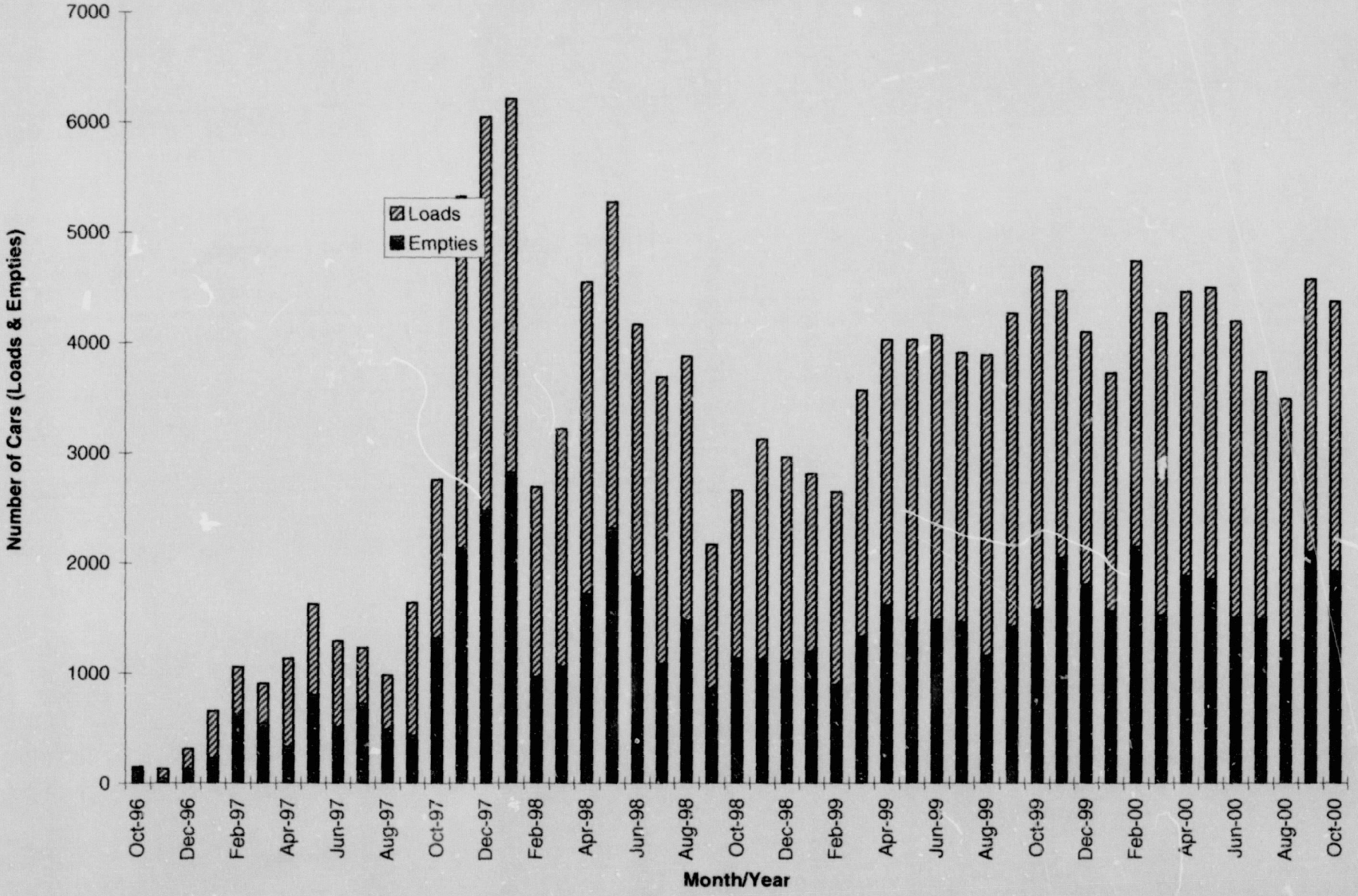


Chart #6

Tex Mex Trackage Rights
Gross Tons (Through Trains)

(All Traffic Included)

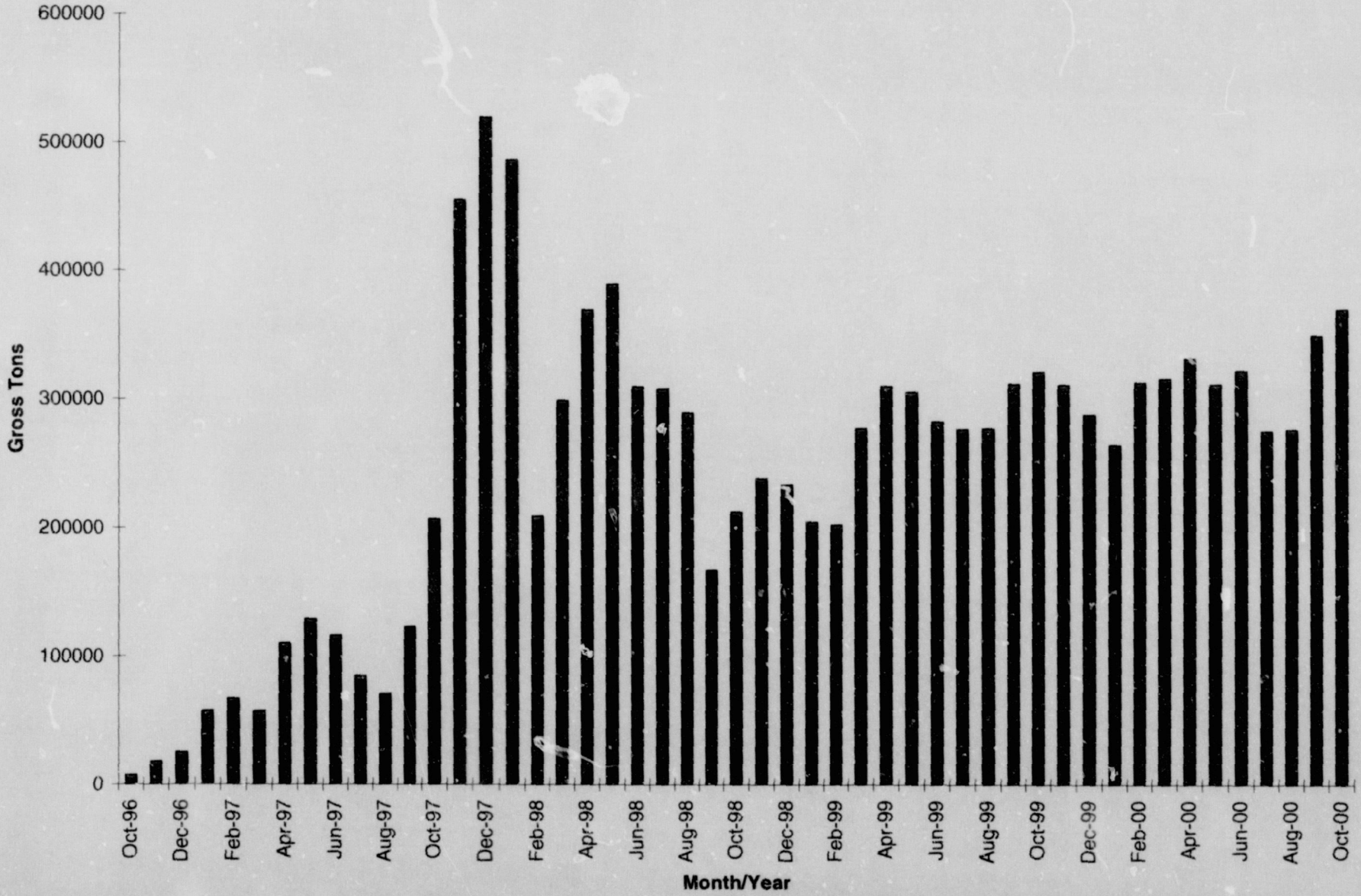


Chart #7

Tex Mex Trackage Rights
Number of Through Trains
(Estimated Service-Order-Related Traffic Excluded)

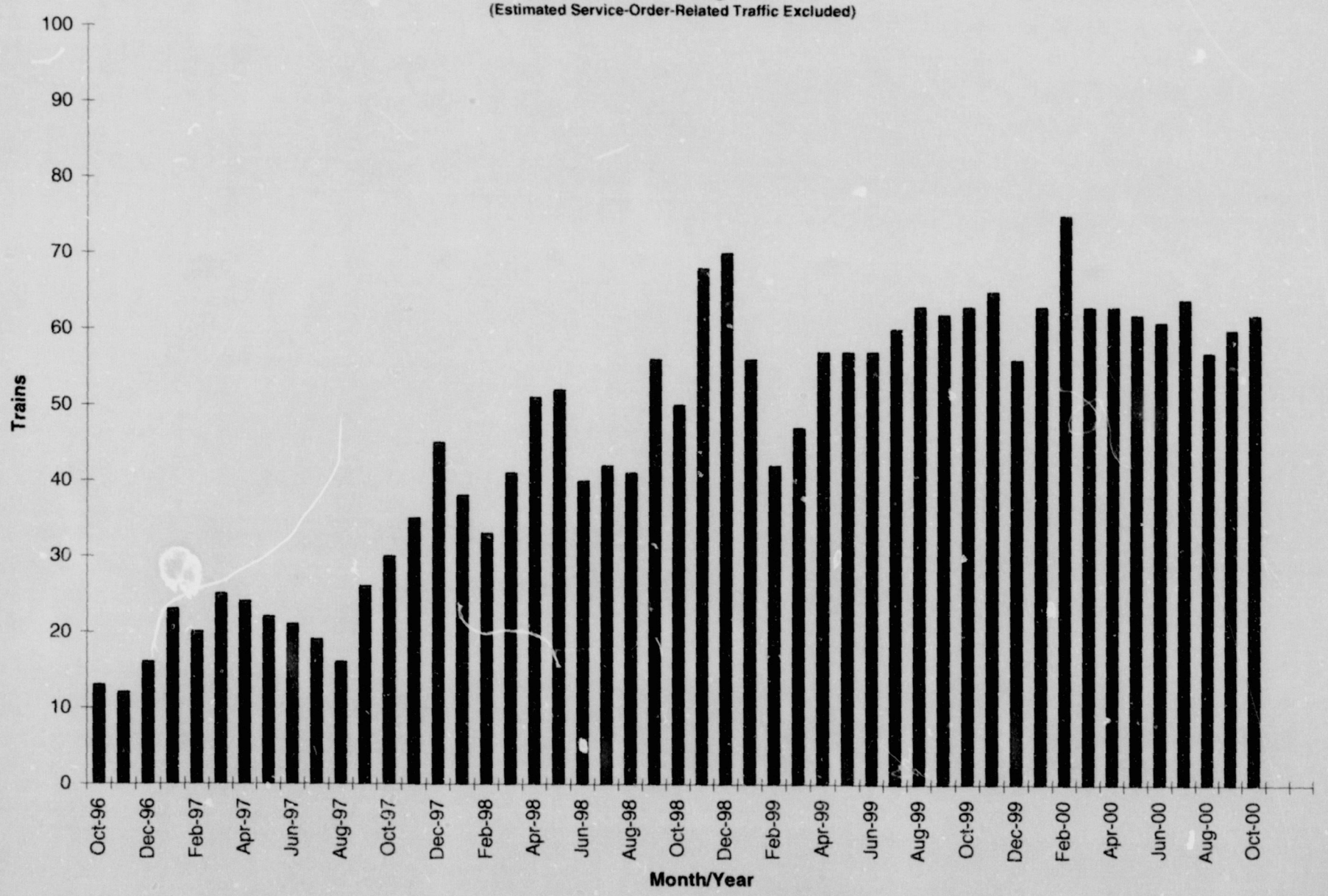


Chart #8

Tex Mex Trackage Rights
Number of Cars (Through Trains)
(Estimated Service-Order-Related Traffic Excluded)

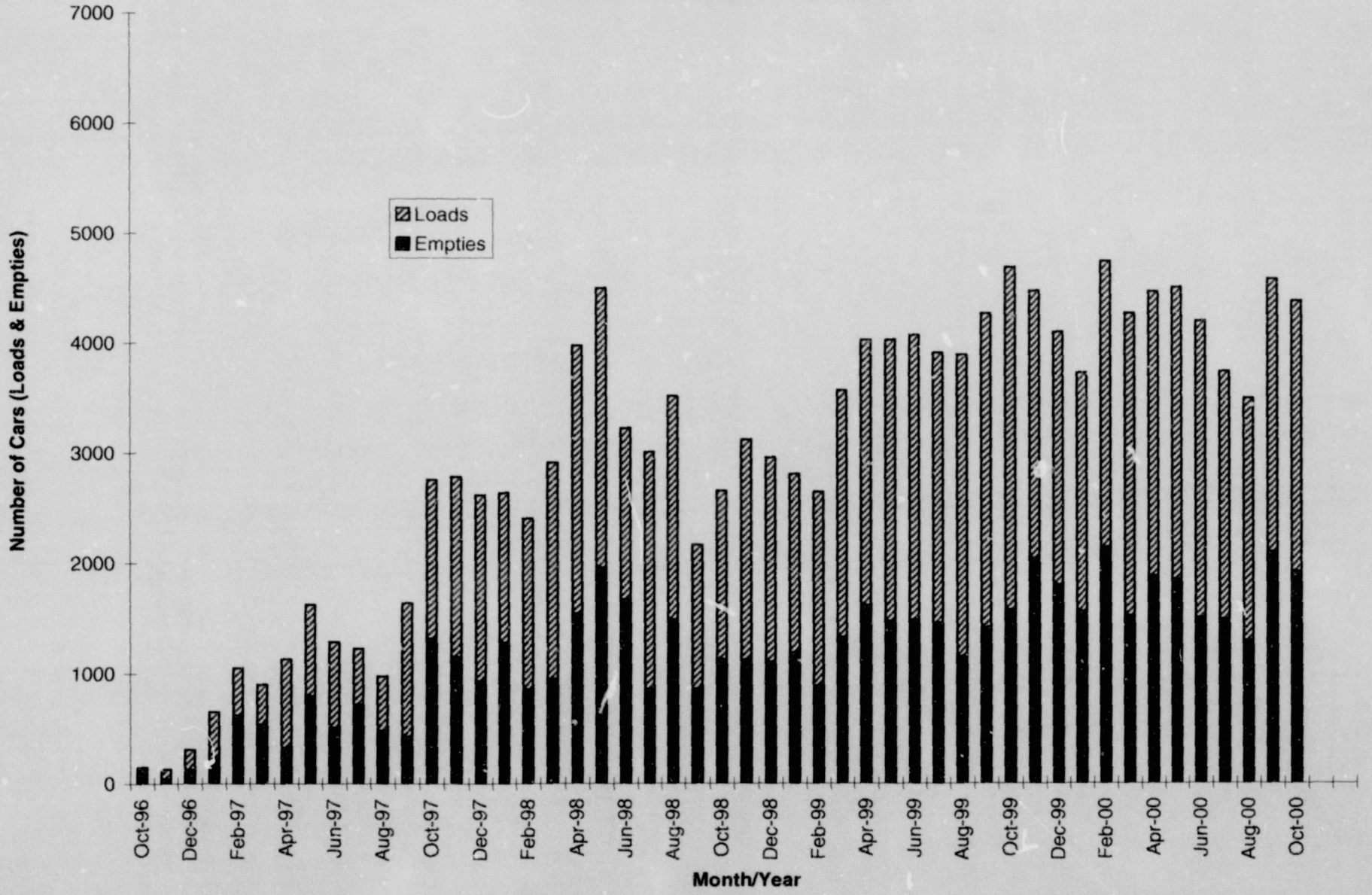


Chart #9

Tex Mex Trackage Rights
Gross Tons (Through Trains)
(Estimated Service-Order-Related Traffic Excluded)

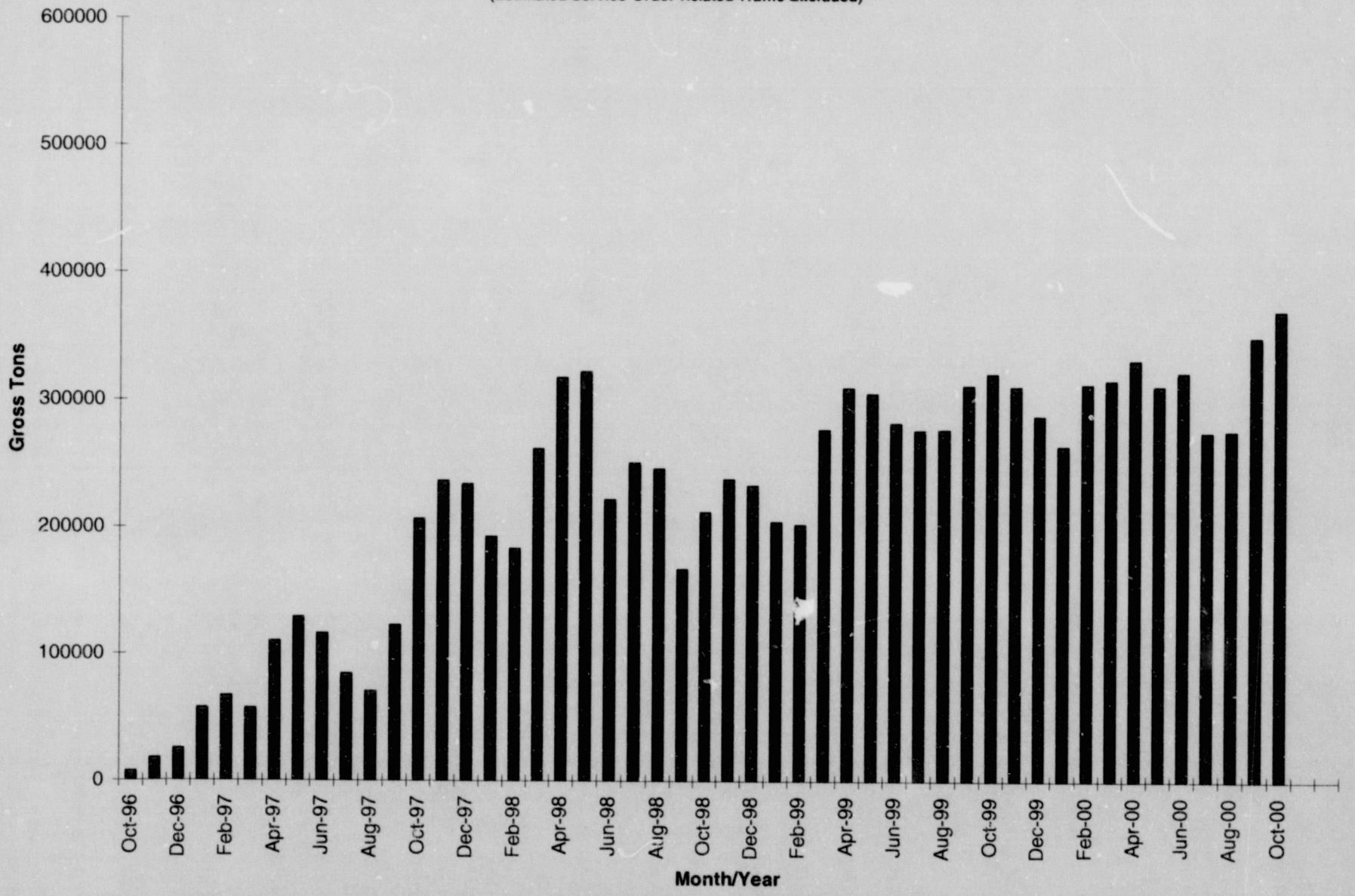


Chart #10

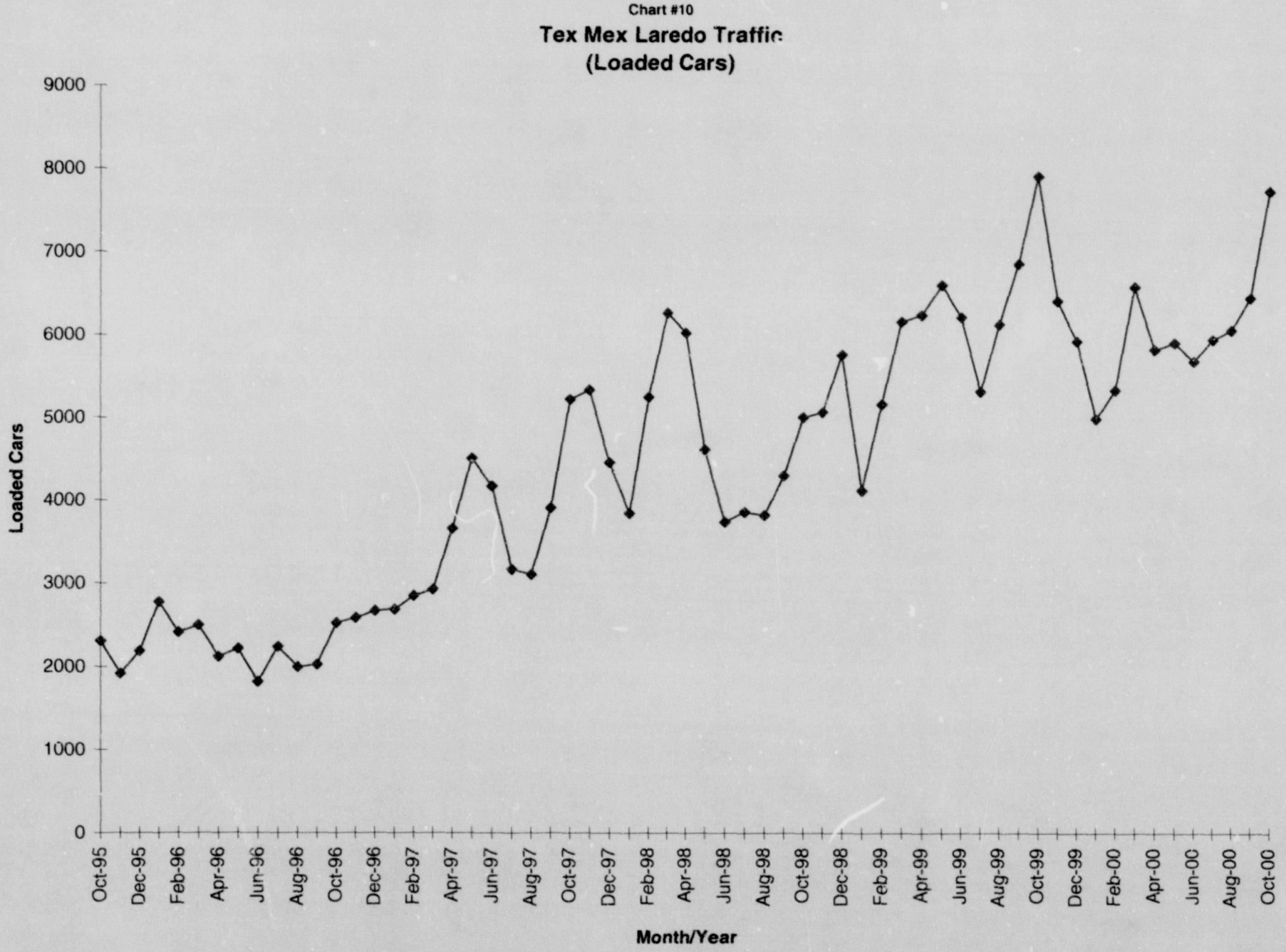
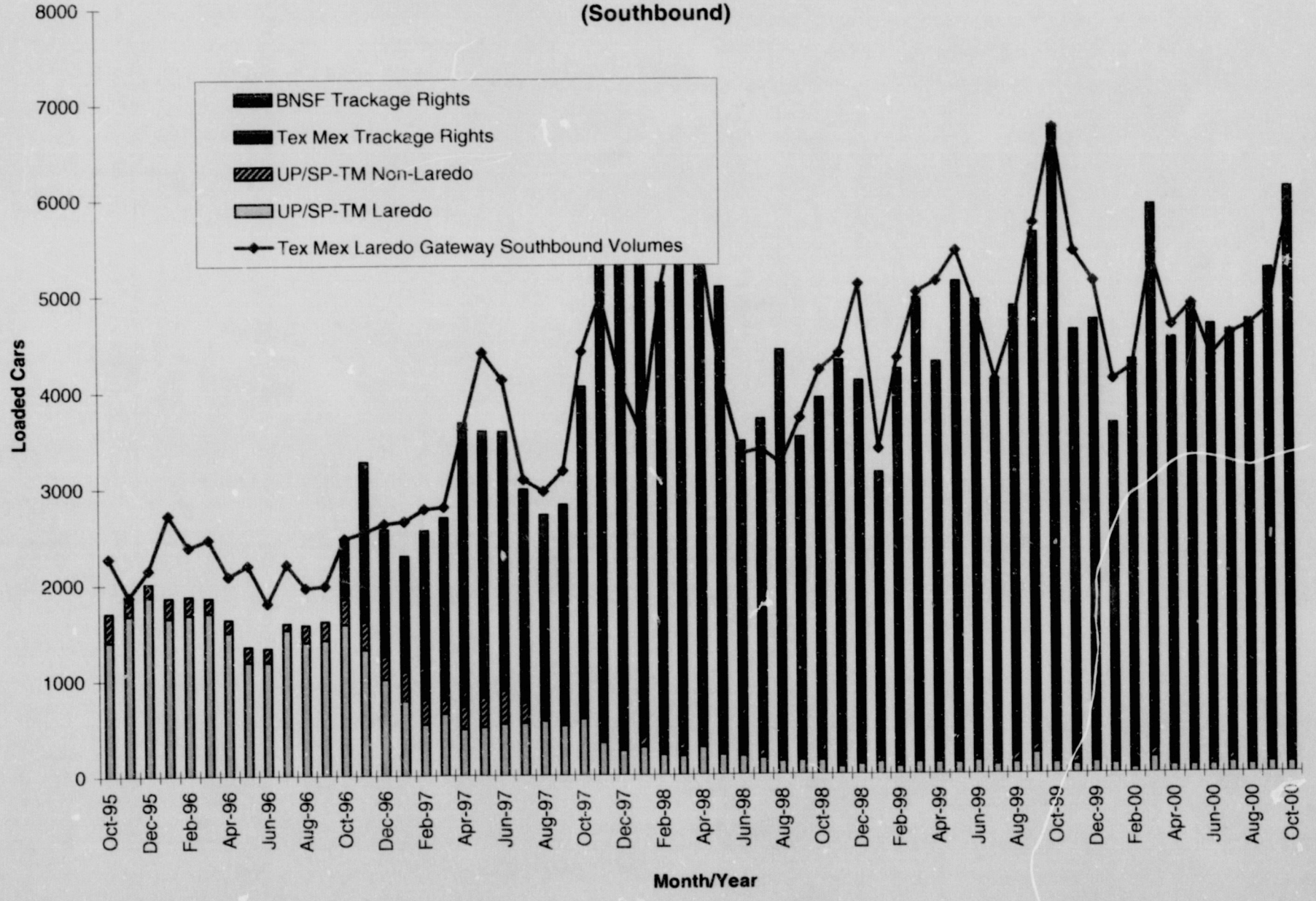

Tex Mex Laredo Traffic
(Loaded Cars)
Loaded Cars
9000
8000
7000
6000
5000
4000
3000
2000
1000
0
Oct-95
Dec-95
Feb-96
Apr-96
Jun-96
Aug-96
Oct-96
Dec-96
Feb-97
Apr-97
Jun-97
Aug-97
Oct-97
Dec-97
Feb-98
Apr-98
Jun-98
Aug-98
Oct-98
Dec-98
Feb-99
Apr-99
Jun-99
Aug-99
Oct-99
Dec-99
Feb-00
Apr-00
Jun-00
Aug-00
Oct-00
Month/Year

Chart # 11

Tex Mex and BNSF Trackage Rights Traffic to Corpus Christi/Robstown and UP/SP-Tex Mex Interline Traffic (Southbound)



Appendix B

TRACKAGE RIGHTS FUNDS

In Section 6 of Applicants' settlement agreement with CMA, Applicants agreed to place trackage rights fees received under the BNSF settlement agreement into two dedicated funds, one with respect to the trackage rights lines in Texas, Louisiana, Arkansas, Missouri and Illinois and one with respect to the trackage rights lines in the Central Corridor and California. Applicants agreed that the money in those funds would be spent on (a) maintenance on those lines, (b) offsetting depreciation of those lines, (c) capital improvements on those lines, and (d) costs for accounting necessary to administer the two funds. The following table provides information regarding the two funds through the quarter ending September 30, 2000, the latest date for which the data have thus far been compiled.

	Texas, Louisiana, Arkansas, Missouri and Illinois	California and Central Corridor
REVENUE		
Trackage Rights Fees	$78,375,300	$72,885,067
Capacity Improvement Fees	0	0
Total Revenue	$78,375,300	$72,885,067
EXPENSES		
Maintenance	$143,659,863	$ 97,861,189
Depreciation	136,693,232	103,581,184
Capital Expenditures	(Not reported)	(Not reported)
Accounting Expenses	178,380	178,380
Total Expenses	$280,531,475	$201,620,753

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of January, 2001 a copy of the foregoing "Fourth Quarter 2000 Progress Report" was mailed, postage prepaid, to all parties of record.

John M. Scheib