02/20/04 FD-32760 210119

ORIGINAL

Before the

SURFACE TRANSPORTATION BOARD



Finance Docket No. 32760 (Sub-No. 42)

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

(Arbitration Review)

Office of Proceedings
FEB 23 2004
Part of
Public Record

PETITION TO ESTABLISH PROCEDURES FOR ARBITRATION UNDER NEW YORK DOCK EMPLOYEE PROTECTIVE CONDITIONS

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TRANSPORTATION BOARD

GORDON P. MacDOUGALL 1025 Connecticut Ave., N.W. Washington DC 20036

Attorney for John E. Grother

Dated: February 20, 2004

Before the SURFACE TRANSPORTATION BOARD



Finance Docket No. 32760 (Sub-No. 42)

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, AND MISSOURI PACIFIC RAILROAD COMPANY
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PETITION TO ESTABLISH PROCEDURES FOR ARBITRATION UNDER NEW YORK DOCK EMPLOYEE PROTECTIVE CONDITIONS

Preliminary Statement

John E. Grother (Grother, or employee), ancillary to review of a forthcoming arbitration award, and in aid of the arbitration prescribed by the Surface Transportation Board (STB), petitions the STB to establish certain procedures for implementing the non-agreement employee arbitration provisions of the New York Dock employee protective conditions, with respect to the current dispute between Grother and his employer (carrier), Union Pacific Railroad Company (UP). Specifically, employee desires (1) that the order of written arbitration submissions be first employee, then carrier, followed by an employee reply, and (2)

Washington DC be designated the site for hearing by the arbitration committee.

Background

Grother was employed by Southern Pacific Transportation

Company (SPTC) as part of its yard force at Tucson, AZ, at the time of the STB's August 1996 approval of <u>Union Pacific/Southern</u>

<u>Pacific Merger</u>, 1 S.T.B. 233 (Aug. 6, 1996) (<u>UP/SP</u>), wherein the STB imposed the so-called <u>New York Dock</u> (<u>NYD</u>) ¹ employee protective conditions for the benefit of affected SPTC employees.

<u>UP/SP</u>, 1 S.T.B. at 452-53. He claims to have been first adversely affected in 1997, as a result of problems with the attempted consolidation of switching between the Phoenix Yard and the Tucson Yard.

Grother was not (and is not) represented by a labor organization. He invokes Article IV of the NYD conditions, as a non-agreement employee, 360 I.C.C. 60, 90:

Employees of the railroad who are not represented by a labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

^{1/} New York Dock Ry.-Control-Brooklyn Eastern Dist., 360 I.C.C. 60 (1979), aff'd sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2nd Cir. 1979).

At Grother's initiative, the National Mediation Board (NMB), on January 21, 2004, designated Lynette A. Ross, as the "neutral/referee member" for arbitration of the Grother/UP dispute under NYD. (Appendix 1). 2/ The NMB states its designation is "ministerial," and the NMB's action only provides a qualified arbitrator...in extending comity to the ICC's dispute resolution process. (Appendix 1, p. 2). The neutral/referee member has not been involved in discussions among the partisan members of the arbitration committee concerning any terms to govern the arbitration.

The partisan parties, while in agreement in principle for most of the terms to govern the proposed arbitration, ^{3/} have come to an impasse with respect the extent and presentation of a written record, and the place for hearing. UP suggests the record be developed by a single, but simultaneous, written submission by carrier and by employee, which would be similar to the ex parte rules in place at the National Railroad Adjustment Board, conducted at NRAB offices in Chicago, IL. 29 CFR 301. (Appendix 2). UP urges that the arbitration hearing be conducted in Chicago, IL. To the contrary, Grother urges the record be developed by the three-step submission process set forth in the STB's own arbitration rules, whereby the complaining party proceeds first with its

²/ The other two members of the committee are William E. Loomis (UP) for the carrier, and Grother for the employee.

^{3/} UP does not believe a written arbitration agreement is necessary prior to an arbitration committee hearing. UP apparently is of the view the parties can participate simply by appearing at a designated time and place. Nevertheless, the parties parties have exchanged views as to the appropriate process.

written statement, and the defendant will proceed next, followed by an opportunity for the complainant to reply. 49 CFR 1108.8.

Grother urges that the arbitration hearing be held in Washington, DC, where the NMB and STB are both located.

The issues involve the interpretation, applicability, and enforcement of the NYD employee protective conditions for the involved Grother and UP, and will likely center upon eligibility of Grother for employee protection, causality, asserted laches, and the measure of any compensation or other benefits.

ARGUMENT

- I. THE ARBITRATION SHOULD BE DESIGNED TO TO DEVELOP A FULL WRITTEN RECORD FOR STB REVIEW AT MINIMUM EXPENSE TO EMPLOYEE.
- A. <u>UP Would Frustrate Effective STB Review.</u> The general practice in <u>NYD</u> arbitration, particularly where an individual or small number of employees are involved, is not to have a transcript of the oral hearing. There is considerable expense involved with a transcript, particularly when expedition is required. The no transcript procedure is projected to be followed here. The absence of a hearing transcript makes the written submissions even more important, in order that a reviewable record may be compiled.

^{4/} An arbitration decision ordinarily is to be issued within 45 days after the hearing is concluded and the record closed. NYD, Art. I, § 11(c).

The UP proposal for the simultaneous exchange of written submissions, to be followed by the oral hearing, would serve to transfer the usual written reply submission and argument, into "live" oral submissions, without a record of the evidence and argument for the STB to review. This would deprive the STB of effective review for the resultant arbitration award, and perhaps necessitate the conduct of additional submissions to the JTB to supplement the record at the time of agency review.

The NYD arbitration process is part the STB's decisional mechanism, with an award being an "order" of the STB, which is carried out in lieu of direct STB action. American Train Dispatchers Ass'n v. ICC, 54 F.3d 842, 845-46 (D.C. Cir. 1995);

International Broth. of Elec. Workers v. ICC, 862 F.2d 330, 335-39 (D.C. Cir. 1988); United Transp. Union v. Norfolk and Western R. Co., 822 F.2d 1114, 1120 (D.C. Cir. 1987).

2. The STB's Arbitration Procedure is Preferable. The three-step written procedure is the general rule for STB arbitration. 49 CFR 1108.8. $\frac{6}{}$

A. <u>STB Consideration</u>. The STB rejected simultaneous filings in establishing its three-step procedure. <u>Arbitration of Disputes</u>

<u>Subject to Stat. Juris. of the STB</u>, 2 S.T.B. 564, 576 (1997).

^{5/} The arbitration process is a delegation by the STB to the arbitrator of the STB's authority to implement employee conditions. Norfolk & W. Ry. Co. and New York, C. & St. L. R. Co. Merger, 5 I.C.C.2d 234, 236 1989). Arbitration is essentially an extension of the STB's action. Brotherhood of Locomotive Engineers v. ICC, 808 F.2d 1570, 1579 n.75 (D.C. Cir. 1987).

 $[\]underline{6}/$ The STB's arbitration rules do not specifically apply to arbitration involving $\underline{\text{NYD}}$ conditions. In the same vein, NRAB arbitration does not extend to $\underline{\text{NYD}}$ conditions.

B. NYD Causality Procedure. The simultaneous submissions urged by UP would be particularly unfair here, where UP challenges Grother's claim to have been affected by the transaction—the matter of causality. The NYD conditions specify that the employee should first identify the transaction and specify the facts, followed by the carrier's evidence. NYD, Art. I, § 11(e), 360 I.C.C. at 88:

In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

Thus, UP's simultaneous submission could not fully cover the matter of causality, but would allow UP to first present its case not in written form in advance of the oral hearing, but at the hearing itself, with Grother to respond extemporaneously at the hearing. Such tactics should be discouraged in the interest of a fair hearing, and in developing a complete and reviewable record. The STB's NYD conditions contemplate answering statements, not simultaneous statements.

C. NRAB-Single Written Submissions. The NRAB procedure for single written submissions is particularly unsuitable here. The NARB is composed of divisions where carriers and unions are equally represented, such that certain procedures are built into the NRAB structure and rules for carriers and unions. 45 U.S.C. 153. Here, Grother, as an unrepresented employee, does not

possess the full range of representation. The single submission procedure of the NRAB would be inappropriate here.

D. <u>Cost of Proceedings</u>. Arbitration is not inexpensive. For a single individual, the sum may be significant. The three-stage written submissions will minimize the ultimate cost for resolving the issues. The UP proposal for one set of simultaneous submissions likely will result in prolix proceedings, and result in additional costs. Moreover, because of the novelty of some of the anticipated issues, and the impact of any award upon future proceedings, it is likely that one or more of the parties will seek review of the award by the STB. Here, the compensation claim is for approximately \$108,000.

Although the cost of arbitration and resultant final agency action may not be avoided, <u>American Train Dispatchers Ass'n v.</u>

<u>ICC</u>, 949 F.2d 413, 414 (D.C. Cir. 1991), the STB should aim to minimize the expense in this situation.

II. THE HEARING SHOULD BE HELD IN WASHINGTON DC, NOT CHICAGO IL.

The hearing location should be Washington, DC, where the facilities of the NMB and STB are situated, rather than Chicago, IL, where the NRAB has its headquarters. The expenses for Grother would be minimized by a Washington location. Moreover, access by the parties, and the arbitrator, to unpublished material at the NMB and STB would be readily available in Washington, DC.

Hearing at Chicago IL would be inappropriate. While UP may have access to facilities at Chicago, Grother and his counsel do

not. Moreover, the arbitration involved in this NYD case involves a comity arrangement between NMB and STB.

III. REFERRAL OF THE WRITTEN SUBMISSION PROCESS AND HEARING LOCATION TO THE ARBITRATOR WOULD BE INAPPROPRIATE.

The STB should not refer the matter of simultaneous or three-part written submissions, or the hearing location, to the arbitrator, as such would not be appropriate. 7/

The matter of the written submissions, as indicated above, goes to the record available to the STB on review, particularly in the absence of a hearing transcript; and a multi-staged submission process is actually required by STB for NYD Art. I, §11(e). Thus, it is for the STB to determine the procedures for the submissions.

The hearing location likewise is for the STB. The arbitration committee is subject to the protective conditions mandated by the STB, such that the facilities maintained by in Washington DC should be available to the parties in an inexpensive manner.

CONCLUSION

The STB should determine that, in the absence of agreement, the involved NYD arbitration should be conducted by the three-stage written submission process, with hearing at Washington DC.

Respectfully submitted,

^{7/} The arbitrator should, of course, schedule the hearing date, and presumably will do so after consultation with the partisan parties of the arbitration committee.

GORDÓN P. MacDOUGALL 1025 Connecticut Ave., N.W. Washington DC 20036

Attorney for John E. Grother

Certificate of Service

I hereby certify I have served a copy of the foregoing upon parties by first class mail postage-prepaid, as follows:

William E. Loomis, Gen. Dir. Employee Relations Planning Union Pacific Railroad Company 1416 Dodge Street-Rm. 332 OMAHA NE 68179

Lynette A. Ross 1220 Fairway Drive Lawrenceburg KY 40342

Washington DC February 20, 2004

GORDON P. MacDOUGAML

Towon Muc Dougeer



NATIONAL MEDIATION BOARD WASHINGTON, D.C. 20572

(202) 692-5000

January 21, 2004

Ms. Lynette A. Ross 1220 Fairway Drive Lawrenceburg, KY 40342

RE: New York Dock Arbitration: John Grother and the Union Pacific Railroad Company

Dear Ms. Ross:

The National Mediation Board designates you arbitrator as ("neutral/referee member") arbitration for pursuant to above-captioned New York Dock Protective Conditions. The parties to the disputes with respect to this appointment are John Grother and the Union Pacific Railroad Company. The NMB's action is pursuant to the dispute resolution procedures provided by the ICC's New York Dock labor protective conditions, 360 ICC 60 (1979), aff'd. sub nom. New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979).

New York Dock conditions provide that the arbitrator's salary and expenses shall be "borne equally by the parties to the proceeding" and that all other expenses shall be paid by the party incurring them." Therefore, it is necessary that you communicate with the parties concerning your availability, per diem compensation and other details.

The arbitrator, not the NMB, is responsible for scheduling and other appropriate procedural determinations concerning the arbitration process. However, we would appreciate receiving a final copy of the award for our files.

In <u>Denver & Rio Grande Western Railroad Co.</u>, 7 NMB 409 (1980), the Board addressed its limited role with respect to requests for arbitral appointments under ICC employee protective conditions. As stated in that decision:

This Board has no authority to look behind the procedural soundness of any such requests. Rather, the Board acts in a ministerial capacity on the basis of administrative comity with the Interstate Commerce Commission. Any adjustments or review of the procedural and technical issues you have raised in this matter must be heard before a forum other than this Agency.

Consistent with Rio Grande, the NMB's action is purely ministerial. It does not indicate any determination with respect to whether the prerequisites for invoking arbitration have been satisfied, or whether other circumstances might permit or preclude the ultimate arbitration of the dispute in question. This agency has no authority to adjudicate the procedural validity of such requests. Rather, the Board acts in an appropriate ministerial capacity in order to serve the public interest by extending comity to the ICC's dispute resolution process.

The NMB's designation of an arbitrator in this matter has no legal consequence to any of the affected parties or potential parties. If any individual, carrier or organization determines that it is not appropriate to proceed with arbitration, this agency will not act to compel participation in the arbitration process. Such procedural issues must be resolved before a forum other than the NMB. The Board's action only provides a qualified arbitrator if arbitration ultimately is pursued.

The NMB has no legitimate role in the resolution of any procedural or technical questions with regard to this dispute, and should not be a party to them.

A decision by the United States Court of Appeals for the Eighth Circuit confirms the appropriateness of the NMB's approach to this matter. Ozark Air Lines, Inc. v. National Mediation Board, et al., 797 F.2d 557 (8th Cir. 1986). In that decision, the Court of Appeals recognized that it would be contrary to "public policy" to "force it [the NMB] to decide the appropriateness of each request for an arbitrator" because such a role "would seriously interfere with NMB's neutrality in labor-management relations, run counter to Congressional policies in creating NMB, and retard its statutory purpose." 797 F.2d at 564.

The Court also found that "forcing it [the NMB] to decide whether each dispute is arbitrable would significantly undercut its impartiality and 'impair its ability to constitute a significant force for conciliation.' Id. The Court of Appeals further determined that "no justiciable controversy existed" in connection with the NMB's contested appointment of an arbitrator though the underlying dispute was not arbitrable.

This discussion of the NMB's ministerial role regarding arbitral appointments does not indicate reservations concerning the use of arbitration.

It is the NMB's experience that arbitration has proven to be an effective and efficient dispute resolution process.

By direction of the NATIONAL MEDIATION BOARD.

Roland Watkins

Director, Arbitration Services

Copies to:

Mr. John E. Grother 1718 Rustic Park Drive Kingwood, TX 77339

Gordon P. MacDougall Representative for John E. Grother Suite 410 1025 Connecticut Avenue, NW Washington, DC 20036

Mr. W. E. Loomis General Director Employee Relations Planning 1416 Dodge Street Room 332 Omaha, NE 68179

PART 301-RULES OF PROCEDURE

301.1 General duties

301.2 Classes of disputes.

301.3 Organization.

301.4 Jurisdiction

301.5 Form of submission.

301.6 General. 301.7 Hearings

301.8 Appearances. 301.9 Awards.

AUTHORITY: Sec. 3, 44 Stat. 578, as amended; 45 U.S.C. 153.

Source: Circular 1, Oct. 10, 1934, unless otherwise noted.

§ 301.1 General duties.

(a) It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any disputes between the carrier and the employees thereof.

(b) All disputes between a carrier or carriers, and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer. respectively, by the carrier or carriers and by the employees thereof interested in the dispute

§ 301.2 Classes of disputes.

(a) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay. rules, or working conditions, including cases pending and unadjusted on the date of approval of this act (June 21, 1934. 48 Stat. 1185; 45 U.S.C. 151-162). shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes: but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the

facts and all supporting data bearing upon the disputes

(b) No petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act, approved June 21, 1934.

\$301.3 Organization.

The National Railroad Adjustment Board was organized as of July 31, 1934. in accordance with the provisions of the Railway Labor Act, approved June 21, 1934. The said Adjustment Board is composed of four Divisions, whose proceedings shall be independent of one another. The First, Second and Third Divisions thereof are each composed of 10 members, and the Fourth Division thereof is composed of 6 members.

§ 301.4 Jurisdiction.

(a) First Division. The First Division will have jurisdiction over disputes involving train-and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yardservice employees.

(b) Second Division. The Second Division will have jurisdiction over disputes involving machinists, boiler makers, blacksmiths, sheet metal workers, electrical workers, car men. the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers.

(c) Third Division. The Third Division will have jurisdiction over disputes involving station tower, and telegraph employees, train dispatchers, maintenance-of-way men. clerical employees. freight handlers, express, station, and store employees, signal men, sleepingcar conductors, sleeping-car porters, and maids and dining-car employees.

(d) Fourth Division. The Fourth Division will have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the First. Second. and Third Divisions.

§ 301.5 Form of submission.

(a) Parties. All parties to the dispute must be stated in each submission.

(b) Statement of claim. Under the caption "statement of claims" the petitioner or petitioners must clearly state the particular question upon which an award is desired.

(c) Statement of facts. In a "joint statement of facts," if possible, briefly, but fully set forth the controlling facts involved. In the event of inability to agree upon a "joint statement of facts." then each party shall show separately he facts as they respectively believe tuem to be

(d) Polition of employees. Under the caption "position of employees" the employees must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any, and all data submitted in support of employees' position must affirmatively show the same to have been presented to the carrier and made a part of the particular question in dispute.

(e) Position of carrier. Under the caption "position of carrier" the carrier must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of carrier's position must affirmatively show the same to have been presented to the employees or duly authorized to the employees or duly authorized to the particular question in dispute

(f) Signatures. All submissions must be signed by the parties submitting the same

(g) Ex parte submission. In event of an ex parte submission the same general form of submission is required. The petitioner will serve written notice upon the appropriate Division of the Adjustment Board of intention to file an ex parte submission on a certain date (30 days hence), and at the same time provide the other party with copy of such notice. For the purpose of identification such notice will state the question involved and give a brief description of the dispute. The Secretary of the appropriate Division of the Adjustment Board will immediately thereupon ad-

vise the other party of the receipt of such notice and request that the submission of such other party be filed with such Division within the same period of time.

§ 301.6 General.

(a) To conserve time and expedite proceedings all parties within the scope of the Adjustment Board should prepare submissions in such manner that the pertinent and related facts and all supporting data bearing upon the dispute will be fully set forth, thus obviating the need of lengthy briefs and unnecessary oral discussions.

(b) All submissions shall be typewritten or machine prepared, addressed to the Secretary of the appropriate Division of the Adjustment Board, and fifteen copies thereof filed by the petitioner or petitioners.

(c) Parties to a dispute are required to state in all submissions whether or not an oral hearing is desired.

§ 301.7 Hearings.

(a) Oral hearings will be granted if requested by the parties or either of them and due notice will be given the parties of the time and date of the hearing.

(b) The parties are, however, charged with the duty and responsibility of including in their original written submission all known relevant, argumentative facts and documentary evidence.

§ 301.8 Appearances.

Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect.

§ 301.9 Awards.

All awards of the Adjustment Board shall be signed by order of the appropriate Division thereof and shall be attested by the signature of its Secretary, as indicated thus:

NATIONAL RAILROAD ADJUSTMENT BOARD.

By Order of	Division
Attest:	
	Secretary]

STB FD 32760 12/19/02 206891



266891 BROWN

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Adrian L. Steel, Jr. Direct Tel (202) 263-3237 Direct Fax (202) 263-5237 asteel@mayerbrownrowe.com

December 19, 2002

BY HAND

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:

As reflected in the Joint Report Regarding Implementation of Section 12 of the BNSF Settlement Agreement filed by The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company on December 11, 2002 (UP/SP-398 - BNSF-106), BNSF and UP have reached an overall resolution of the issues described in the report relating to the adjustment of the trackage rights charges under the BNSF Settlement Agreement. Accordingly, BNSF hereby withdraws its Petition for Reconsideration (BNSF-105) filed on December 2, 2002.

If you have any questions in this regard, please contact the undersigned at (202) 263-3237. Thank you for your assistance.

Office of Proceedings

DEC 19 2002

Sincerely yours,

Adrian L. Steel, Jr.

All Parties of Record cc:

FD 32760 12/2/02 206748



December 2, 2002

BY HAND

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:

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Office of Proceedings

DEC 3 2002

Part of Public Record

Enclosed for filing in the above-captioned proceeding are the original and twenty-five (25) copies of The Burlington Northern and Santa Fe Railway Company's Petition for Reconsideration (BNSF-105). Also enclosed is the disk with the text of the Petition in WordPerfect 9 format.

As BNSF and UP have previously advised the Board, they are currently discussing the possible mutually-agreeable resolution of all of the open issues relating to the trackage rights charges under the BNSF Settlement Agreement. BNSF remains hopeful that the parties will be able to reach agreement before the December 11, 2002 deadline for the report required to be filed by BNSF and UP in Decision No. 98. Accordingly, while BNSF is filing the enclosed Petition in order to comply with the December 2, 2002 deadline set by the Board in Decision No. 99 for the filing of such petitions, BNSF requests that its Petition be held in abeyance (and that the time for the filing of responses by UP or other interested parties to BNSF's Petition be extended correspondingly) until BNSF and UP have determined whether they are able to reach an overall resolution of the open issues. BNSF anticipates that it will be able to advise the Board in this regard before or at the time of the filing of the parties' December 11 report.

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

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DEC 0 2 2002

SURFACE TRANSPORTATION BOARD

1

The Honorable Vernon Williams December 2, 2002 Page 2

If you have any questions, please contact the undersigned at (202) 263-3237. Thank you for your assistance.

Sincerely,

Adrian L. Steel, Jr.

Enclosures

cc: All Parties of Record

BNSF-105

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 WES FERN RAILROAD COMPANY

BNSF'S PETITION FOR RECONSIDERATION

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

December 2, 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 PETITION FOR RECONSIDERATION

The Burlington Northern and Santa Fe Railway Company ("BNSF") submits this Petition for Reconsideration of the Board's decision served October 22, 2002 (Decision No. 98) in this proceeding. In Decision No. 98, the Board denied BNSF's Petition for Clarification (BNSF-98) concerning the mechanism for adjusting the fees to be paid by BNSF for the trackage rights that BNSF acquired over the lines of Union Pacific Railroad Company ("UP") in connection with the 1996 UP/SP merger. In particular, the Board held that BNSF and the American Chemistry Council ("ACC")¹ had not shown that two disputed items (the SP "acquisition premium" and Section 9(c)(i) and 9(c)(iii) merger-related capital expenditures) should be omitted from the calculations used to

¹ The American Chemistry Council was formerly known as the Chemical Manufacturers Association or "CMA".

determine annual adjustments to the trackage rights fees.² In so deciding, the Board rejected BNSF and ACC's argument that the language of Section 7 of the CMA Agreement requires that only post-merger years be considered in the adjustment process. <u>Id.</u> at 4-6. As set forth below, BNSF seeks reconsideration because the Board has failed to give proper weight and effect to this critical section of the CMA Agreement, which is a separate contractual agreement between UP, BNSF and CMA as well as an independent condition imposed by the Board on the UP/SP merger.

BACKGROUND

Section 7 of the CMA Agreement provides:

Section 12 of the BN/Santa Fe Settlement Agreement shall be amended to provide that BN/Santa Fe's trackage rights fees shall be adjusted upward or downward each year by the difference between the year in question and the preceding year in UP/SP's system average URCS costs for the categories of maintenance and operating costs covered by the fee. CMA or its designee shall have the right to audit the escalation calculations. (Emphasis added.)

In their prior submissions to the Board, BNSF and ACC asserted that the plain language of Section 7 requires that post-merger URCS costs should be used in making the annual adjustment calculations. There would be no reason to adjust the GTM rates

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The Board concluded that BNSF and ACC had not pointed to any evidence from the period when the adjustment mechanism was negotiated to support their position. Decision No. 98 at 4. The Board reached this conclusion notwithstanding verified statements from the principal BNSF and ACC negotiators expressly setting forth their intent that the disputed items would have no effect in the annual adjustment process. BNSF therefore continues to adhere to its position that the initial trackage rights fees set by the BNSF Settlement Agreement were meant to incorporate and fully account for both the SP acquisition premium and the anticipated costs of the Section 9(c)(i) and 9(c)(iii) merger-related capital improvements that UP was to fund, and that the consideration of those factors in the fee adjustment process results in double counting. Nonetheless, BNSF does not seek the reconsideration of the Board's conclusion with respect to the specific issue of the parties' intent in this Petition.

in the first year of the merger, and the first adjustment to the rates would be in the second year that they applied. Therefore, the first "year in question" was by definition the second year of the merger, and, by comparing "the year in question" with "the preceding year", the language provides for a comparison of post-merger URCS costs.

UP, on the other hand, contended that the language of Section 7 of the CMA Agreement is "subject to multiple interpretations". UP further argued that John Rebensdom's April 29, 1996 rebuttal verified statement set forth how UP interpreted the language and intended to apply it and that UP and BNSF executed the Second Supplemental Agreement which incorporated language substantially identical to Mr. Rebensdom's proposed language. UP/SP-397 at 12-13.

In Decision No. 98, the Board set forth several reasons for its conclusion that the language of Section 7 should not be interpreted and applied as BNSF and ACC had argued. First, the Board held that ACC's current position could not be squared with CMA's original rationale for proposing to alter the original adjustment mechanism (RCAF-U). Decision No. 98 at 6. Second, ACC's position would cause practical problems in implementing the annual adjustments since the URCS costs for "the year in question" would not be available until several months after the end of the year. Ibid. Third, the Board noted that BNSF had agreed to and executed the Second Supplemental Agreement which contained the current Section 12 adjustment process, that CMA had expressed no opposition to that Agreement or the amended Section 12 process, and that CMA's witness, Thomas D. Crowley, had proposed an adjustment

As ACC pointed out, UP's proposed alternative interpretation that the words "the year in question" in Section 7 must mean the previous year is without foundation. See CMA-18 at 4 n.3 ("If the intention had been to base the adjustment on a comparison of the two prior years' costs, that is what the CMA Agreement would have said.").

mechanism that closely resembled the current Section 12 process. Finally, the Board found no basis for concluding that the current Section 12 adjustment process results in "far less favorable trackage rights fees" than the procedure provided in Section 7 of the CMA Agreement, and that using ACC's proposed interpretation of Section 7 would "have led to slightly *higher*, not lower, trackage rights fees in 1997 and beyond." <u>Ibid.</u> (emphasis original).

However, each of these reasons rests on an apparent misunderstanding of BNSF and ACC's position and their prior submissions, and the Board should reconsider its decision on the weight and effect which should be accorded to Section 7 of the CMA Agreement.

ARGUMENT

A. CMA's Original Rationale for Revising the Annual Adjustment Mechanism

The Board's first reason for concluding that Section 7 of the CMA Agreement should not be read to mandate the use of only post-merger years is that, in order to incorporate UP's projected post-merger efficiencies in the trackage rights fees, UP's pre-merger costs would have to be used as a base. Thus, the Board found that ACC's argument for use of only post-merger years in the adjustment calculations would be contrary to CMA's original concern that the "mechanism would not fully incorporate UP's projected post-merger efficiencies". Decision No. 98 at 4. This reasoning, however, misconstrues CMA's intent in seeking the revision of the annual adjustment mechanism.

CMA had two concerns about the trackage rights compensation set forth in the original BNSF Settlement Agreement. The first concern was that the GTM rates set by the Agreement were at a level which provided UP with compensation in excess of its

operating costs and thus would provide UP with a competitive advantage. See CMA-7, Verified Statement of Thomas D. Crowley ("V.S. Crowley"), at 51-54. The second concern – and the concern that is relevant here – was that the use of RCAF-U to adjust the GTM rates once they were initially set would ignore "the substantial productivity gains that have been achieved by railroads in the recent past and are likely to continue to be achieved in the future". CMA-7 at 14. See also V.S. Crowley at 55-58. Specifically, CMA was concerned that, on a year-to-year going forward basis, the adjustment mechanism would ignore not only productivity improvements brought about by the projected post-merger efficiencies but also productivity improvements resulting from other efficiency enhancements that the industry was expected to achieve. This concern did not focus on an apprehension that the initial cost savings from the merger itself would not be captured. CMA addressed that concern in its argument that the initial GTM rate levels were too high.

Thus, the specific purpose of Section 7 was to fully incorporate UP's post-merger productivity improvements in the Section 12 adjustment mechanism. This is entirely consistent with measuring UP's costs from the commencement of the merger in 1996, as opposed to including one-time charges that would be reflected only through comparison with a pre-merger year.

Moreover, CMA's intent to incorporate UP's future productivity gains can be just as effectively achieved under the procedure set forth in Section 7 as it can through the revised language drafted by UP for Section 12 of the Settlement Agreement. In fact, given CMA's purpose, Section 7 achieves that goal better since it precludes the

comparison of pre-merger and post-merger years and thereby avoids the offset against productivity gains caused by UP's methodology.

B. <u>Implementation Problems</u>

The Board's second reason for rejecting BNSF and ACC's post-merger-years-only interpretation of Section 7 is that such an interpretation would be unworkable because the UP URCS costs for "the year in question" would not be available until several months after the close of the year. While the Board is correct about the availability of the cost figures, the delayed availability does not present an insurmountable – or even unique – problem. The delay could quite easily be accommodated by UP and BNSF through adjustments to the fees once the cost data becomes available. Such adjustments are routine in the railroad industry, and the fact that they would be utilized under Section 7 does not justify deviating from that section's clear intent that only post-merger years would be used in comparing UP URCS costs changes.

C. Second Supplemental Agreement

The Board's third reason for refusing to adopt BNSF and ACC's position was that both BNSF (through its execution of the Second Supplemental Agreement) and CMA (through its failure to object to the revised Section 12 language in the Second Supplemental Agreement) had implicitly acknowledged that UP's formulation of the revised adjustment was appropriate. The Board further noted that UP's revised language was based in large part on testimony given by CMA's witness Mr. Crowley. Decision No. 98 at 5. However, the Board's reliance on these factors is misplaced.

First, as both BNSF and ACC explained in their prior submissions, it was their expectation and understanding that the language in the Second Supplemental

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Agreement proposed by UP would be interpreted and applied in such a manner that all comparisons of URCS costs would be between post-merger years.⁴ This understanding was based on the express language of Section 7 and on the fact that BNSF and CMA reasonably understood that UP would book the purchase premium in 1996. It was not until BNSF audited UP's annual rate calculations in late 2000 that BNSF or ACC had any indication that UP was interpreting the language in a manner inconsistent with Section 7, and BNSF and ACC have consistently thereafter expressed their understanding that only URCS costs from post-merger years should be used to make the annual adjustment calculations.⁵

Further, the Board's reliance on Mr. Crowley's testimony, which was submitted before the CMA Agreement was executed, is misplaced. Mr. Crowley's testimony

As stated by CMA's witness Thomas E. Schick in his Verified Statement, CMA was not involved in the negotiation of the Second Supplemental Agreement and, when he became aware of the change in the language from what was agreed to in Section 7, UP portrayed the change as "simply a technical amendment" due to the difficulty of adjusting fees in the current year based on costs from that year. CMA-17, Verified Statement of Thomas E. Schick at 5-6. UP did not indicate in any manner that the change was substantive in nature or that there would be an impact on the level of fees to be charged to BNSF for its use of the trackage rights lines. Neither Mr. Rebensdorf nor any other UP witness has contradicted Mr. Schick's testimony in this regard. Further, Mr. Rebensdorf's April 29, 1996 testimony stating UP's unilateral interpretation regarding the adjustment mechanism could have no legal effect in modifying the mutual contractual agreement of UP, BNSF and CMA in Section 7 the CMA Agreement.

In Decision No. 98, the Board addressed UP's determination to book the SP purchase premium in the year after SP's acquisition by UP rather than in 1996 and accepted UP's explanation for why it booked the premium in 1997. BNSF and CMA had, however, made the point that, when the rate adjustment mechanism was being negotiated, they had no reason to expect that the purchase premium would be booked in any year except when UP acquired SP, which was 1996. Regardless of when the purchase premium was ultimately booked, it was the intent of the parties to Section 7 of the CMA Agreement that only post-merger years were to be considered in the adjustment, and thus it was implicit that, if UP were to book the premium in a manner which would not lead to that result, necessary adjustments would need to be made so that the underlying intent of the parties would be fulfilled.

concerning the adjustment process was submitted not solely on behalf of CMA, but also on behalf of a number of other parties, including NITL, WCTL, SPI, WPL and WPS, ESI, KENN and SPP In addition, a careful reading of Mr. Crowley's testimony reflects that, in fact, it says nothing with respect to whether pre-merger and post-merger years should be considered in the annual adjustment process. His testimony merely suggested that a one-year lag should be utilized in the adjustment process. While he used the 1997 adjustment as an example, he did not address the question of whether or not any adjustments would be required in comparing 1995 and 1996 costs to reflect the SP acquisition premium and Section 9(c)(i) and 9(c)(iii) merger-related capital expenditures. Indeed, since the language of Section 7 of the CMA Agreement had not even been fully negotiated or executed at the time he prepared his testimony, the fact that Mr. Crowley did not address the issue is fully understandable. Finally, CMA rejected Mr. Crowley's proposed methodology when, in return for agreeing to support the UP/SP merger, it agreed to Section 7 of the CMA Agreement. Thus, the execution of the CMA Agreement negated any relevance that Mr. Crowley's testimony might have had.

D. <u>Impact of Trackage Rights Fees</u>

The final reason given by the Board for declining to read the language of Section 7 as BNSF and ACC have argued is that there is little difference on a mills per ton mile basis (0.1 mills) in the total trackage rights fee adjustment between the alternative adjustment methodologies, and the interpretation advanced by BNSF and ACC would have led to slightly higher trackage rights fees. While the Board is correct that the difference in the parties' methodologies on this issue approximates 0.1 mills per ton-mile, the Board's adoption of UP's argument that a post-merger-years-only interpretation of Section 7 would have led to higher trackage rights fees is misplaced.

The reductions in UP's relevant URCS costs from 1995 to 1996 amounted, by both parties' calculations, to approximately 0.05 mills, and thus the use of a post-merger-years-only interpretation under which the impact of the acquisition premium and Section 9 (c)(i) and 9(c)(iii) are treated consistent with the parties' intent in Section 7 would lead to reduced trackage rights fees.⁶

CONCLUSION

As the Board itself has recognized, the language of Section 7 of the CMA Agreement if given effect would require that the adjustment for 1997 should be based on the differences between UP's 1997 and 1996 URCS data. Decision No. 98 at 5. Both 1996 and 1997 were post-merger years, and thus only URCS costs from such years should be considered in the annual adjustment process. Further, Section 7 is part of an independent contractual agreement executed between UP, BNSF and CMA, and it was imposed by the Board as a separate independent condition on the merger. See Decision No. 44, 1 S.T.B. 233, 419.

The Board also concluded that there is no competitive justification for adjusting the fees that have been in place because BNSF has continued to effectively replace the competition that otherwise would have been lost when SP was absorbed by UP. Decision No. 98 at 7. The Board had previously expressed this view in Decision No. 96 (served March 21, 2002), and BNSF submitted the Verified Statement of Denis J. Smith, its Vice President of Industrial Products Marketing, to demonstrate how an unfavorable cost structure likely will erode BNSF's ability to compete over the long term and that the amount in dispute here results in a differential in the rates which can affect BNSF's ability to compete successfully. BNSF does not, however, seek reconsideration of this aspect of the Board's decision.

As explained by BNSF's witness Richard E. Weicher, this conclusion is further supported by the fact that the use of pre-merger years in the adjustment process contradicts the intent of the parties to the BNSF Settlement Agreement as set forth in Section 12 that the GTM rates were to preserve the "same basic relationship" between rates and costs over the life of the Agreement. See BNSF-102, Verified Statement of Richard E. Weicher at 10-11. Such use of pre-merger years causes an immediate and permanent deviation from that relationship.

Fundamental fairness requires that the bargained-for language of Section 7 of the CMA Agreement not be disregarded and that UP's revision of that language not be applied in a manner that results in an increase in the trackage rights fees that would not otherwise occur. There is no doubt that UP's application of the revised language has just such an effect. Accordingly, BNSF respectfully requests that the Board reconsider the weight and effect to be accorded to Section 7 and that UP, BNSF and ACC be directed to devise an annual adjustment mechanism consistent with the express intent of Section 7.

Respectfully submitted,

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

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Attorneys for The Burlington Northern and Santa Fe Railway Company

December 2, 2002

CERTIFICATE OF SERVICE

I do hereby certify that copies of The Burlington Northern and Santa Fe Railway Company's Petition for Reconsideration (BNSF-105) are being served on all parties of record.

Land date

FD-32760 5-2-00

MAYER, BROWN & PLATT

1909 K STREET, N.W.

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May 2, 2000



By Hand

Honorable Vernon A. Williams Secretary Surface Transportation Board 1925 K Street, N.W. Room 711 Washington, DC 20423

19388

Re:

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

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

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are the original and twenty-five (25) copies of the Petition of The Burlington Northern and Santa Fe Railway Company for Enforcement of Merger and Oversight Conditions (BNSF-91). Also enclosed is a 3.5 inch disk containing the text of the pleading in WordPerfect 6.1 format.

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

Sincerely,

ENTERED
Office of the Secretary

Erika Z. Janes/als

MAY -3 2000

Erika Z. Jones

Enclosures MAY - 3

Part of Public Record

cc:

All Parties of Record

BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY

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

Finance Docket No. 32760 (Sub-No. 21) -198389

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

(OVERSIGHT)

PETITION OF
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
FOR ENFORCEMENT OF MERGER AND OVERSIGHT CONDITIONS

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

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Office of the Secretary

MAY - 3 2000

Part of Public Record

Attorneys for The Burlington Northern and Santa Fe Railway Company

BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760

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

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

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

(OVERSIGHT)

PETITION OF
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
FOR ENFORCEMENT OF MERGER AND OVERSIGHT CONDITIONS

Pursuant to Decision No. 44 in Finance Docket No. 32760 and the "2-To-1 Point Identification Protocol" established by the Board in Decision Nos. 10 and 11 in Finance Docket No. 32760 (Sub-No. 21), The Burlington Northern and Santa Fe Railway

Company ("BNSF"). Petitions the Board for an order declaring that, as a result of the UP/SP merger, the coal-fired plant of AmerenUE ("UE") at Labadie, MO is a "2-to-1" shipper to which BNSF may gain access under the "omnibus" clause of the BNSF Agreement and under the "2-To-1 Point Identification Protocol" (hereinafter "2-To-1 Protocol"). As explained below, UP has denied BNSF's request under the 2-To-1 Protocol for access to the UE plant even though UP has failed to provide UE with a competitive replacement for the merger-related loss of SP rail service to the plant. At the time of the UP/SP merger, BNSF was prepared to allow UP to sell the SP line serving the UE facility to a third carrier, thereby preserving two-carrier service to the UE facility, which there is no question was to be lost as a result of the UP/SP merger. Because, however, UP failed to preserve UE's pre-merger competitive rail options through such a sale, UE's Labadie plant remains a "2-to-1" shipper, and, as such, should be open to BNSF service under the "omnibus" clause of the BNSF Agreement and the 2-To-1 Protocol.

The acronyms used herein are the same as those used in Appendix B to Decision No. 44.

Following the Board's practice, the agreement entered into by BNSF and UP on September 25, 1995, as modified thereafter by the Supplemental Agreement, dated November 18, 1995, and the Second Supplemental Agreement, dated June 27, 1996, shall be referred to herein as the "BNSF Agreement." The 2-To-1 Protocol was entered into by BNSF and UP on June 24-25, 1998, pursuant to Decision Nos. 10 and 11 in the Board's oversight proceeding, Finance Docket No. 32760 (Sub-No. 21).

BACKGROUND

A. THE LABADIE FACILITY AND THE UP/SP MERGER

The UE Labadie facility at issue here is a coal-fired electrical generating plant in Franklin County, MO. At the time of the UP/SP merger, it was the only "2-to-1" shipper facility directly served by UP and SP, and no other rail carrier, on their lines between St. Louis and Kansas City, MO. See AmerenUE's Petition for Clarification and Enforcement of Merger Conditions (dated Jan. 19, 2000) at 5 (hereinafter "UE Petition"). As UP has acknowledged, UE's "Labadie plant was a '2-to-1' shipper at the time of the UP/SP merger." UP Response at 4. See also id. at 2 ("That UE qualified as a '2-to-1' shipper at the time of the UP/SP merger is undisputed."); UE Petition at 5-6 (discussing the plant's "2-to-1" status). Prior to the UP/SP merger, the Labadie plant received direct service from both UP and SP. SP's access for coal from western origins was through the use of overhead trackage rights on UP between Kansas City and St. Louis and the use of the former Chicago, Rock Island & Pacific ("Rock Island") line which SP owned and operated over between St. Louis (Carrie Avenue) and Labadie. See UP Response at 4.

As a "2-to-1" shipper, UE's Labadie plant was subject to the BNSF Agreement's competition-preserving provisions — specifically, section 8(i), the "omnibus" clause of the

UE has petitioned the Board for access to BNSF. See UE Petition. BNSF has filed a reply in support of the UE Petition (BNSF-90) ("BNSF Reply"), and UP has filed a response in opposition, styled "Union Pacific Railroad Company's Response to AmerenUE's Petition for Clarification and Enforcement of Merger Conditions" (UP/SP-374) ("UP Response"). In addition, UE has filed a "Reply of AmerenUE to Additional issues Raised by Union Pacific in its 'UP/SP-374' Response" ("UE Reply"), and UP has filed a reply thereto (UP/SP-375) ("UP Reply").

agreement. See Verified Statement of Richard B. Peterson ("V.S. Peterson") (UP/SP-23), at 167 (stating that "in all events the Labadie plant is covered by the [BNSF Agreement] 'omnibus' clause"). BNSF, however, agreed that it would not object to UP making an alternative arrangement to preserve the plant's pre-merger competitive rail options through the sale of the former SP Rock Island line to a third carrier.

Initially, UP had offered to sell the former Rock Island line, along with certain other lines, to BNSF. BNSF declined to purchase the Rock Island line because of its price, condition, cost of rehabilitation, and potential circuity. Verified Statement of Richard E. Weicher ("V.S. Weicher") at 1-2 (Attachment A hereto). UP then proposed that BNSF agree that two-carrier competition for the UE Labadie plant be preserved through the sale of the former Rock Island line to a third rail carrier. V.S. Weicher at 2. BNSF acquiesced to not listing Labadie as an enumerated point in Exhibit A to the original settlement agreement and indicated that it would not object to another carrier obtaining access to the plant to remedy its "2-to-1" status. <u>Ibid</u>. However, if the former Rock Island line was not sold to another carrier, UE's Labadie plant would remain a "2-to-1" shipper and the "omnibus" clause would apply.^{5/2}

As explained below, the BNSF Agreement's "omnibus" clause preserves the competitive options of "2-to-1" shippers not covered by other provisions of the BNSF Agreement who could not be reached by the trackage rights and line sales provided for in those other provisions.

In its response to UE's Petition and in its reply to UE's Reply, UP has claimed that, after BNSF advised UP that it did not wish to purchase the former Rock Island line, BNSF agreed that the Labadie plant would receive "unique" treatment and that, if UP did not sell the former Rock Island line to another carrier, UP could negotiate directly with UE to find a competitive alternative to UP service. See UP Response at 2; UP Reply at 6. However, even assuming the accuracy of UP's assertion, BNSF did not agree that

The expectation underlying BNSF's agreement to permit UP to preserve rail competition to the Labadie plant through the sale of the former Rock Island line to a third carrier, however, has been frustrated. UP failed to preserve two-carrier competition at the Labadie plant by means of a sale of the former Rock Island line to a third carrier. In fact, when it sold the former Rock Island line to the Missouri Central Railroad Company ("MOC") in October 1999 (more than three years following the merger of UP and SP in September 1996), UP included a condition prohibiting MOC from using the line to deliver coal to the Labadie plant, the one "2-to-1" shipper facility accessible to MOC which had been without competitive rail service options since 1996. See UE Petition at 22. Moreover, UP also has failed to provide for any other means of preserving rail competition for the Labadie plant. See Id. at 7-20.

In light of these facts, BNSF submitted a request to UP under the 2-To-1 Protocol for access to UE's Labadie plant. See Attachment B hereto. UE and BNSF also executed a transportation contract on January 19, 2000, for coal tonnage not subject to UE's contractual volume commitment under its existing contract with UP.

After first seeking to hold BNSF's request under the 2-To-1 Protocol in abeyance
— a response that is not provided for under the 2-To-1 Protocol — UP eventually
responded to a second BNSF request by denying BNSF access to the plant, stating that

it would not have access to the facility under the BNSF Agreement if UP and UE were unable to devise an arrangement to preserve pre-merger rail competition to the plant. See V.S. Weicher at 3. Thus, if the Board were to conclude, as UE contends in its Petition and Reply, that the "Conceptual Framework" executed between UP and UE has not in fact preserved competitive two-carrier service to the Labadie plant, BNSF access to the plant is required. See also BNSF-90, at 6-8.

the "'2-to-1' Point Identification Protocol * * * does not apply" to the UE Labadie plant because UP and UE had entered into a separate settlement agreement to provide the plant with a "competitive alternative." Letter from Lawrence E. Wzorek, UP, to Peter J. Rickershauser, BNSF, dated Feb. 7, 2000 (Attachment C hereto). As we show below, this explanation is insufficient to deny BNSF access to the UE Labadie plant.

B. THE APPLICABLE LEGAL FRAMEWORK

In Decision No. 44, the Board approved the UP/SP nierger subject to a number of conditions (including the imposition of the BNSF Agreement, as modified) that were designed to protect the competitive options and rights of "2-to-1" shippers — that is, shippers that were open to service by UP and SP, and no other railroad, prior to the UP/SP merger. See, e.g., Decision No. 44, at 16-17, 103, 105-107, 121-124, 144-146. Among the provisions of the BNSF Agreement imposed by the Board was the so-called "omnibus" clause, which protects shippers, such as UE's Labadie plant, that lost two-carrier service as a result of the UP/SP merger, but are not directly accessible to BNSF's trackage rights lines. See BNSF Agreement Section 8(i). Under the "omnibus" clause, the pre-merger rail competitive options of "2-to-1" shippers are to be preserved by BNSF access via direct trackage rights, reciprocal switch, haulage rights, ratemaking authority, or other acceptable means of BNSF access. See ibid. Furthermore, under Section 8(i), any such access must be sufficient to permit BNSF to compete effectively with UP as a replacement for SP.

This dispute is properly before the Board for resolution and is ripe for decision.

Following the approval of the UP/SP merger, the Board instituted an oversight

proceeding in order to assess the effectiveness of the UP/SP merger conditions, and to receive reports and comments on those conditions. *See* Fin. Dkt. No. 32760 (Sub-No. 21), Decision No. 10, at 2 (describing oversight proceeding) (hereinafter "Decision No. 10"). One of the concerns raised by BNSF in the course of this oversight proceeding was that UP was slow in responding to BNSF inquiries concerning the "2-to-1" status of various shippers. Finding the "possibility that BNSF may be unable to obtain a prompt determination of whether BNSF is entitled to serve a particular shipper" "unacceptable" (Decision No. 10, at 7), the Board directed UP and BNSF to establish a "protocol for resolving such issues" (*id.* at 8). The Board also specifically noted that such a protocol could include a provision whereby disputes under the protocol could be addressed to the Board for resolution. *Id.* at 8. *See also id.* ("We stand ready to resolve promptly all disputes concerning issues of whether BNSF may serve a particular shipper.").

Thereafter, in Decision No. 11 of the Oversight Proceeding, the Board adopted a draft protocol agreed to by BNSF and UP, as modified by certain UP proposed revisions. *See* Fin. Dkt. No. 32760 (Sub-No. 21), Decision No. 11, at 3-4 (hereinafter "Decision No. 11"). In Decision No. 11, the Board once again specifically noted its "continued availability to resolve 2-to-1 disputes expeditiously." *Id.* at 3 (footnote omitted).

The UP revisions approved by the Board related to disputes between BNSF and UP concerning whether BNSF would be entitled to serve facilities pending determination of their "2-to-1" status and whether there would be a presumption in favor of "2-to-1" status. See Decision No. 11, at 2-3.

Subsequently, on June 24 and June 25, 1998, BNSF and UP executed a 2-To-1 Protocol substantially in accordance with the terms of Decision No. 11. Under the protocol, when BNSF submits information regarding five or less facilities to which it seeks access, UP has "five (5) business days from the date of such [BNSF] communication to respond by written or electronic communication to any request for access." 2-To-1 Protocol at ¶ 2. A failure to respond in the appointed time confers a right of access on BNSF. See id. at ¶ 3. Moreover, "[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." Id. at ¶ 6. Finally, if UP denies BNSF's request for access, BNSF may "seek an order from the STB finding that BNSF was entitled to access that facility." Id. at ¶ 5. See also id. at ¶ 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 * * * *.").

ARGUMENT

As explained above, BNSF is entitled to access to "2-to-1" shipper facilities not accessible via BNSF's trackage rights under the BNSF Agreement's "omnibus" clause. BNSF may seek identification of and access to such facilities by invoking the 2-To-1 Protocol, and disputes arising under the 2-To-1 Protocol may as a matter of right be taken to the Board for resolution. As we have shown, UE's Labadie plant is an

The protocol as adopted, however, provided for BNSF interim service to facilities pending determination of their "2-to-1" status. Under the protocol, if a facility that has received such interim service were ultimately determined *not* to be a "2-to-1" facility, BNSF would have to terminate the service and compensate UP on the basis of a method outlined in the protocol. See 2-to-1 Point Protocol ¶ 1 (Attachment D hereto).

"omnibus" "2-to-1" point, and UP has denied BNSF access to the plant. Accordingly, this dispute is properly before the Board, and the Board should permit BNSF to serve the UE Labadie facility.

As also noted above, UP has acknowledged that UE's "Labadie plant was a '2-to-1' shipper at the time of the UP/SP merger." UP's Response at 4. The Labadie plant was not expressly included in the points listed in the provisions of the BNSF Agreement, however, because BNSF was agreeable to preserving rail competition for the Labadie plant by means of UP's sale of the former Rock Island line to a third carrier. Weicher V.S. at 2. Nevertheless, in selling the Rock Island line to MOC in October 1999, UP attached a condition *prohibiting* MOC from serving the Labadie plant.

By failing to remedy the loss of two-carrier service to the Labadie plant by means of the sale of the former Rock Island line, UP has deprived the Labadie plant of the competitive options that it had prior to the UP/SP merger and has undermined the basis for excluding the Labadie plant from the competition-preserving provisions of the BNSF Agreement. BNSF, therefore, is entitled to serve the plant under the "omnibus" clause of the BNSF Agreement.

BNSF anticipates, however, that UP may argue that BNSF agreed to permit UP to replicate the plant's pre-merger rail competition by means other than the sale of the former Rock Island line through UE's agreement to the "Conceptual Framework" discussed at length in the UE Petition, the UP Response, the UE Reply, and the UP Reply. That argument would be unsupportable.

First, as noted above (at note 5), BNSF agreed that two-carrier service to the Labadie plant could be preserved by UP's sale of the former Rock Island line to a third carrier that would provide competitive service to the plant, rather than only by direct service by BNSF. When UP sold the former Rock Island line, however, UP attached a condition forbidding the purchaser from delivering coal to the facility, and thus the plant remains an "omnibus" "2-to-1" point, and BNSF retains the right to provide competitive service to the plant. Further, in any event, BNSF did not agree to an arrangement which would — as has happened with the "Conceptual Framework" here — fail to fully preserve the Labadie plant's pre-merger competitive options. V.S. Weicher at 3.

Second, because BNSF was not a party to (or beneficiary of) the "Conceptual Framework," that agreement — to the extent that it is enforceable at all under Missouri law — cannot deprive BNSF of its entitlement, under the BNSF Agreement, to "provide competitive service" (BNSF Agreement, Section 8(i)) to the Labadie plant. In fact, as UE has persuasively shown in its petition (UE Petition at 11-15), it is extremely doubtful that the "Conceptual Framework" could even be deemed to be a waiver by *UE*; it certainly does not deprive *BNSF* of its entitlement to access under the BNSF Agreement. *See also* BNSF Reply at 6-8 (showing that the "Conceptual Framework" should not be deemed to preclude UE from seeking access to BNSF).

CONCLUSION

In the merger proceeding, UP repeatedly touted its alleged resolve to preserve rail competition for all "2-to-1" shippers. Thus, UP stated in its brief that "[t]he steps agreed upon with CMA, together with other steps taken by Applicants, resolve any conceivable

question as to the effectiveness of the BN/Santa Fe settlement in preserving and enhancing competition." Applicants' Brief (UP/SP-260), at 8. In fact, UP told the Board that one of the benefits of the merger would be that "[e]very '2-to-1' shipper will enjoy stronger competition," and that UP and SP went "beyond what might strictly be required by an analysis of the competitive effects of the merger." V.S. Peterson at 163. See also Applicants' Brief (UP/SP-260), at 1 (the merger "will strengthen competition for every affected shipper" (emphasis in original)). As has been abundantly demonstrated by UE in its Petition, and as is clear even from the UP Response thereto, UE's Labadie plant — a "2-to-1" shipper facility — has in fact lost two-carrier rail service and, therefore, has been deprived of rail competition for its traffic.

BNSF never acquiesced to the Labadie plant's loss of two-carrier competition.

Accordingly, under the "omnibus" clause of the BNSF Agreement, and under the 2-To-1

Protocol, BNSF should be permitted access to UE's Labadie plant in order to replace the lost competition suffered by UE as a result of the UP/SP merger.

For the foregoing reasons, the Board should clarify that the UE Labadie plant is a "2-to-1" shipper to which BNSF is entitled to access under the "omnibus" clause of the BNSF Agreement and the 2-To-1 Protocol.

Respectfully submitted,

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

The Burlington Northern and Santa Fe Railway Company 2500 Lou Menk Drive P.O. Box 961039 Ft. Worth, Texas 76161-0039 (817) 352-2353

and

547 W. Jackson Boulevard Chicago, Illinois 60661 (312) 850-5679 Epika Z. JONES/als

Erika Z. Jones
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1909 K. Street, NW
Washington, DC 20006-1101
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Attorneys for The Burlington Northern and Santa Fe Railway Company

May 2, 2000

Attachment A

Verified Statement of Richard E. Weicher

I am Richard E. Weicher, Vice President and Senior Regulatory Counsel of The Burlington Northern and Santa Fe Railway Company. Since joining the Law Department of The Atchison, Topeka and Santa Fe Railway Company in 1974, I have worked extensively in the areas of regulatory practice, administrative litigation and transactions in the railroad industry. I became General Counsel of ATSF in 1989, and Vice President Law and General Counsel of BNSF in 1995. I assumed my current position in 1999.

I was one of the principal negotiators for BNSF of the agreement between BNSF and the Applicants in the UP/SP merger proceeding that has come to be known as the "BNSF Agreement." Specifically, I participated in the face-to-face negotiations with representatives of the Applicants, and I participated in the review of the Applicants' proposals and the drafting of various BNSF proposals.

In the course of the negotiations, the Applicants offered several rail lines for sale to BNSF, including a portion of the former Rock Island line between St. Louis and Kansas City owned by SP at the time of the merger upon which the AmerenUE ("UE") plant at Labadie, Missouri is located.

After considering UP's offer from an operational and marketing perspective, the BNSF negotiators declined the Applicants' offer to sell a number of the offered lines, including the former SP Rock Island line. We based our decision not to purchase the line on the price UP set for the line, the condition of the line, the cost of the necessary rehabilitation of the line, and the potential route circuity that would be involved in serving the plant. Our decision, however, did not reflect any indifference to the competitive situation facing the UE Labadie plant.

Because the UE Labadie plant (which, as noted above, is on the former Rock Island line) had received service from SP and UP, and no other carrier prior to the UP/SP merger, both BNSF and the Applicants recognized that the facility was a "2-to-1" shipper. The facility, however, was not on a line over which BNSF obtained trackage rights under the BNSF Agreement. Thus, as BNSF and the Applicants recognized, the UE Labadie plant was subject to the provisions of the "omnibus" clause, which provides for BNSF service to "2-to-1" shippers that are not located on trackage rights lines and that are not otherwise provided for in other provisions of the BNSF Agreement.

Instead of providing expressly enumerated rights under the BNSF Agreement for BNSF service to the UE Labadie plant, however, the Applicants proposed that BNSF agree to an arrangement whereby the Applicants would sell the former Rock Island line to another carrier, which would serve the plant and thereby preserve pre-merger rail competition for the plant's traffic. BNSF acquiesced to not listing Labadie as an enumerated point in Exhibit A to the original settlement agreement, and advised UP that it would not object to another carrier obtaining access to the plant to remedy its "2-to-1" status by purchasing the former Rock Island line.

However, BNSF understood that, if UP was unable to preserve pre-merger rail competition for the plant through a sale of the former Rock Island line to a third carrier, the plant would remain a "2-to-1" shipper and the "omnibus" clause would apply. Moreover, BNSF never agreed to an arrangement that would *fail* altogether to replicate the plant's pre-merger rail options. To the contrary, BNSF knowingly agreed to the broad "omnibus" clause which provided BNSF with a clear right and obligation to serve

any and all "2-to-1" points, whether named or unnamed or even identified at that time, so that UP could maintain, as it aggressively did throughout the UP/SP merger proceeding, that all "2-to-1" shippers would have alternative service available to them to remedy the loss of competition that would otherwise occur through the elimination of a separate UP and SP.

Thus, to the extent that UP might now take the position that BNSF agreed to anything more than that UP had the right to sell the Labadie line to another carrier as a way to address the "2-to-1" status of the plant, or to exclude the Labadie plant from the coverage of the BNSF Agreement "omnibus" clause — and, by extension, the "2-To-1 Point Identification Protocol" — regardless of the form and adequacy of the plant's post-merger competitive options, UP is mistaken. In the absence of such two-carrier competition to the plant having been restored, BNSF continues to have the right and obligation to provide service to the UE facility.

VERIFICATION

DISTRICT OF COLUMBIA) SS

RICHARD E. WEICHER, being first duly sworn, deposes and says that he has read the foregoing Verified Statement and that the contents thereof are true and correct to the best of his knowledge and belief.

Richard E. Weicher

Subscribed and sworn to before me on this 25th day of April, 2000.

Kouto A. Russ Notary Public

My commission expires:

My Commission Expires August 14, 2001

Attachment B

```
> ----Original Message----
> From: Bartoskewitz, Richard T
> Sent: Thursday, January 20, 2000 6:06 PM
       'Linda M. Gaeta@NOTES.UP.COM'; 'Irma J. Martin@NOTES.UP.COM';
> 'Robert B. Price@NOTES.UP.COM'; 'John H. Ransom@NOTES.UP.COM'
      Rickershauser, Pete J
> Subject:
              Union Electric Company (d/b/a Ameren UE), Labadie MO
               High
> Importance:
> Linda, I have one customer to add to the "2-to-1" database:
                              Union Electric Company (d/b/a Ameren UE)
        Customer name:
        Physical (rail) address:
                                   No. 10 Labadie Power Plant Road,
> Labadie, MO 63055
        Mailing address:
                               One Ameren Plaza
                1901 Chouteau Plaza
>
                P.O. Box 66149, MC 611
>
                St. Louis, MO 63166-6149
       Contact name: Robert K. Neff, Transportation Director
                              314-554-2342
        Telephone number:
                      314-554-4188
        Fax number:
> Union Electric Company (d/b/a Ameren UE) operates a coal-fired utility
> plant at Labadie, Missouri, a 2-to-1 point. Ameren UE's facility is
> located approximately 43 miles west of St. Louis, on UP's Labadie
> Industrial Lead (Jefferson City Subdivision).
> Prior to the UP/SP merger, Ameren UE's utility plant at Labadie, Missouri
> was jointly and directly served by both UP and SP, and no other rail
> carrier. BNSF's research has produced the following evidence to
> substantiate that Ameren UE's facility at Labadie is a 2-to-1 customer
> located at a 2-to-1 point.
> SP Central Region Timetable Number 1 dated April 14, 1996, St. Louis
> Subdivision (pages 7-8), shows a station of "Labadie" (station number
> 62460) at milepost 46.0, and also lists the station "Union Electric"
> (station number 62455) at milepost 44.5. The section entitled "Speed On
> Other Than Main Track" specifies speeds for loaded and empty coal trains.
> Under the section entitled "Miscellaneous" is a note that "Six-axle
> locomotives are prohibited west of Lackland and on all industry tracks
> except coal trains may operate to and from the coal plant."
> UP Timetable Number 2 dated October 29, 1995, Sedalia Subdivision (pages
> 72-73), shows a station of "West Labadie" (station number MX044) at
> milepost 43.7. The UP timetable also has the following reference to the
> Ameren UE facility: "Labadie Spur: West Labadie MP 0.0 to MP 5.75.
> Maximum Speed 10 MPH. If any restrictive signal is encountered...stop
> train and do not proceed until authorized by personnel responsible for the
> signal or Union Electric supervisor."
> Furthermore, the "2-to-1" customer lists developed by UP and SP during the
> discovery process in the UP/SP merger proceeding demonstrate that both UP
> and SP shipped bituminous coal (STCC 11 21) to a receiver at Labadie (West
> Labadie).
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> I will be glad to fax a copy of the pages from the timetable or the 2-to-1
> lists referenced above, if that would be helpful.
>
> BNSF elects to serve Ameren UE at Labadie, Missouri via trackage rights on
> the UP Jefferson City Subdivision between St. Louis and Labadie.
>
> Thank you for your attention to this request, and please feel free to
> contact me directly at 817-352-2284 if you have any questions.
>
> Rick Bartoskewitz
> Manager Interline Development
> Burlington Northern Santa Fe
> 817-352-2284
```

Attachment C

1416 Dodge Street Ornaha, Nebraska 68179 (402) 271-3897 Fax (402) 271-5610



February 7, 2000

Via Facsimile (817) 352-7154

Peter J. Rickershauser Vice President Network Development Burlington Northern Santa Fe 2600 Lou Menk Drive, 2nd Floor Fort Worth, TX 76131

Re: Union Electric Co. (d/b/a Ameren UE), Labadie, MO

Dear Pete:

John Ransom has referred your letter of February 2 concerning Union Electric at Labadie, MO, to me for a response.

The "2-to-1" Point Identification Protocol which you refer to does not apply in this situation. As you know, that 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." During the negotiations among UP, SP and BNSF which led to the Settlement Agreement that the STB approved as a condition of its approval of the UP/SP merger, our railroads agreed that the Union Electric plant at Labadie would receive unique treatment. The parties agreed that UP could negotiate directly with the shipper, and that BNSF would not object to an arrangement, even with another railroad, that met Union Electric's needs for substitute rail competition. After extensive negotiations, UP entered into a settlement agreement with Union Electric to provide the competitive alternative. That agreement remains in effect, leaving BNSF no right to demand direct access to the Labadie plant.

Nevertheless, since you insist that UP would have only two options in responding to your request under the protocol, if in fact it did apply, UP denies BNSF's request for access on the ground that all of the interested parties reached an agreement on a competitive option for the Labadie plant which satisfies the conditions established by the STB in the UP/SP proceeding. UP will describe its position in detail in a submission to the Surface Transportation Board tomorrow, February 8, which responds to a petition by Union Electric's owner, Ameren. A copy of that response will be delivered by hand to BNSF's counsel in Washington.

Lawrence E. legout

John Ransom

CC:

Michael Roper (via fax 817-352-2397)

Attachment D

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:

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

Pate.

THE BURLINGTON NORTHERN AND

SANTA FE RAILWAY COMPANY

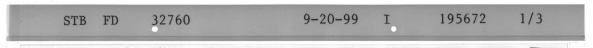
Date:

June 26, 1998

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petition of The Burlington Northern and Santa Fe Railway Company for Enforcement of Merger and Oversight Conditions has been served this 2nd day of May 2000, on all parties of record.

Lover de Greek V.



Title This Jack STB FD-32760 9-20-99 TD-195672

SLOVER & LOFTUS

ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N. W.

WASHINGTON, D. C. 20036

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KELVIN J. DOWD
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CHRISTOPHER A. MILLS
FRANK J. PEEGOLIZZI
ANDREW B. KOLESAR III
PETER A. PFOHL
DANIEL M. JAFFE

September 20, 1999

BY HAND DELIVERY

WILLIAM L. SLOVER C. MICHAEL LOFTUS

DONALD G. AVERY

JOHN H. LE SEUR

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

SEP 21 1999

Part of Public Record

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

Dear Mr. Secretary:

Enclosed for filing in the above-referenced proceeding please find an original and twenty-five (25) copies of the Petition of Entergy Services, Inc. and Entergy Arkansas, Inc. for Enforcement of Merger Condition (ESI-30). In accordance with the Board's regulations, we have also enclosed a Wordperfect diskette containing the Petition.

An additional copy of the filing is enclosed. Kindly indicate receipt and filing by time-stamping this copy and returning it to the bearer of this letter.

Thank you for your attention to this matter.

Sincerety

un (

Frank J//Pe

An Attorney for Entergy Services,

Inc. and Entergy Arkansas, Inc.

Enclosures

cc: Arvid E. Roach II, Esq.

195672

BEFORE THE SURFACE TRANSPORTATION BOARD

RECEIVED
SEP 20 1000

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 GRAND WZSTERN RAILROAD COMPANY

Finance Docket Nos. 32760

PETITION OF ENTERGY SERVICES, INC. AND ENTERGY ARKANSAS, INC. FOR ENFORCEMENT OF MERGER CONDITION

ENTERED
Office of the Secretary

SEP 21 1999

Part of Public Record ENTERGY SERVICES, INC. and ENTERGY ARKANISAS, INC.

By: O.H. Storey
Janan Honeysuckle
Entergy Services, Inc.
Mail Unit L-ENT-26D
639 Loyola Avenue
New Orleans, LA 70113

C. Michael Loftus
Donald G. Avery
Frank J. Pergolizzi
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Their Attorneys

OF COUNSEL:

John R. Molm
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Troutman Sanders LLP
1300 I Street, N.W.
Suite 500 East
Washington, D.C. 20005-3314
(202) 274-2950

DATED: September 20, 1999

Argument

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 GRAND WESTERN
RAILROAD COMPANY

Firance Docket Nos. 32760

PETITION OF ENTERGY SERVICES, INC. AND ENTERGY ARKANSAS, INC. FOR ENFORCEMENT OF MERGER CONDITION

Entergy Services, Inc. and its affiliate Entergy Arkansas, Inc. (collectively referred to as "Entergy"), hereby petition the Board for enforcement of Decision No. 44 in this proceeding. Specifically, Entergy seeks a determination from the Board that upon the completion of a build-out from Entergy's White Bluff Steam Electric Station ("White Bluff") near Redfield, Arkansas to a point located on a line formerly owned by Southern Pacific Railroad Company ("SP"), the Burlington Northern and Santa Fe Railway Company ("BNSF") will have the authority under Decision No. 44 to provide rail transportation service to White Bluff using trackage rights over UP's lines.

¹ White Bluff presently is served only via Union Pacific Railroad Company ("UP").

Consistent with the purpose of the Board's imposition of ameliorative conditions, Entergy will demonstrate that prior to the merger of UP and SP, Entergy would have been able to obtain competitive rail service to its White Bluff Plant by building out to a point on an SP line located near Pine Bluff, Arkansas and known as the "Arsenal Lead." In support of this Petition, Entergy submits the attached Verified Statements of:

- * Mr. Robert R. McClanahan former Division Superintendent of SP's Pine Bluff operations;
- * Mr. Charles W. Jewell, Jr. Director, Coal Supply for Entergy Services, Inc.; and
- * Mr. Peter J. Smykla, Jr. President and General Manager of Mid-State Corporation, which currently owns a portion of SP's Arsenal Lead.

SUMMARY

The actual construction of Entergy's contemplated build-out is the subject of a related Petition for Exemption that Entergy filed with the Board on July 30, 1999. See Finance Docket No. 33782, Petition for an Exemption from 49 U.S.C. § 10901 to Construct and Operate a Rail Line Between White Bluff and Pine Bluff, Arkansas. Therein, Entergy proposes the following three-part project:

(1) The construction of trackage connecting Entergy's White Bluff Plant to trackage located on the United States Govern-

² Entergy has appended a map of the proposed construction hereto as Counsel's Exhibit No. 1.

ment's Pine Bluff Arsenal (the "Arsenal");3

- (2) The rehabilitation of certain portions of the Arsenal trackage as well as trackage formerly owned by St. Louis Southwestern Railway Company ("SSW"), known as the Arsenal Lead; and
- (3) The construction of a more efficient crossover from the former SSW line to the UP mainline extending from Pine Bluff to Little Rock.⁴

Recently, UP filed an Opposition to Entergy's Petition for Exemption. See Finance Docket No. 33782, Opposition of Union Pacific Railroad Company (filed August 31, 1999) ("UP Opposition"). Therein, UP comments upon issues that are more pertinent to the Board's continuing jurisdiction in this docket than to the Petition for Exemption.⁵

In the instant Petition, Entergy requests that the Board issue an order: (i) modifying the trackage rights that BNSF received in the merger proceeding to enable BNSF to provide

³ The Pine Bluff Arsenal has already expressed its approval and support for Entergy's proposed construction. To that end, Entergy has attached as Counsel's Exhibit No. 2 a letter of support from Colonel Gary J. Motsek, Commander of the Pine Bluff Arsenal.

⁴ While coal trains still would be able to access the line in the absence of this new connection, such trains would be required to back off the UP line utilizing the existing crossover and then proceed north onto the Arsenal trackage for ultimate delivery to the plant. The proposed new connection will provide for more efficient and safer operation of Entergy's coal trains, and will minimize any potential disruption to UP service over its main line from Pine Bluff to Little Rock.

⁵ Contemporaneously herewith, Entergy is filing its Reply to UP's Opposition in Finance Docket No. 33782.

service to White Bluff by using this new spur; and (ii) directing UP to cooperate with Entergy in the connection of this spur to its Pine Bluff to Little Rock main line at a point immediately south of that line's current connection to the Arsenal Lead. This relief is appropriate under Decision No. 44. Specifically, the build-out provision (§ 13a) of UP's settlement agreement with the Chemical Manufacturers Association ("CMA"), as imposed as a condition of Decision No. 44 (id. at 146), grants trackage rights to BNSF to serve any shipper currently served only by UP that had, pre-merger, a build-out option to SP.

Entergy's White Bluff Plant meets the criteria set forth for this condition. In particular, Entergy had the ability (prior to the UP/SP merger) to build out to a point on the SP's line that connected the City of Pine Bluff with the Pine Bluff Arsenal. By completing such a build-out, Entergy could have obtained competitive coal transportation service to its White Bluff Plant.

out that it outlined in its prior Comments and Responsive Application in this proceeding. In those earlier filings, Entergy indicated that its preliminary investigation had revealed that a twenty-one (21) mile build-out would be necessary to connect White Bluff with the former SP line in Pine Bluff. Upon more detailed subsequent examination, however, Entergy discovered that at the time of the merger, SP remained under a common carrier obligation to provide service to the Arsenal Lead and Gaylord Spur. In light of these discoveries, Entergy re-evaluated its construction options and determined that the most efficient and least disruptive build-out option would be the three step project outlined above.

SP would have been able to access this point in two separate ways. First, SP held "bridge" trackage rights over Missouri Pacific Railroad Company's ("MP") nearby main line from an SP-MP consolidated main line in Pine Bluff, Arkansas to the area served by the Arsenal Lead. Using these rights, SP could have moved coal on its own lines to Pine Bluff, could have operated over the MP line from Pine Bluff to the line's connection with the Arsenal Lead, and then could have completed the delivery to Entergy's build-out using its own Arsenal Lead. Second, even in the absence of these trackage rights, SP had the ability, and in fact, had a common carrier obligation to serve a build-out from White Bluff directly via its own Arsenal Lead from Pine Bluff to the point of connection. Although SP previously had removed a segment of track from this line and previously sold another portion of the line to a non-carrier, the Arsenal Lead nevertheless legally remained a certificated rail line over which Entergy could have compelled SP to provide common carrier service. See, e.g., Busboom Grain Co., Inc. v. ICC, 830 F.2d 74, 76 (7th Cir. 1987) (holding that a railroad's common carrier obligation continues in the absence of lawful abandonment authority).

Given these two separate means of SP access to the point of Entergy's intended build-out, there are two possible forms that a grant of trackage rights to BNSF in response to this Petition could take. First, the Board could grant trackage rights to BNSF to operate over UP's Arsenal Lead from Pine Bluff to its point of connection with the Pine Bluff Arsenal. This

option, of course, would require UP to rebuild this line at its own considerable effort and expense. Moreover, this option would generate a tremendous level of disruption to the Pine Bluff community. The second, more preferable option would be for the Board to allow BNSF to operate over UP's existing main line from Fine Bluff to a new connection with the Arsenal Lead immediately south of the Pine Bluff Arsenal. This approach would replicate the manner in which SP itself most recently provided service to industries located on the Arsenal Lead. For the Board's information, BNSF already holds trackage rights over this UP line pursuant to Decision No. 44. Id. at 259.7

BACKGROUND

Entergy Corporation is an investor-owned public utility holding company registered pursuant to the Public Utility Holding Company Act of 1935, with headquarters in New Orleans, Louisiana. Entergy Services, Inc. is the fuel procurement agent for Entergy Corporation's public utility operating subsidiaries, including Entergy Arkansas. In this capacity, Entergy Services is responsible for acquiring approximately fifteen million tons of coal and related transportation for Entergy's coal-fired stations.

Entergy Arkansas produces, distributes and sells electric power at retail to approximately 600,000 residential, com-

⁷ As will be discussed in greater detail, *infra*, Entergy's Petition for Enforcement is also consistent with the Entergy-specific build-out condition that the Board imposed in Decision No. 44.

mercial, industrial and agricultural customers located in sixtythree (63) counties in Arkansas, and engages in purchases and
sales in the wholesale market as well. Entergy Arkansas operates
two coal-fired generating stations, including the White Bluff
plant and the Independence Steam Electric Station ("Independence"). Each of these plants ideally will burn approximately 6.5
million tons of coal annually (or 13 million tons total), all of
which is produced in the southern Powder River Basin ("PRB") and
all of which is transported to White Bluff and Independence by
rail.

As Entergy has explained in prior filings in this

Docket, since August 1984, Entergy Arkansas' PRB coal has been

transported to its White Bluff and Independence plants pursuant

to long-term rail transportation agreements. Verified Statement

of Charles W. Jewell, Jr. ("Jewell V.S.") at 3. Under these

transportation agreements, Entergy Arkansas is currently commit
ted to ship 100% of the coal originating in the PRB and destined

to White Bluff and Independence via the UP, with a minimum volume

of 10 million tons per year. Effective January 1, 2000, Entergy

may no longer be required to transport 100% of its PRB require
ments via UP. Rather, Entergy Arkansas' volume commitment may be

reduced to 90% of the coal transported via any mode from the PRB

to White Bluff and Independence via the UP, subject to a maximum

volume commitment of 12.5 million tons. In addition, the minimum

volume commitment may no longer be applicable. Id. at 4.

There is also a possibility all of Entergy's contract tonnage may soon be available. As explained by Entergy's Charles W. Jewell (id. at 5), Entergy currently is engaged in litigation against UP in the United States District Court for the District of Nebraska. See Entergy Services, Inc. and Entergy Arkansas, Inc. v. Union Pacific Railroad Company, Case No. 8:98CV345 (U.S.D.C., D. Neb.). Therein Entergy seeks judicial cancellation of its rail transportation agreement with UP based on UP's breaches of its contractual service standards during the last several years.

Significantly, in a decision dated January 28, 1999, Federal District Court Judge Lyle E. Strom granted summary judgment on Entergy's Motion for Partial Summary Judgment as to Entergy's claim that UP had "breached the interim agreement by failing to transport all coal tendered by Entergy, therefore creating deficits and in failing to make up deficit tonnage within the succeeding calendar quarter." See Jewell V.S. at 6-7 & Exhibit No. (CWJ-1) at 23 (emphasis added). Judge Strom also made clear that if Entergy can prove that UP's breach was "material," then Entergy "is entitled to not perform its remaining duties under the contract." Id. at 19. The issue of the materiality of the breach remains pending in the litigation. Trial is currently scheduled for the Fall of 2000. Jewell V.S. at 7. Entergy's contractual dispute with UP, however, need not be resolved in order for the Board to enforce the ameliorative conditions of Decision No. 44. Furthermore, as noted supra, even if the court does not find that Entergy's contract with UP has been terminated, there still will be sufficient tonnage available to justify the construction of the spur.

ARGUMENT

Pursuant to 49 U.S.C. § 11324, the Board has the authority to ameliorate the anticompetitive impact of a railroad consolidation through the imposition of protective conditions. The Board relied heavily upon this statutory authority in its Decision No. 44 as a means to distinguish the case from the illfated SF/SP merger proceeding. See Decision No. 44 at 102-103 (citing Santa Fe Southern Pacific Corp. -- Control -- SPT Co., 2 I.C.C.2d 709 (1986), and 3 I.C.C.2d 926 (1987) (reopening denied)). In fact, the applicants themselves understood the tremendous importance of conditioning the anticompetitive impact of their merger. See Decision No. 44 at 103 ("[A]pplicants here have offered approximately 4,000 miles of trackage rights, and will sell about 330 miles of trackage, to their most able and aggressive competitor, BNSF, in an attempt to redress competitive problem areas."). The purpose of such conditions, of course, is to preserve pre-merger competitive alternatives, whether those alternatives actually are in place, or instead, only constitute potential competitive options. This Petition asks the Board to find that Entergy's proposed construction is an appropriate way to preserve such pre-merger potential competition.

In this regard, the Board conditioned its approval of the UP/SP merger application in a number of respects. Of principal relevance to the instant Petition are the Board's CMA buildout condition and its Entergy-specific build-out condition.

A. The CMA Build-Out Condition

On April 18, 1996, UP entered into a settlement agreement with BNSF and the Chemical Manufacturers Association ("CMA"). This agreement, known as the CMA Agreement, made certain modifications to the original BNSF Settlement Agreement.

Section 13(a) the CMA Agreement added a "build-out" condition to the BNSF Settlement whereby a CMA member that enjoyed the premerger ability to generate competition between the applicants via build-out would retain that ability post-merger, indicating that any shipper that:

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

CMA Settlement Agreement at 4-5 (April 18, 1996), UP/SP-219 (emphasis added).

At the request of various parties to the merger proceeding including Entergy, Decision No. 44 imposed this condition upon its approval of the consolidation in a modified form.

Decision No. 44, inter alia, extended the CMA build-out condition to apply to all exclusively served shippers located on the lines of either UP or SP:

Build-in/build-out options. The CMA agreement provides a post-merger procedure by which a CMA member can raise a claim that the merger deprived it of a build-in/build-out option. We require as a condition that this procedure be modified in two ways: first, by making this procedure applicable to all shippers; second, by removing the time limit to which this procedure is subject. These modifications will allow BNSF to replicate the competitive options now provided by the independent operations of UP and SP. We further clarify that a shipper invoking this procedure need not demonstrate economic feasibility; the only test of feasibility is whether the line is actually constructed. Any technical disputes with respect to the implementation of this build-in/build-out remedy may be resolved either by arbitration or by the Board.

Decision No. 44 at 146 (emphasis added); see also Finance Docket No. 32760, Union Pacific Corp. -- Control and Merger -- Southern Pacific Rail Corp., Decision No. 66 served December 31, 1996, at 12-13.8

[&]quot;In its Opposition filing, UP suggests that the parties must arbitrate their dispute regarding the availability of trackage rights to BNSF. See UP Opposition at 14 ("[T]he CMA agreement's build-out provision . . requires arbitration of disputed build-out claims.") (emphasis added). UP is mistaken in this argument. As the quoted language of Decision No. 44 demonstrates (and as UP elsewhere acknowledges), any "technical disputes" regarding the implementation of the CMA condition may be resolved either through arbitration or before the Board. Given the close relationship between the instant dispute and (continued...)

B. SP's Arsenal Lead

Entergy's Petition relates in large measure to a certificated rail line (the "Arsenal Lead") that UP's predecessor, the St. Louis Southwestern Railway Company ("SSW"), constructed in the Pine Bluff, Arkansas area in the 1940s. While a number of inter-related factors ultimately led to SSW's removal of certain track from this line and the sale of another portion of the line to a non-carrier, SP never abandoned the Arsenal Lead. Given the significance of this line's history (and current status) to this Petition, Entergy will recount in some detail a number of relevant events.

1. Construction and Certification

On January 23, 1942, the United States Government contracted with SSW to build a 4.41 mile line from downtown Pine Bluff to the Pine Bluff Arsenal. See Verified Statement of Robert R. McClanahan ("McClanahan V.S."); Exhibit No. __ (RRM-1). Under the terms of the parties' agreement, the Government obtained the necessary right-of-way for the line and SSW built and maintained the track. Id. This track, known as the Arsenal Lead, extended approximately from SP Milepost 268.6 in downtown. Pine Bluff to SP Milepost 273 near the Arsenal property line.

matters within the Board's particular expertise (e.g., issues regarding the interpretation of the merger conditions and regarding the need to secure abandonment authorization in order to extinguish a common carrier obligation), the Board is best suited to resolve this matter.

SSW received ICC authority to construct and commence common carrier operations over the Arsenal Lead pursuant to the 1942 decision of the Interstate Commerce Commission in Finance Docket No. 13608, St. Louis Southwestern Ry. Co. Trustee et al., Construction and Operation, Certificate of Public Convenience and Necessity Issued February 17, 1942 (finding that the present and future public convenience and necessity require the proposed construction and operation of the referenced line of railroad). See McClanahan V.S.; Exhibit No. __ (RRM-2). This line served as a vital and active means of transportation to a number of shippers from the 1940's to the 1980's. McClanahan V.S. at 3.

2. The Construction of the Gaylord Spur and a Connection Between SSW's Arsenal Lead and Missouri Pacific's Main Line

In April of 1954, the Pine Bluff Arsenal authorized SSW and the Missouri Pacific Railroad Company ("MP") to construct a spur to permit the railroads to provide service to certain new customers in the vicinity of the Pine Bluff Arsenal. This "Gaylord Spur," which SSW and SP constructed from 1956-57, branched off of the Arsenal Lead at approximately SP Milepost 272.8 just south of the Arsenal. Id. at 4. SSW owned the first 110 feet of the Gaylord Spur, SSW and MP jointly owned the next 3,340 feet of the spur, and a variety of other entities owned the remaining 8,377 feet of the spur. See Finance Docket No. 33782, Petition for Exemption, Verified Statement of Peter J. Smykla, Jr. at 2. In addition to the Gaylord Spur, SSW and SP also built a cross-

over from MP's Pine Bluff to Little Rock main line to the Arsenal Lead. This crossover consisted of a total of 622 feet of track; the first 312 feet of which MP owned and the next 310 feet of which SSW owned. Id. at 3. SSW and MP alternated switching the Gaylord Spur and the Arsenal every year. McClanahan V.S. at 4.

The Effort to Relieve Congestion in the City of Pine Bluff

In mid-1984, local public authorities in Arkansas sought to relieve congestion in downtown Pine Bluff by eliminating the redundancy in SSW and MP's parallel rail lines on Third and Fourth Avenues, respectively. In particular, MP, SSW, the Arkansas State Highway and Transportation Department, the City of Pine Bluff, Arkansas, and Jefferson County, Arkansas each signed a Memorandum of Understanding ("MOU") for the purpose of relocating the SSW rail line traversing Third Avenue in downtown Pine Bluff. See McClanahan V.S.; Exhibit No. (RRM-3). contemplated that SSW would remove its track running through downtown Pine Bluff and instead use a 1.12 mile common corridor with MP on Fourth Avenue for double-track joint operations. MOU directed MP and SSW to "promptly enter into negotiations [with each other] to formulate agreement(s) governing the joint operations by the MP and SSW in the Fourth Avenue common corridor." Id.; Exhibit No. (RRM-3) at 8, 10.9

See Finance Docket No. 31008, Missouri Pacific R.R. --Trackage Rights -- St. Louis Southwestern Ry., Notice of Exemption filed March 18, 1987 (granting MP trackage rights over SSW's (continued...)

One consequence of the relocation project was to sever SSW's Arsenal Lead from SSW's main line to Pine Bluff. Therefore, to prevent the termination of service to shippers located in the vicinity of the Pine Bluff Arsenal (whom SSW previously was able to serve using the Arsenal Lead), the MOU contemplated that SSW would access its Arsenal Lead from the north using trackage rights over MP's main line. In this regard, UP's witness Jerry S. Wilmoth observes in the UP Opposition that "[i]n accordance with the MOU, once the relocation project was completed, UP allowed SP to use UP's Pine Bluff-Little Rock line (including the crossover to the Arsenal Lead) . . ." See Verified Statement of Mr. Jerry S. Wilmoth ("Wilmoth V.S.") at 4.

4. <u>Disposition of the Arsenal Lead</u>

Following this relocation project in downtown Pine
Bluff (and the removal of SSW's track along Third Avenue), SSW
took two additional steps regarding the Arsenal Lead. First, at
the time of the relocation project, SSW removed approximately
1.24 additional miles of track (SP Milepost 268.6 to SP Milepost
269.84) along the Arsenal Lead beginning at the point north of
Third Avenue at which the Rail Demonstration Project severed the

[&]quot;(...continued)
new Fourth Avenue line); Finance Docket No. 31027, St. Louis
Southwestern Ry. -- Trackage Rights -- Missouri Pacific R.R.,
Notice of Exemption filed April 9, 1987 (granting SSW trackage
rights over MP's existing Fourth Avenue line). Each of these
Notices submitted a draft agreement to the Commission regarding
the operation of the Fourth Avenue Corridor as joint double line
track that is entirely consistent with Entergy's position.

Arsenal Lead. SSW, however, did not seek to abandon this or any other portion of the Arsenal Lead (at that or any other time).

McClanahan V.S. at 6.

Second, in December of 1992, SP sold approximately three miles of the Arsenal Lead to Mid-State Corporation, an entity owned by Mr. Peter Smykla. See Verified Statement of Mr. Peter J. Smykla, Jr. ("Smykla V.S.") at 1-2.10 The portion of the Arsenal Lead conveyed in this sale extended from SP Milepost 269.84 to SP Milepost 272.81 (approximately two tenths of a mile south of the Arsenal property). The sale agreement provides that the Buyer (Mr. Smykla) "is agreeable to leave the track substantially in place should future common carrier service be required by shippers, potential shippers, SSW or the United States Government in the interests of national security for a period of twenty five (25) years." See Exhibit No. __ (PJS-1) at 1 (emphasis added).11

C. Entergy's Request Meets the Requirements of the CMA Build-Out Condition

As indicated *supra*, the Board imposed the CMA Settlement Agreement's build-out condition as a means to ameliorate the anticompetitive impact of the UP/SP merger for shippers who

¹⁰ ICC approval was not sought regarding this sale.

¹¹ Furthermore, SP could not have terminated or transferred its common carrier obligation by selling this portion of the Arsenal Lead to Mr. Smykla even if it had desired to do so without authorization from the Commission. See discussion, infra, at 27-29.

(through the construction of a rail spur) were able to access potential competition between UP and SP before the merger. Entergy's request for BNSF trackage rights to serve the White Bluff Plant satisfies the criteria for this condition. In its August 31, 1999 Opposition, UP acknowledges that the appropriate test for a request for BNSF trackage rights under the CMA build-out condition is whether SP could have served the point in question prior to the merger. See UP Opposition at 4.

UP, however, thereupon devotes the bulk of its filing to the argument that SSW's trackage rights over the UP main line from Pine Bluff to Little Rock were limited to serving existing shippers in the Gaylord Spur area. *Id.* at 5. UP's argument in this regard is both incorrect and ultimately fails to provide a complete analysis of the issue.

1. Access Using Trackage Rights Over the MP Main Line

Pursuant to the parties' 1984 MOU, SP obtained trackage rights over MP's Pine Bluff-Little Rock main line and the connection to the Arsenal Lead that was built in 1956-57 in conjunction with the Gaylord Spur project. See Wilmoth V.S. at 4. The net result of this grant of trackage rights was that SP moved its point of access to the Arsenal Lead from the former southern connection with SP's Third Avenue Corridor to the northern connection with the MP main line (just south of the Arsenal). As Mr. McClanahan indicates in his verified statement:

It certainly was not our intention as a part of the Rail Demonstration Project to give up any rights that we had to serve new shippers on our own line, and we did not enter into an agreement through which we would seriously undermine our ability to satisfy our common carrier obligation should any new shipper request service at a point along the Arsenal Lead or Gaylord Spur.

McClanahan V.S. at 6.

UP argues in its August 31 Opposition filing, however, that the wording of the MOU limited SP's rights to serve only its "existing shippers." In this regard, the MOU provides that:

[t]he SSW will have the right to provide rail service to their existing shippers and receivers of railway carloads of freight by use of rail connections as provided by the project and/or as in agreement with MP operations.

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

Exhibit No. __ (RRM-3) at 3 (emphasis added). Mr. McClanahan thoroughly demonstrates that UP is reading this language out of context, and provides substantial support for Entergy's position from the terms of the MOU itself.

First, Mr. McClanahan observes that "[r]ather than being some form of severe limitation on SSW's right to serve new shippers on the Arsenal Lead (as UP suggests), this language instead gave SP the right to continue to serve the shippers it

had previously served that were affected by the relocation; i.e., those along its downtown rail corridor." McClanahan V.S. at 7 ("[T]he 'existing shippers' language is presented as an affirmative right of SSW's and not as some sort of limitation.").

Next, Mr. McClanahan clarifies that the "bridge movement only" language that appears in the MOU only prohibits SP from serving "any shippers on MP's track between Pine Bluff and the connection to the Arsenal" and does not make any reference whatsoever to shippers located on SP's Arsenal Lead. Id. Mr. McClanahan also shows that additional language of the MOU itself confirms this interpretation. Specifically, the MOU indicates that MP:

. . . will promptly enter into negotiations with the SSW to formulate agreement(s) governing the joint operations by the MP and SSW in the Fourth Avenue common corridor and to serve the existing industries in the downtown area.

Exhibit No. __ (RRM-3) at 8 (emphasis added). In other words, the MOU itself suggests that the "existing shippers" phrase that UP now attempts to twist to its advantage actually meant existing "downtown" shippers, not existing shippers (and only existing shippers) on the Arsenal Lead or Gaylord Spur.

Further confirming his position that SP had the right to serve a build-out to its line, Mr. McClanahan also provides a contemporaneous example of his interpretation of SP's rights with regard to the use of the MP trackage rights. Mr. McClanahan

indicates that during the same period of time in which SP participated in the relocation project, an entity known as the Pine Bluff Industrial Foundation became interested in some land that was located east of the Arsenal Lead (to develop into another Industrial Park):

This Foundation had been working to encourage industries to locate on this land and approached me to discuss the possibility of receiving switching service. One of their questions at that time was whether an industry located east of the Arsenal Lead would be able to receive service from SP alone, or from both SP and UP. My response at that time, which I believe was entirely correct, was that UP would not have the ability to serve this area, and that only SP would be in a position to do so. This, of course, was based upon my understanding of our arrangements with UP, whereby SP had the right to operate over MP's Pine Bluff to Little Rock line to access the Arsenal Lead and Gaylord Spur, even to provide service to new shippers on our line. In other words, any industry, including Entergy, that desired to do so could have built a spur to any point along SP's Arsenal Lead and SP would have had the exclusive right to provide service to that industry using its trackage rights over the MP.

McClanahan V.S. at 8-9.

Finally, Mr. McClanahan responds as follows to UP's argument (see UP Opposition at 9) that SP gave up its right to serve new shippers such as Entergy as a means to avoid the expense associated with connecting its Arsenal Lead with the Fourth Avenue Corridor:

If we had suspected in any way that we were being asked to give up our right to serve new shippers on our line, we would have insisted that our new Fourth Avenue line be connected to the Arsenal Lead. Contrary to UP's argument, this connection would have been performed at the expense of the Demonstration Project and not SP. See Exhibit No. 3) at 6, 12. (The MOU gave SP the right to approve the engineering details of the project.) With the prospect of a new industrial park being established on the land east of (and adjacent to) our Arsenal Lead, it would have been extremely unlikely that SP would have agreed to an arrangement that would have cut us off from those potential shippers.

Id. at 10-11. Mr. McClanahan's explanation is entirely consistent with the undisputed nature and purpose of the Rail Demonstration Project. This project was intended to benefit the Pine Bluff community, and SP agreed to participate strictly on the condition that it be kept whole. If SP truly had been asked to forfeit its rights to serve new shippers, then it is entirely reasonable to conclude that: (i) SP would have refused to participate in the Rail Demonstration Project; or (ii) SP would have insisted that adequate steps be taken to preserve fully its "preproject" rights.

The opposite conclusion, which UP advances in its
August 31, 1999 Opposition, is based fundamentally upon the
argument that SP voluntarily entered into an arrangement through
which its ability to serve new customers on its own line was
severely compromised. Had SP made such a gratuitous concession,
it not only would have undermined its ability to satisfy its
common carrier obligation, but would have prevented SP from

developing new sources of revenue. There is no reason to adopt a construction of the parties' MOU that depends upon the premise that experienced SP personnel freely relinquished these important rights.

Further, agency precedent confirms that a rail carrier cannot validly enter into an agreement that restricts its ability to serve new shippers locating on its <u>own</u> trackage. For example, in Finance Docket No. 32248, Hanson Natural Resources Company - Non-Common Carrier Status - Petition for a Declaratory Order, Decision served December 5, 1994, the Commission stated:

Any restriction, imposed by any entity, that limits the properties that might be served would be inconsistent with the common carrier obligation that will accompany Santa Fe's hypothetical future common carrier obligations. Santa Fe, once having commenced common carrier operations on the Baca-LRM Line, will have no right to deny service to any shipper. If a complaint regarding such a restriction should arise in the future, we would find the offending restriction void as inconsistent with public policy. . .

If common carrier service were authorized on the LRM Spur in the future, however, any restrictions limiting the shippers that could be served would, upon challenge, also be found void as contrary to public policy and the common carrier obligation.

Id. at 33-34 (emphasis added).

The same conclusion is warranted here. If, as UP suggests in its Opposition, SP had agreed to surrender its ability to fulfill its common carrier obligation to serve new shippers connecting to the Arsenal Lead and Gaylord Spur through the

MOU, 12 such an agreement clearly would have been unlawful. See, e.g., United States v. Baltimore & O.R.R., 333 U.S. 169, 177-78 (1948) ("Baltimore & O.R.R.") (finding that parties may not enter into trackage rights agreements that abrogate rights and responsibilities under the statutory provisions of the Interstate Commerce Act). Simply stated, UP and SP were not free to agree amongst themselves to preclude Entergy's ability to build-out to SP's own trackage. As the Supreme Court further held in its Baltimore & O.R.R. decision:

[p]ractically the only argument suggested to justify discriminatory practices under the circumstances here is that an owner has a right to let others use his land subject to whatever conditions the owner chooses to impose. It is even argued that to construe the Interstate Commerce Act as limiting that right would result in depriving an owner of his property without due process of law. But no such broad generalization can be accepted. Property can be used even by its owner only in accordance with law, and conditions its owner places on its use by another are subject to like limitations. Of course it does not deprive an owner of his property without due process of law to deny him the right to enforce conditions upon its use which conflict with the power of Congress to regulate railroads so as to secure equality of treatment of those whom the railroads serve.

Id. at 176-77.

¹² See Verified Statement of Mr. Carl Bradley at 3 ("SP understood that the agreement involved a trade-off: SP was able to avoid the cost of reconnecting the Arsenal Lead to its mainline, and was able to save the costs associated with maintaining the Lead, but it had the right to use UP's line to serve existing customers only.").

For the foregoing reasons, supported by the specific analysis of the SP representative with the greatest familiarity with the project, the Board should find that SP would have had the ability to serve Entergy's intended build-out point by using its trackage rights over MP's line.

2. Access Using SP's Own Arsenal Lead

SP's right (and duty) to serve Entergy's contemplated build-out point on the Arsenal Lead arose not just from SP's trackage rights over the UP main line, however, but also from SP's pre-existing common carrier obligation. As Entergy noted, supra, SSW constructed and operated this line pursuant to a certificate of public convenience and necessity that the ICC issued in 1942. See McClanahan V.S.; Exhibit No. __ (RRM-2). Pursuant to 49 U.S.C. § 10903, SP would have been permitted to abandon this line (and thus relieve itself of its common carrier obligation) only by securing abandonment authorization from the ICC or STB. SP never obtained such authorization. 13

The two steps that SP did take to dispose of this line (i.e., partial track removal and partial sale to a non-carrier) did not relieve it of its obligation to serve new shippers like Entergy that could have built out to the Arsenal Lead. In this

¹³ On May 30, 1991, SSW secured abandonment authorization from the ICC to permit its abandonment of a separate line from Pine Bluff ... Little Rock via Altheimer, Arkansas. See Docket No. AB-39 (Sub-No. 16X), St. Louis Southwestern Railroad Co. --Petition for Exemption -- Abandonment Between Sherry and Altheimer, Pulaski, Lonoke and Jefferson Counties, AR (Decision served May 30, 1991).

regard, the decision of the United States Court of Appeals for the Seventh Circuit in Busboom Grain Co., Inc. v. ICC, 830 F.2d 72 (7th Cir. 1987) is instructive. Therein, the court held that:

[o]nce the railroad has been permitted to leave the business as a common carrier over a particular line, it may not be compelled to resume the business any more than a stranger could be dragooned to start service on the line. Until the abandonment process is lawfully complete, the railroad's obligation as a common carrier continues. If the Commission's Secretary forged the Commissioners' signatures to a document authorizing abandonment, the railroad's cessation of service would not prevent the Commission from vacating the order and completing the regular administrative process.

Id. at 76 (emphasis added). Similarly, the Commission's own line of authority in the Chelsea Property Owners cases supports this principle. Therein, the Commission held that a carrier cannot escape its jurisdiction simply by terminating service or removing track:

Given the Highline's history as a requlated rail line, we continue to have jurisdiction over it, even though the track in question now possesses many of the characteristics of a spur. We recently addressed the status of a rail line unused for 15 years. In holding that the track's use as a part of a line haul rail operation prior to the unauthorized cessation of service made it a railroad line subject to our abandonment regulation, we stressed the well established principle that a carrier cannot escape our abandonment jurisdiction simply by terminating service or removing track. Docket No. AB-52, (Sub-No. 71X), The Atchison, Topeka and Santa Fe Railway Company -- Abandonment

Exemption -- In Lyon County, KS (not printed), served June 17, 1991 . . .

Chelsea Property Owners -- Abandonment -- Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track in New York, NY, 8 I.C.C.2d 773, 790 (1992) (emphasis added). In its quoted Lyon County decision, the Commission offered even more explicit guidance regarding the continuation of a railroad's common carrier obligation in the absence of abandonment:

[W] here a carrier decides to reduce or cease service and/or remove track, the carrier's common carrier obligation remains until appropriate abandonment authority is obtained.

Docket No. AB-52, (Sub-No. 71X), The Atchison, Topeka and Santa Fe Railway Company -- Abandonment Exemption -- In Lyon County, KS, Decision served June 17, 1991, at 5; see also Finance Docket No. 33508, Missouri Central R.R. -- Acquisition and Operation Exemption -- Lines of Union Pacific R.R., and Finance Docket No. 33537, GRC Holdings Corp. -- Acquisition Exemption -- Union Pacific R.R., Decision served April 30, 1998, at 3, 7 (rejecting claim that, as the result of an eighteen-year period of disuse and the removal of approximately three miles of track, there had been a "de facto" abandonment of a portion of SSW's Rock Island line "because it is well established that a rail line is not abandoned until this agency authorizes abandonment under 49

U.S.C. 10903 or the exemption provisions at 49 U.S.C. 10502."). 14 Consequently, SP remained legally obligated to provide common carrier service over the Arsenal Lead despite the removal of track.

Moreover, the agreement governing the sale of the portion of the Arsenal Lead to Mr. Smykla, a non-carrier, not only did not relieve SP of its common carrier obligations over the line, but itself actually confirms SP's intention to retain those obligations. As indicated *supra*, this agreement states that:

Buyer is not a common carrier and is desirous of acquiring the Arsenal Spur intact and not for the purpose of common carrier rail transportation and is agreeable to leave the track substantially in place should future common carrier rail service be required by shippers, potential shippers, SSW or the United States Government in the interests of national security for a period of twenty five (25) years.

The Board added that "[t]he preservation of the right of way, albeit in a state of disrepair, however, suggests an intent to resume rail operations at some point." Id. at 7. Moreover, the Board noted (with particular relevance to the instant case) that "[t]he SP/SSW did not operate over the line at least in part because it received trackage rights over the parallel UP line between St. Louis and Kansas City as a condition of the approval by the Interstate Commerce Commission (ICC) of the merger between the UP and the Missouri Pacific Railroad Company in 1982. The SP/SSW embargoed the poorly maintained line after acquiring it, but did not seek authority from the ICC during the 1980s either to discontinue service or abandon the line." Id. at 8 (emphasis added).

Smykla V.S.; Exhibit No. __ (PJS-1) at 1. 15 Consequently, Entergy would have been legally able to demand that SP provide common carrier service to the White Bluff Plant (via the Arsenal Lead) prior to the UP/SP merger. See, e.g., Finance Docket No. 31847, State of Maine, Dept. of Transp. -- Acquisition and Operation Exemption -- Maine Central R.R., Decision served May 24, 1991, at 2-3 ("State of Maine"). In its State of Maine decision, the Commission found that no common carrier rights or obligations were transferred to a non-carrier purchaser where the parties had agreed that the transferring carrier would retain its common carrier obligation over the relevant line. Id. at 2 ("[B]oth parties agree that MEC retains the common carrier obligation and that it could not cease to offer service on the line without ICC permission."). This same conclusion is warranted regarding SP's agreement with Mr. Smykla. See Smykla V.S. at 2. 16

Even beyond this legal obligation, however, SP's own Division Superintendent in Pine Bluff at the time of the rail

 $^{^{15}}$ As indicated supra, ICC approval was not sought regarding this transaction.

authority regarding the portion of the Arsenal Lead that it physically removed, and even if SP had conveyed its common carrier obligation over approximately three miles of the line to Mid-State Corporation (with ICC approval), SP still would have remained obligated to provide service to the northernmost portion of its Arsenal Lead (i.e., the point to which Entergy proposes to construct its spur). See, e.g., The Denver and Rio Grande Western R.R. -- Abandonment Between Farmington, NM and Alamosa and Antonito, CO, 334 I.C.C. 539, 550 (1969) (basing approval of an abandonment that would strand a portion of DRGW's narrow gauge line upon the availability of substituted truck-for-rail service for the stranded shippers).

relocation project confirms in his attached verified statement that SP would have been pleased to have had the opportunity to deliver 6.5 million tons of coal per year (either on a single-line or an interline basis) to the White Bluff Plant. In particular, SP's Mr. McClanahan states that, if necessary, SP would have used its Arsenal Lead in order to accommodate a request from Entergy for such high-volume, high-revenue service. See McClanahan V.S. at 2, 12. Therefore, even assuming for the sake of argument that SP had lacked sufficient rights to permit it to operate over MP's line to serve Entergy, a grant of relief under the CMA build-out condition nevertheless would still be appropriate because SP had the ability and duty to serve Entergy using its own Arsenal Lead.

D. Entergy's Request for Relief is Consistent With the Goal of the Board's Entergy-Specific Condition

In Decision No. 44, the Board also granted Entergy's request for a condition authorizing BNSF's use of its trackage rights between Memphis and Pine Bluff, Arkansas¹⁷ to serve White Bluff upon the completion of what was believed to be an approximately 21-mile build-out from the plant to an unspecified point in Pine Bluff. See Decision No. 44 at 154, 185, 232.

In both its Comments and Responsive Application filed in this proceeding, Entergy explained that in early 1995 it began

¹⁷ The Memphis-Pine Bluff line segment is part of SP's line between Memphis and Houston, over which BNSF obtained trackage rights pursuant to its settlement with the Applicants.

considering ways of introducing competition to the transportation of its Southern Powder River Basin coal to its Arkansas coal-fired plants in order to lower the costs of coal at these plants to what it considered competitive levels. See March 29, 1996 Comments of Entergy Services, Inc., Arkansas Power & Light Company and Gulf States Utilities Company, Verified Statement of Roy A. Giangrosso at 11-14. Entergy further noted that "after preliminary investigation," it had concluded that the only feasible means of achieving transport competition was to construct an approximately 21-mile spur or other line from the White Bluff plant to a connection with SP at Pine Bluff, Arkansas. Id. at 13-14 (emphasis added). Based on that preliminary investigation, Entergy assumed that the nearest SP line was 21 miles away and would be served by BNSF via trackage rights over SP's former line between Memphis and Pine Bluff.

As explained by the Board, this Entergy-specific condition was intended to ensure "the continued availability of a competitive build-out option for Entergy's White Bluff plant."

Id. at 154. Specifically, the Board noted that it had:

. . . ensured the continued availability of a competitive build-out option for Entergy's White Bluff plant near Redfield, AR, which is now served exclusively by UP. BNSF will be permitted to substitute for SP if a connection is ever built linking the plant to a nearby SP line at Pine Bluff. (BNSF will be operating over this SP line via the trackage rights it will receive under the BNSF agreement.) Entergy will thus continue to have the option of building out to an independent carrier and will continue to be able to use

this option in its negotiations with applicants.

Decision No. 44 at 154.

This additional condition of Decision No. 44 is consistent with the overall goal of assuring that Entergy would be able to replicate the potential competition that existed prior to the merger of UP and SP. Since Entergy's build-out to the Arsenal Lead will allow Entergy to achieve this goal with far less disruption to the Pine Bluff community than would result from the full twenty-one mile build-out previously authorized by the Board, the Entergy-specific condition of Decision No. 44 provides further support for Entergy's request for BNSF trackage right to the Arsenal Lead.

E. UP's Arguments Regarding Service Issues are Both Incorrect and Inapposite to this Request

Finally, UP has attempted to distract and mislead the Board (in its Opposition filing) by accusing Entergy of using the Exemption proceeding to gain an advantage in litigation. UP's claims are both incorrect and inapposite to the consideration of Entergy's Petitions. Indeed, Entergy submits that UP is the party trying to improve its position in the litigation by again attempting to mislead the Board into reviewing its service performance without regard to the full facts and in total disregard of the parties' contractual arrangements.

As Entergy Witness Jewell explained in prior verified statements in connection with Entergy's requests for emergency

relief in Ex Parte No. 573, Rail Service in the Western United States, and Service Order No. 1518, Joint Petition for Service Order (collectively "Ex Parte No. 573"), UP's claims that use of distributed power and barge coal as the answers to its service deficiencies during the service crisis ignore the requirements of the contract and the practicalities of Entergy's situation. See Ex Parte No. 573, Verified Statements of Charles W. Jewell, Jr. dated May 18, 1998 and June 16, 1998. Similarly, UP's attempt to hide its own poor service by attacking Entergy's inventory management practices ignores the reality that if UP had simply delivered the coal it was required to deliver in accordance with Entergy's rail transportation agreement there would have been no need for the curtailments that Entergy experienced during 1997 and 1998. Id.

In the Emergency Petition, Entergy submitted extensive factual evidence demonstrating that: (1) UP's service performance had breached its rail transportation agreement with Entergy; (2) Distributed Power trainsets were not required or permitted under the agreement, would not have resulted in the delivery of any additional coal to Entergy, and would have required substantial capital expense on the part of Entergy; (3) UP's detour proposal was impractical and would not have enabled Entergy to fully utilize BNSF without dependence on UP; (4) the barge alternative was a complicated, temporary arrangement that was difficult to implement and of limited utility given the significant deficiencies in deliveries via the UP; and (5) UP's obligation is to

deliver the quantities of coal that Entergy needs, when it needs the coal, and that delivery of more coal when it is not needed is not a substitute for compliance with the contract. Id. In ruling on the Emergency Petition, the Board did not allow for discovery or evidentiary proceedings that would have revealed the flaws in UP's distorted version of the facts. It also did not consider whether the service failures resulted in a violation of UP's contractual obligations. If it had, the Board would have seen, as the Court has, 18 that UP's service levels violated Entergy's rail transportation agreement.

The parties have engaged, and are continuing to engage, in substantial discovery in connection with the court litigation. Entergy has requested information to further support its claims that UP's breach of its rail transportation is material. UP's attempts to shift blame to Entergy for its self-inflicted service crisis are currently before the Court. The Board should not render rulings on these issues without the same full development of the facts. Moreover, such a resolution is not necessary. Entergy's reference to UP's poor service simply explains that the service concerns are another reason Entergy believes the spur construction is necessary and would benefit the public interest. There is, however, no requirement under either the Board's CMA or Entergy-specific build-out conditions that Entergy demonstrate the need for alternate service on this basis.

¹⁸ See discussion, supra, at 8.

Accordingly, the Board should avoid being distracted by UP's smokescreens. In this regard, the Board should be aware that notwithstanding its July 31, 1998 ruling on Entergy's earlier Emergency Petition, the Court has ruled that UP breached the parties' agreement "by failing to transport all coal tendered by plaintiff, therefore creating deficits and in failing to make up deficit tonnage within the succeeding quarter." See Jewell V.S.; Exhibit No. __ (CWJ-1) at 23. Moreover, the Board should be aware that the Court made this determination despite UP's claim that during the first half of 1997, it had "delivered all the coal Entergy was willing to accept." Id. at 8. Very simply, what UP seeks to achieve by its extensive discussion at pages 18-21 of its Opposition is to lure the Board into making unfavorable comments about Entergy which UP can then seek to use to its advantage in the court litigation.

CONCLUSION

For all of the foregoing reasons, the Board should enter an order enforcing Decision No. 44 insofar as it grants trackage rights to BNSF over UP's line to replicate the competition that existing between UP and SP before the merger. As indicated supra, that purpose could be achieved: (i) by requiring UP to reconstruct its Arsenal Lead and granting BNSF the right to operate over that line from Pine Bluff to the point of connection between the Arsenal Lead and the Pine Bluff Arsenal; or (ii) simply by modifying the trackage rights BNSF received in

the merger proceeding to allow BNSF to operate over UP's existing Pine Bluff to Little Rock main line and serve the Entergy buildout, and requiring UP to cooperate with Entergy to establish a more efficient connection with UP's Pine Bluff to Little Rock line so that BNSF's coal trains will not unduly congest traffic on UP's main line.

Respectfully submitted,

ENTERGY SERVICES, INC. and ENTERGY ARKANSAS, INC.

By: O.H. Storey Janan Honeysuckle Entergy Services, Inc. Mail Unit L-ENT-26D 639 Loyola Avenue New Orleans, LA 70113

OF COUNSEL:

John R. Molm Sandra L. Brown Troutman Sanders LLP 1300 I Street, N.W. Suite 500 East Washington, D.C. 20005-3314 (202) 274-2950

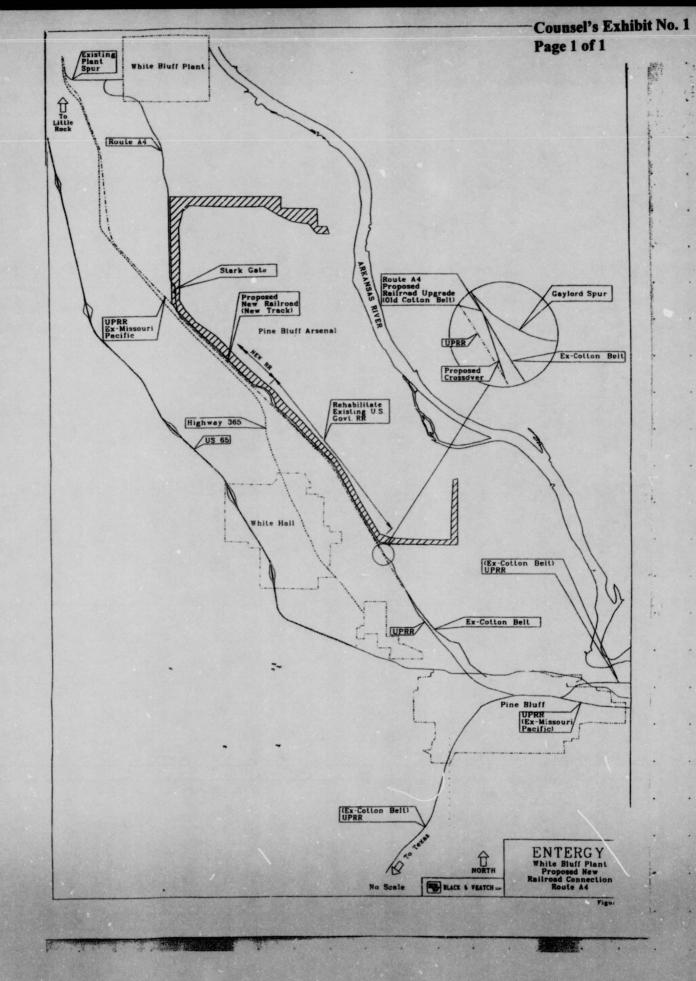
DATED: September 20, 1999

C. Michael Loftus Donald G. Avery Frank J. Pergolizzi Andrew B. Kolesar III Slover & Loftus 1224 Seventeenth St., N.W.

Washington, D.C. 20036

(202) 347-7170

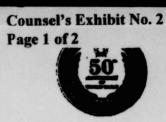
Their Attorneys





DEPARTMENT OF THE ARMY PINE BLUFF ARSENAL PINE SLUFF, ARKANSAS 71802-9500

July 23, 1999



Office of the Commander

Honorable Vernon A. Williams
Secretary, Surface Transportation Board
1925 K Street, N.W.
Mercury Building, Room 711
Washington, D.C. 20423-0001

Dear Secretary Williams:

The purpose of this letter is to support the Petition for Enforcement of Merger, Condition, as well as the separate Petition for Exemption, filed by Entergy Services, Inc. and Entergy Arkansas, Inc. (collectively referred to as Entergy). Entergy seeks approval to construct a rail line connecting its White Bluff Steam Electric Station to rail facilities at which it can obtain competitive service by the Burlington Northern and Santa Fe Railroad in the vicinity of Pine Bluff, Arkansas. A portion of Entergy's proposed connection would incorporate and extend trackage owned by the United Stated Government at the Pine Bluff Arsenal.

The Pine Bluff Arsenal produces, stores and demils conventional ammunition; serves as the Group Technology Center for illumination and infrared munitions; serves as the Specified Mission facility for smoke munitions; and maintains the sole U.S. capability for white phosphorus The installation supports the storage and destruction of the second largest statewide chemical weapons stockpile, preservation of the only permitted site east of the Rockies for acceptance of non-stockpile chemical munitions; and enforcement of international treaty efforts through compliance, and education of world-wide inspectors. The Arsenal is the Joint Services' Center of Expertise for Chemical/Biological Defensive Equipment production, maintenance, testing, certification and training. supports design agencies with development and engineering, prototype production, testing and demonstration. The Arsenal ensures environmental excellence through hazardous material/waste management programs; and serves the needs of Arkansas communities and the military population as the only active Army installation in the state.

The Arsenal believes that the proposed construction project will provide many benefits to the Arsenal and Department of Defense. The Entergy project will, at no cost to the government, result in a significant rehabilitation and enhancement of approximately six miles of government-owned track and right-of-way. This rehabilitation will enable the Arsenal to better utilize these facilities in obtaining competitive rail service for itself. In addition, the new rail company will assume responsibility for maintenance and repairs on the Arsenal trackage. This will result in annual savings to the Government of between \$100,000 and \$150,000.

Further, The Department of Defense should be a beneficiary of the Entergy project. As noted above, the Pine Bluff Arsenal is a highly sensitive and an important national facility. It is also a large consumer of electricity. It is our understanding that one of the purposes of the Entergy project is to increase rail competition to White Bluff, and that this competition will result in reduced transportation rates and greater reliability of rail service. The government expects it will benefit in two ways from this competition: (1) reduced electricity costs; and (2) less susceptibility to service outages at its facilities.

The Arsenal hereby confirms that it supports the proposed construction project and is in the process of negotiating formal agreements with Entergy that would govern the parties' relationship should the project proceed.

For all of the foregoing reasons, we urge you to approve Entergy's requests for authority to proceed with its construction project.

Sincerely,

Gary J Motsek Colonel, U.S. Army

Commanding

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 GRAND WESTERN)
RAILROAD COMPANY

Finance Docket Nos. 32760

VERIFIED STATEMENT OF ROBERT R. McCLANAHAN

My name is Robert R. McClanahan. I am the former
Division Superintendent of the Southern Pacific Transportation
Company's ("SP") Pine Bluff Division. Entergy has requested that
I provide factual background to the Board regarding rail operations in and around Pine Bluff, as they relate to the "Petition
of Entergy Services, Inc. and Entergy Arkansas, Inc. for Enforcement of Merger Condition." In preparing this statement, I have
reviewed Entergy's July 30, 1999 "Petition for an Exemption From
49 U.S.C. § 10901 to Construct and Operate a Rail Line Between
White Bluff and Pine Bluff, Arkansas," and Union Pacific Railroad
Company's ("UP") August 31 Opposition to that Petition. UP's
Opposition includes the Verified Statements of Jerry Wilmoth,
Carl Bradley, and William Somervell. (For the Board's information, Mr. Bradley was my assistant from 1982-1988).

Based upon my review of these materials and my own independent knowledge gained from forty-three years' experience in the railroad industry, I can confirm to the Board that prior to the merger of UP and SP, we at SP would have been able to provide service to a build-out from Entergy's White Bluff Plant using our own Arsenal Lead line or using our trackage rights over a nearby line of the Missouri Pacific Railroad ("MP"). In either case, we would have provided service to White Bluff, particularly in light of the significant revenue that would have been associated with such a high-volume movement of coal.

I began my railroad career with the St. Louis Southwestern Railway Company ("SSW" or "Cotton Belt") as a Telegrapher in 1945 in Mt. Pleasant, Texas. After holding a variety of positions of increasing responsibility within the Southern Pacific System, I moved to Pine Bluff, Arkansas in 1974, where I was promoted to the position of Assistant Superintendent to then-Division Superintendent W.F. Reed. In this position, I was directly involved in the supervision of Cotton Belt operations. In June of 1982, Mr. Reed retired and I was appointed to fill his job as Division Superintendent, with principal responsibility for the Cotton Belt Division. I held this position until 1988 when I retired from railroading. Given this level of involvement with the Cotton Belt's operations, and given my continuing twenty-five year residency in Pine Bluff, I have a thorough understanding of the rail lines at issue in Entergy's Petition for Enforcement of Condition.

When I returned to the Cotton Belt we operated a rail line along the Third Avenue Corridor in downtown Pine Bluff. In addition, we operated a line connecting our Third Avenue Corridor with the United States Army's Pine Bluff Arsenal (the "Arsenal Lead"), which was located several miles north of downtown Pine Bluff. The Cotton Belt had built the Arsenal Lead pursuant to an agreement dated January 23, 1942 with the United States Government. I have attached a copy of this Agreement as my Exhibit No. (RRM-1). Under the terms of this agreement, the Government obtained the necessary right-of-way for a 4.41 mile line from downtown Pine Bluff to the Pine Bluff Arsenal and SSW built and maintained the track. This track extended approximately from SP Milepost 268.6 in downtown Pine Bluff to SP Milepost 273 near the Arsenal property line. From Third Avenue, this line extended in a northerly direction approximately four miles to the Pine Bluff Arsenal. The Interstate Commerce Commission approved SSW's construction and operation of this line as a common carrier by its decision dated February 14, 1942 in Finance Docket No. 13608, St. Louis Southwestern Railway Co. Trustee et al. -- Construction and Operation. A copy of this decision is attached hereto as Exhibit No. (RRM-2).

From the 1940's to the 1980's, the Cotton Belt actively used its Arsenal Lead to provide rail service to a number of different shippers located north of downtown Pine Bluff. During this same time period, MP operated a rail line that traversed

Fourth Avenue through Pine Bluff and extended north to the City of Little Rock, Arkansas, passing nearby the Pine Bluff Arsenal.

In April of 1954, the Pine Bluff Arsenal permitted the Cotton Belt and MP to construct the so-called "Gaylord Spur" to facilitate service to certain private industry located in the area just south of the Arsenal. This spur, which the Cotton Belt and SP ultimately constructed in 1956-57, branched off of the Arsenal Lead at approximately SP Milepost 272.8 just south of the Arsenal. In addition to the Gaylord Spur, the Cotton Belt and MP built a crossover from MP's Pine Bluff to Little Rock main line to the Arsenal Lead. From 1957 to 1994, the Cotton Belt and MP alternated switching the Gaylord Spur and the Arsenal every year.

In the late 1970's or early 1980's, our local public authorities began to contemplate certain means by which traffic congestion in downtown Pine Bluff might be relieved. At that time, the Cotton Belt operated on Third Avenue and the MP ran down Fourth Avenue, with a conflicting crossing near Laurel Street. In order to advance this "Rail Demonstration Project," consultants were retained to evaluate potential alternatives for future rail service in the Pine Bluff area. Along with then-Superintendent Reed, I attended many planning meetings with representatives from the Arkansas Highway Department, Jefferson County, the City of Pine Bluff, and the two railroads.

One of the alternatives first considered was to route the SP east and south of town to a connection with its Texarkana main line some miles south of Pine Bluff, and to route UP east of

U.S. Highway 65 near Lake Pine Bluff. The final decision, however, was to relocate the SP main track from its existing Third Avenue location to Fourth Avenue, where MP had been operating alone. This relocation would allow the two railroads to conduct joint double track operations on Fourth Avenue, and would permit the closing of several crossings in Pine Bluff. This plan greatly reduced the length (and therefore the expense) of highway overpasses that were to be built over the Fourth Avenue Corridor, and would permit the closing of several grade crossings in Pine Bluff. For example, this consolidation permitted the four-lane Plum Street and Texas Avenue overpasses to be limited to approximately one city block, rather than the more than two block length that would have been required without relocation of the SP line.

attend meetings regarding this project and I worked closely with the principal representatives of the various interests to oversee the implementation of the final plan. By mid-1984, these parties (i.e., MP, SSW, the Arkansas State Highway and Transportation Department, the City of Pine Bluff, Arkansas, and Jefferson County, Arkansas) signed a Memorandum of Understanding ("MOU") setting forth their intentions with respect to the Rail Demonstration Project. I have attached a copy of this MOU as Exhibit No. _ (RRM-3) to my statement. This MOU contemplated that: (i) SSW would abandon its track running through downtown Pine Bluff and instead use the common corridor with MP on Fourth Avenue for joint operations; (ii) SSW would abandon a spur track along Sixth

Avenue; and (iii) SSW would eliminate its connection to the Arsenal Lead on Third Avenue. (At the time that we signed the MOU, there were four rail-served industries in the Gaylord Spur area in addition to the Arsenal). I should point out that while SP removed the Third Avenue track, no formal abandonment effort was undertaken with the ICC regarding either the Third Avenue Corridor or any other portion of the Arsenal Lead. (The MOU, of course, did not contemplate that we would abandon any portion of the Arsenal Lead.)

By removing the Third Avenue connection to the Arsenal Lead, of course, SP would cut off southern access to its Arsenal Lead. Fursuant to the parties' understanding, however, this access was to be replaced by access to the Arsenal Lead from the north (via trackage rights over MP's Pine Bluff to Little Rock main line and a connection to the Arsenal Lead built in 1956-57). In my view, this merely meant that SP would move its connection to the Arsenal Lead from one end to the other. It certainly was not our intention as a part of the Rail Demonstration Project to give up any rights that we had to serve new shippers on our own line, and we did not enter into an agreement through which we would seriously undermine our ability to satisfy our common carrier obligation should any new shipper request service at a point along the Arsenal Lead or Gaylord Spur.

Much has been made by UP in its August 31 Opposition filing regarding the wording of the MOU regarding the right of SP

to serve only its "existing shippers." In this regard, page 3 of my Exhibit No. __ (RRM-3) provides that:

[t]he SSW will have the right to provide rail service to their existing shippers and receivers of railway carloads of freight by use of rail connections as provided by the project and/or as in agreement with MP operations.

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

(emphasis added). Rather than being some form of severe limitation on SSW's right to serve new shippers on the Arsenal Lead (as UP suggests), this language instead gave SP the right to continue to serve the shippers it had previously served that were affected by the relocation; i.e., those along its downtown rail corridor. The Board should note that the "existing shippers" language is presented as an affirmative right of SSW's and not as some sort of limitation.

In other words, the MOU certainly does not indicate that SSW "will have the right to provide rail service to their existing shippers but will not have the right to provide service to new shippers on its own line." Similarly, the "bridge movement only" language that we see in the MOU only prohibits SP from serving any shippers on MP's track between Pine Bluff and the connection to the Arsenal. There is no mention made of shippers located on SP's Arsenal Lead.

There is additional language of the MOU that is consistent with this interpretation. In particular, the MOU indicates (at page 8 of my Exhibit No. __ (RRM-3)) that MP:

. . . will promptly enter into negotiations with the SSW to formulate agreement(s) governing the joint operations by the MP and SSW in the Fourth Avenue common corridor and to serve the existing industries in the downtown area.

(emphasis added). In other words, the MOU itself suggests that the "existing shippers" phrase that UP now attempts to use to its advantage actually meant existing "downtown" shippers, not existing shippers (and only existing shippers) on the Arsenal Lead or Gaylord Spur.

agreement that we signed regarding trackage rights over MP's main line north of Pine Bluff was dated November 15, 1985. This agreement does not impact the understanding set forth in the MOU, and to the extent that it precludes the construction of any spur to "the Joint Facility" (as UP observes in its Opposition), it is irrelevant to the current issue because Entergy is proposing to build out to the Arsenal Lead and not to a Joint Facility.

I should also point out that during the same period of time in which SP participated in the relocation project, an entity known as the Pine Bluff Industrial Foundation became interested in some land that was located east of the Arsenal Lead (to develop into another Industrial Park). This Foundation had

been working to encourage industries to locate on this land and approached me to discuss the possibility of receiving switching service. One of their questions at that time was whether an industry located east of the Arsenal Lead would be able to receive service from SP alone, or from both SP and UP. My response at that time, which I believe was entirely correct, was that UP would not have the ability to serve this area, and that only SP would be in a position to do so. This, of course, was based upon my understanding of our arrangements with UP, whereby SP had the right to operate over MP's Pine Bluff to Little Rock line to access the Arsenal Lead and Gaylord Spur, even to provide service to new shippers on our line. In other words, any industry, including Entergy, that desired to do so could have built a spur to any point along SP's Arsenal Lead and SP would have had the exclusive right to provide service to that industry using its trackage rights over the MP. As I understand UP's argument in its Opposition filing, taken to its logical conclusion, UP claims that it would have been the only carrier able to provide service to the new Industrial Park. There is no legitimate basis for this conclusion.

In my estimation, the best way to evaluate both Entergy and UP's positions in this dispute is to consider the situation that existed prior to the Rail Demonstration Project. At that time, Entergy certainly could have built a spur from White Bluff to the Arsenal Lead, and SP would have been able to provide service to the plant via our Third Avenue connection to the

Arsenal Lead. Now, if we consider the situation after the Rail Demonstration Project, we inevitably reach the same conclusion. The only change that the Rail Demonstration Project made was to move the point of access to SP's Atsenal Lead from the south to the north. Therefore, SP would have been able to serve Entergy at this time as well, using its trackage rights over MP.

I should point out that SP was not the proponent of the project and SP did not stand to benefit from the project. We simply agreed to a relocation of our track as a means to assist the community. Significantly, our willingness to participate in the Rail Demonstration Project was necessarily conditioned on our understanding that allowing our connection with the Arsenal Lead to be severed would not forfeit any of our rights, or compromise our ability to meet our obligations.

In this regard, I must take issue with a comment made by my former assistant, Carl Bradley, in his verified statement. Specifically, Mr. Bradley claims that SP made a trade-off in the Demonstration Project that allowed it to avoid the cost of reconnecting its downtown line with the Arsenal Lead in exchange for giving up its right to serve new shippers. I disagree strongly with this characterization.

We at SP were well aware of what we were doing. Since we knew that we had exactly the same rights after the relocation project that we had enjoyed before, we had no reason to reconnect the Arsenal Lead to the new main line. If we had suspected in any way that we were being asked to give up our right to serve

new shippers on our line, we would have insisted that our new Fourth Avenue line be connected to the Arsenal Lead. Contrary to UP's argument, this connection would have been performed at the expense of the Demonstration Project and not SP. See Exhibit No. (RRM-3) at 6, 12. (The MOU gave SP the right to approve the engineering details of the project.) With the prospect of a new industrial park being established on the land east of (and adjacent to) our Arsenal Lead, it would have been extremely unlikely that SP would have agreed to an arrangement that would have cut us off from those potential shippers. For the sake of clarity, I will reiterate that the "existing shippers" language of the MOU permitted SP to continue to serve its shippers in downtown Pine Bluff and protected MP shippers that were located on MP's line between Pine Bluff and the Arsenal, but did not prohibit SP from serving: (i) new shippers that might choose to locate on SP's own trackage; or (ii) shippers that desired to build-out to SP's line. Given these considerations, it is unrealistic to suppose that SP would make the trade-off that Carl Bradley now suggests that we made.

Having been present at many meetings related to the development and implementation of this Project (from its inception to its completion), I am convinced that SP had the right to use its trackage rights over MP to provide service to an Entergy build-out. I know from this personal involvement that the intention of the parties involved in the Project was that neither MP nor SP would come out with more than it had at the beginning.

It was never the goal of the Project to punish or restrict either party, but rather, that through the willing cooperation of all of the parties (including the two railroads), the City of Pine Bluff would benefit. In its current interpretation, however, UP is attempting to claim that it gained and SP lost. That interpretation is mistaken.

Finally, I should note that even if the Board were to find that UP is correct in its argument that SP did not obtain the right to use its trackage rights over MP to serve new shippers on the Arsenal Lead (such as Entergy), the Board nevertheless should find that SP would have had the ability and in fact the common carrier obligation to provide this service directly over its Arsenal Lead. In other words, it is evident to me that Entergy could have obtained competing service from SP prior to the UP/SP merger in one manner or another. As I indicated at the outset of my statement, if invited to participate (either on a single-line or interline basis) in the movement of coal to White Bluff, we would have made every effort to divert this high-volume, high-revenue traffic to our line and away from our main competitor in the region.

7/3

THIS CONTRACT, entered into this 22rd day of January, 1942, by and between the UNITED STATES OF AMERICA, hereinefter called the "Government," represented by the Contracting Officer executing this contract, and BERRYMAN HENWOOD, Trustee, St. Louis Southwestern Reilway Company, Debtor, as Trustee, and not individually, hereinefter called the "Eailway Company," WITNESSERN:

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101 24 00 10L 01.1

WHEREAS, the Covernment, under authority of Act of July 2, 1940, (Public No. 703, 76th Congress), as emended by the Act approved June 30, 1941 (Public No. 139, 77th Congress), is ongaged in the construction of, and intends to operate, an incondicry bomb plant, known as the "Pine Bluff Arsenal," located near the City of Pine Bluff, in the State of Arkenses; and

MHERRAS, the Government desires to obtain service in the handling and moving of empty and loaded railroad cars to and from said arsenol;

NOW, THEREFORE, in consideration of the mutual promises and obligations hereinefter stipulated to be assumed, kept and performed, and in further consideration of the increased volume of freight that will be transported by the Railway Company, the parties hereto covenant and agree as follows:

ARTICLE I

12.04 hour

The Government agrees that it will, without expense to the Railway Company; furnish right-of-way for the construction of a lead-in trock; approximately 4.41 Pine Bluff, arkways, to the southern boundary of the Pine Bluff Areand Reservation, being the south line of Section 14, Township 5 South, Range 10 Vest, Jefferson County, Arkansas, all rights or title to said right-of-way to remain vested in the Government, except as hereinofter stated.

The Rollmay Company agrees that it will construct and maintain; without expense to the Government, a lead-in track on said right-of-way from the Rollway Company's main line on Third Avenue, in Pine Bluff, Arkansas, to said southern-boundary of the Pine Bluff Arsadal Reservation. Construction of the lead-in track shall be commenced within ten (10) days after the receipt by the Rellway Company of the Government's approval of right-of-way location and the receipt of Interstate construction of said lead-in track over said right-of-way and shall be completed as soon as possible thereofter; PROVIDED; that the Government shall; without expense to the Railway Company, comply with all requirements of the City of Pine Bluff, Arkansas, imposed in connection with the grant of permission to construct said lead-in track through said City.

ARTICLS II

The Government hereby grants the Rullway Company a license to enter upon and use the right-of-way hereinbefore mentioned for the purpose of constructing the lead-in track and for the purpose of maintenance of and operations on such track.

It is understood that the Government, its officers or agents, assume no responsibility for loss or demage indured as a result of any construction work, with this contract or in connection with the contract or in connection with the licenses granted by the Government in this contract.

It is further understood and agreed that the licenses herein granted shall continue in effect until such time as the Government shall order the removal of that

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portion of the lead-in track which was built at the expense of the Railway Company; PROVIDED, that after the lead-in track is ordered removed the Railway Company shall have minety (90) days after the receipt of the Covernment's order and receipt of Interstate Commerce Commission Certificate authorizing such abandonment, within which to remove said lead-in track. It is understood and agreed that if the lead-in track and appurtanences are not removed within said ninety (90) day period, title thereto shall vest in the Covernment without further action brought, and no claim for demages against the Covernment, or its officers or agents, chall be created by or made on account thereof. It is further understood and agreed that if the Covernment orders removal of the lead-in track or any portion thereof to enother location, then the Covernment shall pay the cost of such removal and relocation, and shall license the Railway Company to use such of Covernment's premises as may be necessary for the relocation of same. The licenses hereby granted, and any license granted for the lead-in track, if relocated as hereimbove provided, shall be free of any rental or other charges.

ARTICLE III

The Roilway Company agrees when so requested, and under such condition a license is granted to the Roilway Company, to handle, to and from the lead-in track or all tracks of the Government reached via the lead-in track as may from time to time be specified by the commanding officer in charge of the Pine Bluff Arsenal, or his cuthorized representative, all railroad cars consigned to and from said Pine. Bluff Arsenal over the tracks of the Roilway Company and its connections, and in connection therewith will furnish, supply and operate mative power and provide the personnel and facilities necessary to the proper handling and moving of said cars as above provided.

It is expressly understood and agreed that the Railway Company will perform the above-mentioned services to and from the lead-in truck or all tracks of the Government reached via said lead-in track without extra charge over and above the lawful line-houl tariff rate applicable at Pine Bluff Arsenal, Arkansas.

ARTIGLE IV

The Government will permit or maintain no obstruction or thing on its premises adjacent to any track over which the Railway Company will operate hereunder which shall have a vertical elearance of less than twenty-two (22) feet from the nearer rail or a horizontal elearance of less than eight and one-half (32) feet from the center line of any such track, except leading platform clearance may seven and one-half (32) feet, unless probibited by competent public authority.

ARTICLE V

It is understood that the movement of rollroad locomotives involves some risk of fire, and the Reilway Company assumes no responsibility for loss or damage to property of Government arising from fire caused by locomotives operated by the

Reilimy Company on the lead-in track or any track of the Covernment, or in the vicinity thereof, for the purpose of serving the Covernment,

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ARTICLE VI

No manher of or delegate to Congress or Resident Commissioner shall be permitted to any share or part of this contract or to any benefit-that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

ARTICLE VII

This contract shall become effective as of the date of the completion of execution hereof and continue until further notice by the Government to the Reilway Company. Notice of intention to terminate this contract shall be at the option of the United States, and shall be given in writing by the contracting officer to the Reilway Company not less than ninety (90) days in advance of the effective date of termination. Covenants herein shall inurs to or bind each party's successors and assigns; PROVIDED, that no right of the Government shall be transferred or assigned, either voluntarily or involuntarily, except by express agreement acceptable to the Reilway Company; however, the Government is not hereby prohibited from treasferring or assigning this contract to any person, portnership, or corporation operating said plant for or on behalf of the Government.

ARTICLE VIII

This instrument is executed by and shall be binding upon Berrymon Henwood, not as an individual, but solely as Trustee of the property of St. Louis Southwestern Railway Company, Debtor, under authority of the Court in certain proceedings under amendatory Section 77 of the Bankruptey Act, in the District Court of the United States for the Eastern Judicial District of Missouri, Eastern Division, entitled "In the Matter of St. Louis Southwestern Railway Company, Debtor," Cause No. 8497.

ARTICLE IX

This contract is subject to the approval of THE DISTRICT MIGINER, U. S. ENGINEER OFFICE; LITTLE HOCK, ARKANSAS, and subject to approval of the United States District Court, Eastern Division, Eastern Judicial District of Missouri, and shall not be effective until so approved.

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WITHERSIES:	St. Louis Southwestern Bmilumy Company, Debtor,
(S) PROPERTY DEST	By (SIGNO) DANIEL UPTIMETOWN Officer
Chief Operating Officer APPROVED JANUARY 23 . 1942.	THE UNITED STATES OF AMERICA
(SIGNO) T. P. KING T. Y. Kern, Lt. Col., Corps of Engineers, Diseries Engineer. APPROVED AS TO FORM: (SIGNO) A.	By (SIGNED) FRANCIS D. BEYER
The same of the sa	TOTAL P.11

This report will not be printed in full in the permanent series of Interstate Commerce Commission Reports.

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 13608

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY TRUSTEE ET AL. CONSTRUCTION AND OPERATION

Submitted February 14, 1942. Decided February 17, 1942.

Certificate issued authorizing the trustee of the St. Louis Southwestern Railway Company, debtor, and the St. Louis Southwestern Railway Company, (1) to construct a line of railroad, and (2) to operate over a line of railroad, in Jefferson County, Ark.

A. H. Kiskaddon, John W. Murchy, and B. F. Batts for applicants.

REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS PORTER, MAHAFFIE, AND MILLER BY DIVISION 4:

Berryman Henwood, trustee in reorganization proceedings of the St. Louis Southwestern Railway Company, debtor, and the St. Louis Southwestern Railway Company, on January 23, 1942, jointly applied for authority to (a) construct a line of railroad, extending from a point on the applicants existing line of railroad on Third Avenue, Pine Bluff, to the south boundary line of the United States Government Pine Bluff Arsenal Reservation, approximately 4.41 miles, and (b) operate over a line of railroad within the reservation, 1.45 miles, all in Jefferson County, Ark. No representations have been made by State authorities, and no objection to granting the application has been presented.

The proposed construction and operation are for the sole purpose of affording additional rail facilities to a defense plant now in the course of construction at the reservation. The plant will be operated by or in behalf of the United States Government. According to the terms of an agreement providing for the railroad construction contemplated, the Government will furnish the right-of-way and the applicants will construct and maintain the line. All railroad cars consigned to and from the plant will be handled by the applicants without extra charge over and above the lawful line-haul tariff rate, The contract is terminable at the option of the Government upon notice in writing.

The line in question will connect with tracks to be constructed within the reservation and will substantially parallel a line of the Missouri Pacific railroad, which also will serve the defense plant. Construction is expected to commence on February 15, 1942, and be completed on May 15, 1942. The track will be standard gage and laid with

Finance Docket No. 13608 - Sheet 2.

second-hand 75-pound rail. There will be five open-deck wooden trestles, aggregating 364 feet in length and from 4 to 18 feet in height. The estimated cost of construction is \$93,100 and will be financed from the applicants' current funds. The proposed operation also will be conducted over Government-owned tracks in the reservation, including switching within the plant.

During construction of the defense plant the applicants expect to handle 3,000 cars of construction material which will yield estimated gross revenues of \$150,000. The estimated expenses are \$112,884, indicating earnings of \$37,116. The enticipated traffic for the first year of operation after completion of the plant and each year thereafter for the duration of the war is 12,500 carloads. The annual results of operation, based on the estimated traffic, are operating revenues \$1,250,000; main-line operating expenses—maintenance of equipment \$206,375, transportation expenses \$378,125, and switching \$50,000, total expenses \$634,500; railway tax accruals \$236,200; hire of freight cars at \$2 a car, \$25,000; and net earnings \$354,300. The operating expenses, except switching charges which were determined at the rate of \$4 a car, represent certain percentages based on the applicants' 1940 operations. Substantially all of the anticipated traffic is to and from the reservation. Upon termination of the war, however, operations will cease or the volume of traffic will be greatly reduced.

It appears that the proposed construction and operation will be profitable to the applicants and that such construction and operation are required to comply with the Government's policy of having available to plants of this character transportation facilities of two independent lines of railroad.

We find that the present and future public convenience and necessity require (1) construction by Berryman Henwood, trustee in reorganization proceedings of the St. Louis Southwestern Railway Company, debtor, and the St. Louis Southwestern Railway Company, of a line of railroad, and (2) operation by them over a line of railroad within the United States Pine Bluff Arsenal Reservation, as described herein, in Jefferson County, Ark.

An appropriate certificate will be issued, which will provide that such construction shall be commenced on or before March 15, 1942, and be completed on or before June 15, 1942.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D. C., on the 17th day of February, A. D. 1942.

Finance Docket No. 13608.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY TRUSTEE ET AL. CONSTRUCTION AND OPERATION

Investigation of the matters and things involved in this proceeding having been made, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity require (1) construction by Berryman Henwood, trustee in reorganization proceedings of the St. Louis Southwestern Railway Company, debtor, and the St. Louis Southwestern Railway Company, of the line of railroad, and (2) operation by them over a line of railroad within the United States Government Pine Bluff Arsenal Reservation, in Jefferson County, Ark., described in the report aforesaid: Provided, however, and this certificate is issued upon the express condition, that such construction shall be commenced on or before March 15, 1942, and be completed on or before June 15, 1942.

It is ordered, That said trustee shall report to this Commission in writing the commencement and completion of said line of railroad within 15 days after such commencement and completion, respectively.

It is further ordered, That said trustee, when filing schedules establishing rates and charges applicable on said line of railroad, shall in such schedules refer to this certificate by title, date, and docket number.

And it is further ordered, That said trustee shall report to this Commission as required by valuation order No. 24, effective May 15, 1928.

By the Commission, division 4.

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Secretary.

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MEMORANDUM

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OF

UNDERSTANDING

FOR THE IMPLEMENTATION

OF A

RAILROAD - HIGHWAY DEMONSTRATION PROJECT

Pine Bluff, Arkansas FAP RR-8380(15)

March 1984 Update

MEMORANDUM OF UNDERSTANDING Pine Bluff, Arkansas Railroad Demonstration Project

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··· RECITALS ···

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

The parties to this Memorandum of Understanding are:

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

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

Various alternates for implementing a demonstration project have been investigated in coordination with the Pine Bluff Railroad Steering Committee. Subsequent to the F.Y. 1981 Federal Allocation Plan, limited build, usable segments, were proposed and accepted for preliminary engineering and design. The limited build project consists of five (5) proposed grade separations at Texas, Walnut and Plum Streets and Sixth and Seventeenth Avenues. Attached as Exhibit "A", and made a part of this Memorandum by reference, is a map showing the locations of the proposed grade separations.

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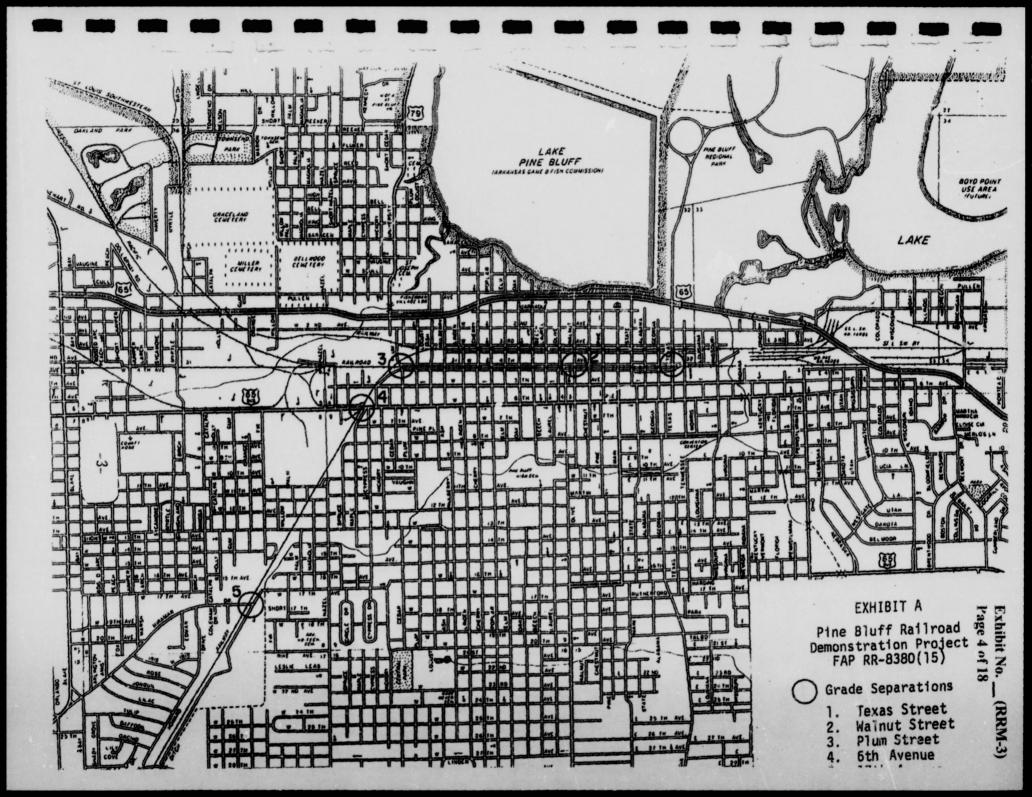
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A basic feature of the project is the consolidation of the operations of the MP and the SSW in a common corridor along Fourth Avenue within the Pine Bluff central city area. The main line track of the SSW will be relocated from the 3rd Avenue to the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

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



···FUNDING···

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- (1) This entire agreement is conditioned and contingent upon 95% or more of the eligible cost being funded by Federal funds. The remaining five percent of the funding of eligible costs will be arranged and/or made by JC and PB, except that the AHTD will provide the local five percent matching amount for designated highway grade separations on State Highway facilities.
- (2) As specified in FHWA Memorandum dated January 4, 1974, pertaining to Implementation Procedures (Section 163(a) (k), Federal-Aid Highway Act of 1973, Demonstration Project Railroad Highway Crossings), the procedures to be followed for advancing and completing these projects are to be in accordance with the standard procedures employed on regular Federal-Aid railroad-highway improvement projects in cooperation with the state highway departments. Therefore, all project work shall be in accordance with applicable federal, state, county or city laws, statutes, ordinances, rules, regulations, policies or procedures.
- (3) The eligible costs under the terms of this agreement are those costs incurred to effect the consolidation of the MP and SSW rail operations in the central PB area, including appropriate switching and signalization items, construct the limited build alternatives, and rehabilitate the portion of Third Avenue where tracks have been removed. The Third Avenue rehabilitation will consist of approximately 6,000 feet of improvements from Missouri to Mulberry Streets, including removing excess rock from the old track bed, partially removing rises at street

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

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

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

SPECIFIC AGREEMENTS OF THE ARKANSAS STATE HIGHWAY AND TRANSPORTATION DEPARTMENT

The Arkansas State Highway and Transportation Department agrees it will:

- (1) At project expense administer and/or perform the design, prepare or have prepared plans and specifications, handle eligible utility adjustments, construct or arrange for the construction of the facilities shown on Exhibit "A", together with the eligible appurtenances thereto.
- (2) Appraise and acquire at project expense any and all additional rights-of-way outside the 4th Avenue Corridor necessary to construct the project.
- (3) Participate in the local five percent matching amount by providing matching funds to construct grade separations for state highway facilities only, according to project plans and specifications.
- (4) After grade separations have been designed and constructed according to project plans and specifications, maintain at its cost and expense such facilities on the State Highway System.
- (5) Work with PB and JC concerning continued public information and involvement during project implementation.

SPECIFIC AGREEMENTS OF THE MISSOURI PACIFIC RAILROAD COMPANY

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Missouri Pacific Railroad Company hereby specifically agrees that:

- (1) It will not oppose or protest any applications filed by the SSW with the Transportation Commission of Arkansas or the Interstate Commerce Commission or other relevant government authorities which are required in order for tracks to be built and for operations of the MP and the SSW to be consolidated in the common corridor along 4th Avenue, provided such applications are in accordance with this Memorandum of Understanding.
- (2) It will promptly enter into negotiations with the SSW to formulate agreement(s) governing the joint operations by the MP and SSW in the Fourth Avenue common corridor and to serve the existing industries in the downtown area. The agreement(s) will be completed and executed before the consolidation of operations of the MP and the SSW is begun; or if agreement(s) has not been reached by a time appointed by the AHTD, the MP and SSW will by mutual agreement submit the matter to arbitration for a period of no longer than 30 days and in such event the decision of the arbitrator will be binding upon both parties.
 - (3) It will provide written approval of engineering details, plans, and specifications, when satisfactory from a railroad (MP) standpoint, prior to project implementation.

SPECIFIC AGREEMENTS OF THE MP (Cont'd)

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

THE ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

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St. Louis Southwestern Railway Company hereby specifically agrees that:

- (1) It will promptly file and prosecute any and all applications necessary for it to secure authority from either the Transportation Commission of Arkansas or the Interstate Commerce Commission or other relevant government authorities for construction of tracks to connect its main line on 3rd Avenue to its newly constructed line on 4th Avenue, to conduct operations over the common corridor and to operate over MP tracks for access to the Pine Bluff Arsenal.
- (2) It will not oppose or protest any applications filed by the MP with the Transportation Commission of Arkansas or the Interstate Commerce Commission or other relevant government authorities which are required in order for operations of the MP and the SSW to be consolidated in the 4th Avenue Corridor, provided such applications are in accordance with this Memorandum of Understanding.
- (3) It will promptly enter into negotiations with the MP to formulate agreement(s) governing the joint operations by the MP and SSW in the Fourth Avenue common corridor and to serve the existing industries in the downtown area. The agreement(s) will be completed and executed before the consolidation of operations of the SSW and the MP is begun; or if agreement(s) has not been

SPECIFIC AGREEMENTS OF THE SSW (Cont'd)

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

- (4) It will execute procedures for abandonment on the section of spur track along 6th Avenue to accommodate the planned 6th Avenue grade separation. Rail service for the area will be continued according to item (3) above, and the right-of-way for this abandoned section will be disposed of according to item (7). The removal of track materials on the abandoned section is project expense.
- (5) Upon completion of the new consolidated portion along Fourth Avenue, the SSW shall commence operations over the system and immediately commence procedures for abandonment on the unused paralleling section on Third Avenue and, at project expense, arrange for removal of this rail segment.
- (6) All track materials recovered from the abandoned section(s) that are accepted by SSW and returned to stock shall be credited to the project at current secondhand prices of such used material. Material recovered and not accepted for reuse by SSW shall, following an opportunity for AHTD inspection, be sold by SSW to the highest bidder; or if SSW practices a system of periodic disposal by sale, credit to the project shall be at the going prices supported by the records of SSW. The cost of removing, salvaging, transporting, and handling all recovered materials, including rails and cross ties, shall not exceed the value of those materials recovered.

SPECIFIC AGREEMENTS OF THE SSW (Cont'd)

- (7) It will enter into agreement with PB to convey by appropriate instruments, abandoned track rights-of-way along Third Avenue and for the spur track right-of-way along 6th Avenue, free of any cost to PB, for use in current or future transportation plans or for other public purposes.
- (8) It will provide written approval of engineering details, plans, and specifications, when satisfactory from a railroad (SSW) standpoint, prior to project implementation.
- (9) In the event a street underpass is selected, it will maintain the tracks and bridge structure, excluding abutments and foundations, which will be maintained by the public agency having jurisdiction over the subject street or roadway.

SPECIFIC AGREEMENTS OF THE CITY OF PINE BLUFF, ARKANSAS

The City of Pine Bluff agrees to:

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- (1) Cooperate with each other party of this Memorandum of Understanding and use their best effort to cause this project to be constructed as expeditiously as possible.
- (2) Enter into written agreement or agreements with JC to provide one-half of the five percent local matching funds for the project, except for those highway grade separations on state highway facilities where the local match will be provided by AHTD.
- (3) Enter into agreement with SSW to receive by appropriate instruments, any property abandoned under the project lying within the corporate limits of PB at the time of conveyance to be used in current or future transportation plans or for other public purposes. In the event PB chooses to dispose of the property, they will provide AHTD a monetary amount equal to the appraised estimate of just compensation to be credited to the project.
- (4) Review and update as necessary, existing city ordinances pertaining to railroad operations remaining in the inner city.
- (5) Maintain at its cost and expense, such city street facilities constructed as a part or result of this project.
- (6) Work with JC and the AHTD concerning continued public information and involvement during project implementation.

SPECIFIC AGREEMENTS OF THE CITY OF PINE BLUFF (Cont'd)

- (7) Convey by appropriate instrument(s) the additional right-ofway requirements needed for accomplishing consolidation of the operations of the MP and the SSW within the Public Common along Fourth Avenue.
- (8) Maintain or arrange to have maintained, at its cost and expense, the grade separations not on the State Highway System, after such facilities have been designed and constructed according to project plans and specifications.

SPECIFIC AGREEMENTS OF JEFFERSON COUNTY, ARKANSAS

Jefferson County, Arkansas agrees to:

- (1) Cooperate with each other party of this Memorandum of Understanding and use their best effort to cause this project to be constructed as expeditiously as possible.
- (2) Enter into written agreement or agreements with PB to provide one-half of the five percent local matching funds for the project, except for those highway grade separations on state highway facilities where the local match will be provided by AHTD.
- (3) Work with PB and the AHTD concerning continued public information and involvement during project implementation.

GENERAL AGREEMENTS

All parties hereto agree:

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- (1) They will each cooperate with the other and use their best efforts to cause the project to be constructed as expeditiously as possible. All work contemplated in this agreement shall be performed in a good and workmanlike manner in accordance with the approved plans and specifications which are to be developed to the satisfaction of the parties, and as a part of the Area Transportation Study.
- (2) The books, papers, records, and accounts of the parties, so far as they relate to the items of expense for labor and materials, or are in any way connected with the work herein contemplated, shall, at all times, be open to inspection and audit by the authorized representatives of the parties and the Federal Highway Administration.
- (3) The parties agree, as between themselves, that each will be solely responsible for any actions, costs, fees and damages, and liability resulting from injury, death and/or property damage which is caused by an act or omission of their respective agents or employees working in the course and within the scope of this project. The provisions of this section are for the exclusive benefit of the parties hereto and not for the benefit of any other party.
- (4) The parties hereto agree and understand that all work contemplated by this agreement will be in compliance with the

GENERAL AGREEMENTS (Cont'd)

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

- (5) That all applicable regulations of the Federal Highway Administration Federal-aid Program Manual, Vol. 6, Chapter 6, Section 2, Sub-section 1, are incorporated herein by reference.
- (6) In connection with the performance of work under this agreement, the parties agree not to discriminate against any employee or applicant for employment because of race, religion, color, national origin, sex or age. Such agreement shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.
- (7) This agreement shall inure to the benefits of and be binding upon the successors and assigns of the MP, the SSW, JC, PB, and the AHTD.

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

APPROVED AS TO FORM:

General Council, AHTD

May 17, 1984

Date

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY BY	MISSOURI PACIFIC RAILROAD COMPANY BY Vice President-Operation May 2, 1984 Date
CITY OF DIME DI HEE	JEFFERSON COUNTY, ARKANSAS

APPROVED:

ARKANSAS STATE HIGHWAY AND TRANSPORTATION DEPARTMENT

Director of Highways and Transportation

5/17/84 /Date Division Administrator
FEDERAL HIGHWAY ADMINISTRATION

VERIFICATION

State of Arkansas)
) ss:
County of Jefferson)

Robert R. McClanahan, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated to the best of his knowledge, information, and belief.

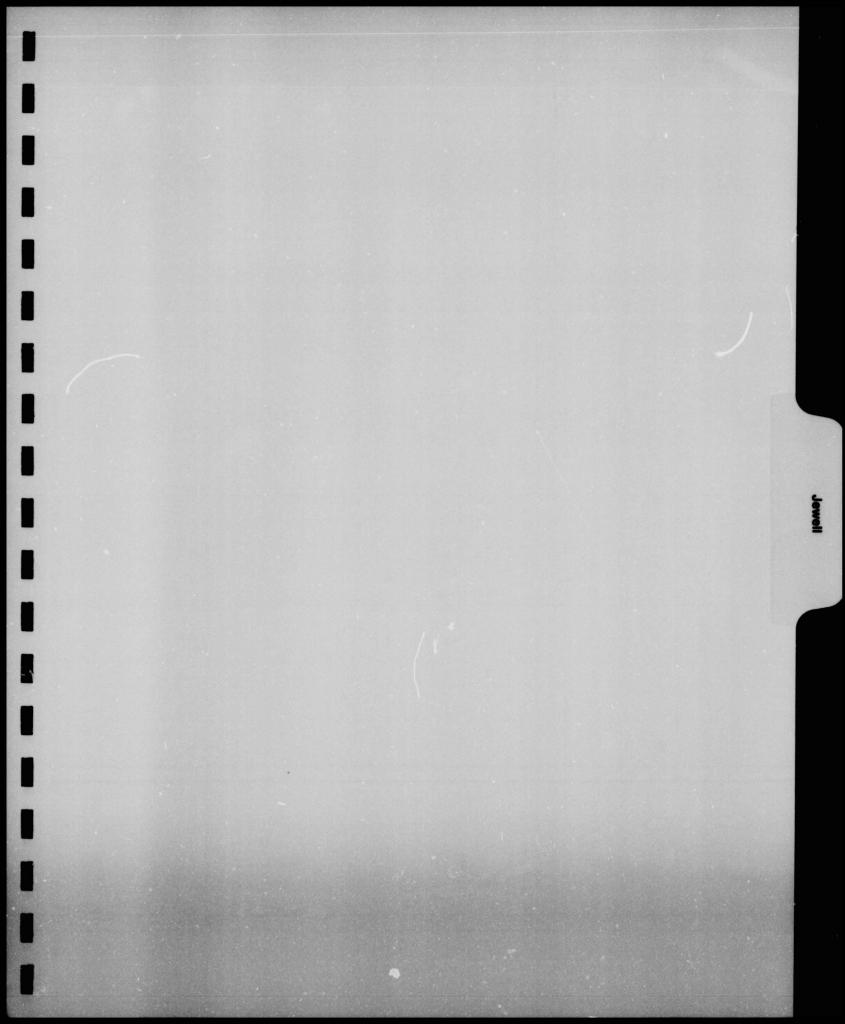
Robert R. McClanahan

Subscribed and sworn to before me this 1644 day of September, 1999

Jaule Z. Morhaw Notary Public

My Commission expires:

OFFICIAL SEAL
PAULA K. MCGRAW
NOTARY PUBLIC. ARKANSAS
Grant County Arkansas
My Commission Exp. 07/10/08



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 GRAND WESTERN
RAILROAD COMPANY

Finance Docket Nos. 32760

VERIFIED STATEMENT OF CHARLES W. JEWELL, JR.

My name is Charles W. Jewell, Jr. I am the Director, Coal Supply for Entergy Services, Inc. ("ESI"). My office address is 10055 Grogans Mill Road, Suite 300, The Woodlands, Texas 77380.

I joined ESI (in my present position) on March 31, 1997. Prior to joining Entergy, I was employed by PacifiCorp, a large investor-owned electric utility operating in the northwestern United States, as Manager, and then Director, of Coal and Fuel Supply. I held that position for approximately four years. Prior to joining PacifiCorp, I worked for several companies, primarily in the financial and business development areas. I have a B.S. in Accounting from West Virginia University and a Masters in Business Administration from Marshall University.

As I explained in a Verified Statement filed in this proceeding on October 23, 1997, my responsibilities as Director, Coal Supply for ESI include the acquisition of coal and related

transportation for all of the electric utility operating subsidiaries of Entergy Corporation. Entergy Corporation is an investor-owned public utility holding company registered pursuant to the Public Utility Holding Company Act of 1935. The Entergy operating companies include Entergy Arkansas, Inc. ("Entergy Arkansas, " formerly known as Arkansas Power & Light Company), Entergy Gulf States, Inc. (formerly Gulf States Utilities Company), Entergy Louisiana, Inc. (formerly Louisiana Power & Light Company), Entergy Mississippi, Inc. (formerly Mississippi Power & Light Company), and Entergy New Orleans, Inc. (formerly New Orleans Public Service, Inc.). ESI is a wholly-owned subsidiary of Entergy Corporation, and acts as the agent for the above-named operating companies in acquiring fuel and related transportation for their coal-fired power plants, including Entergy Arkansas' two large coal-fired plants in Arkansas, the White Bluff Steam Electric Station ("White Bluff") and the Independence Steam Electric Station ("Independence"). (I will refer to ESI and Entergy Arkansas, Inc. collectively as "Entergy" in this statement.)

The purpose of this Verified Statement is to provide the Surface Transportation Board with facts concerning Entergy's plans to construct a rail line connecting the White Bluff Station to lines formerly owned by the Southern Pacific Transportation Company ("SP") in the Pine Bluff, Arkansas area. As explained below, this connection is necessary to assure the reliability of

coal deliveries, as well as to introduce competitive rail service to White Bluff.

Entergy Arkansas produces, distributes and sells electric power to approximately 600,000 residential, commercial and agricultural customers located in 63 countries in Arkansas, and also engages in the wholesale power market. Its White Bluff and Independence Plants collectively consist of four units (two at each plant), with a combined capacity of approximately 3,337 megawatts. Each plant is capable of burning approximately 6.5 million tons of coal annually, or 13 million tons in total, all of which is produced in the southern Power River Basin ("PRB") of Wyoming, and all of which is transported by rail (currently, the Union Pacific Railroad Company ("UP")).

Since August 1984, Entergy Arkansas' PRB coal has been transported to its White Bluff and Independence plants pursuant to long-term rail transportation agreements. On July 23, 1983, the first of these agreements was entered by and between Entergy Arkansas, UP, and two UP predecessor companies, Western Railroad Properties, Incorporated ("WRPI") and Chicago and North Western Transportation Company ("CNW"). This agreement provided for the transportation of coal originating in the PRB and destined ror Entergy Arkansas' White Bluff and Independence Plants (the "UP Agreement"). A related agreement was executed the same day by and between Entergy Arkansas and another UP predecessor company, the Missouri Pacific Railroad Company ("MP") (the "MP Agreement").

Interstate Commerce Commission ("ICC") pursuant to 49 U.S.C. § 10713, and are identified as Contract Numbers ICC-UP-C-505 and ICC-MP-C-0403.

On October 1, 1991, Entergy Arkansas, UP, WRPI, CNW and MP executed the Interim Rail Transportation Agreement ("Interim Agreement"), ICC-WRPI-C-0065, which was also approved by the ICC. The execution of the Interim Agreement effectively formed one rail transportation agreement consisting of the Interim Agreement and the 1983 Agreements ("Rail Transportation Agreement").

Under the Rail Transportation Agreement, Entergy
Arkansas is currently committed to ship 100% of the coal originating in the PRB and destined to White Bluff and Independence via the UP, with a minimum volume of 10 million tons per year.
Upon expiration of the Interim Agreement at the end of 1999,
Entergy may no longer be required to transport 100% of its PRB requirements via UP. Rather, Entergy Arkansas' volume commitment may be reduced to 90% of the coal transported via any mode from the PRB to White Bluff and Independence via the UP, subject to a maximum volume commitment of 12.5 million tons. In addition, the minimum volume commitment may no longer be applicable.

Currently, the two Arkansas stations are capable of using (assuming UP is capable of delivering, and/or willing to deliver, all of Entergy's required tonnage) 13 million tons of coal per year. Accordingly, if Entergy were to continue to consume coal at this rate following the expiration of the Interim Agreement, Entergy could move at least 1.3 million tons per year

by carriers other than UP to either station. Thus, even if Entergy's contractual relationship with UP remains unchanged, Entergy may be able to ship this volume of tonnage to White Bluff by other carriers effective January 1, 2000, assuming the availability of a suitable connection, i.e., the proposed rail line.

In addition, there remains a possibility that all of Entergy's PRB volumes may be available for alternative transportation service by the time construction of the proposed White Bluff rail line is completed. Entergy is currently seeking judicial cancellation of its rail transportation agreement with UP based on UP's breaches of its contractual service standards during the last several years. Entergy Services, Inc. and Entergy Arkansas, Inc. v. Union Pacific Railroad Company, Case No. 8:98CV345 (U.S.D.C., D. Neb.). As Entergy has explained in prior Board filings, over the last several years its rail service has been abysmal. UP has suffered through severe service crises in 1994, 1995, 1997 and 1998. Throughout this period, UP consistently has failed to comply with the contract service standards (most notably the stated transit times). As a result, Entergy has endured several periods when it received insufficient quantities of coal to sustain normal burns, and needed to curtail generation at its Arkansas coal-fired plants. In addition, Entergy has been required to replace lost coal-fired generation with more expensive power generation sources in order to serve its customers. Specifically, UP fell short of its delivery obligations by creating substantial deficit tonnages since 1994

and by failing to make up those deficits by approximately 3.0 million tons in 1994 and 1995, and approximately 3.5 million tons in 1997 and 1998, or a total of roughly 6.5 million tons over the last five years. That amount of coal is enough to keep the White Bluff plant running at normal levels for an entire year.

UP has recently attempted to distract the Board from the above realities. In an Opposition filed in response to Entergy's Petition for An Exemption to Construct and Operate a Rail Line Between White Bluff and Pine Bluff, Arkansas, Finance Docket No. 33782, UP Witness Gough attempts to blame Entergy for the above deficiencies in service. I have previously addressed virtually all of the points raised by Mr. Gough and explained why his claims are without merit in my Verified Statements dated May 18, 1998 and June 16, 1998 in Ex Parte No. 573.

While I do not intend to restate all of the reasons why Mr. Gough's statement distorts the facts and ignores the parties' contractual obligations and rights, there are certain very significant facts that UP and Mr. Gough conveniently omit that I believe the Board should consider. First, neither UP nor Mr. Gough informs the Board that the service deficiencies cited by Entergy in its Emergency Petition have been found to be a breach of contract by the United States District Court for the District of Nebraska. On January 28, 1999, a Federal District Court Judge granted summary judgment on Entergy's Motion for Partial Summary Judgment as to Entergy's claim that UP had breached the agreement by failing to transport all coal tendered by Entergy, therefore

creating deficits and in failing to make up deficit tonnage within the succeeding calendar quarter. See Order dated January 28, 1999 (Exhibit No. __ (CWJ-1)), at 23. The Judge also made clear that if Entergy can prove that UP's breach was "material," then Entergy "is entitled to not perform its remaining duties under the contract." Id. at 19. The issue of the materiality of the breach remains pending in the litigation. Trial is currently scheduled for the Fall of 2000. The issues that UP has raised as to Entergy's responsibility for not assisting UP in connection with its breaches of the service standard are issues that are currently pending before the Court and have been, and are, the focus of considerable discovery.

Second, UP suggests that Entergy has somehow benefitted over the years (despite UP's substandard service) because of its "low" rates under the contract. Rest assured that Entergy's rate levels are not "low." On the contrary, Entergy's rates are amongst the highest paid by shippers in our geographic region. In fact, during a speech given last week at the Western Coal Transportation Association's 1999 Fall Meeting, Mr. Jerry Vaninetti of Resource Data International, Inc. ("RDI") identified Entergy as the shipper paying the highest annual above-market premium for rail transportation service. See Exhibit No. (CWJ-2). This fact is particularly disturbing given the levels of service that we have received in exchange for these premium rates. Also, the substantial savings cited by Mr. Gough must be considered in context. While it is true that Entergy's initial

contract rates resulted in savings relative to the rates that were being charged prior to 1983, it is also true that the ICC found the prior rates to be unlawful. In addition, while it is true that the UP outbid ETSI to obtain the Entergy Arkansas business, it is well-known that ETSI's competitiveness was quashed by the efforts of the western railroads. Thus, the fact that Entergy Arkansas was better off initially under its rail contract with UP does not have any relevance. What is relevant, as the Court has already recognized, is that UP is not providing the service that is required under the Rail Transportation Agreement.

Finally, UP boasts that it is "flooding" Entergy with coal in recent months. This misses the point. Entergy has a contractual right and need to get the amount of coal required under the contract when it is needed. The fact that UP can deliver more coal today than we need does nothing to change the fact that UP breached our contract and delivered 6.5 million tons less coal than Entergy required over the last five years.

Similarly, the fact that UP may have delivered more coal in 1998 than in 1997 is misleading - the bottom line is they still failed to deliver the coal that was required in 1998.

It is in the above context that Entergy began to reevaluate its options for a competitive alternative at White Bluff. Entergy made a preliminary investigation of these options in 1995. We revisited this issue in 1998, both in anticipation of the availability of 10% of our PRB tonnage upon expiration of

the Interim Agreement, and as a potential means to protect ourselves from future UP rail service disruptions. Specifically, we contracted with an engineering firm, Black & Veatch, to review the various potential routings that might be available to connect the White Bluff plant to a line formerly owned and operated by a former subsidiary of the Southern Pacific Railroad ("SP"), the St. Louis Southwestern Railway (which was commonly referred to as the "Cotton Belt"). In the course of exploring those potential routings, we entered into discussions with the Pine Bluff Arsenal to use their existing trackage and right-of-way in connection with new track to be constructed by Entergy from White Bluff to the Arsenal. Further research indicated that the Arsenal was formerly served by both the Missouri Pacific and Cotton Belt railroads, and that the track over which the Cotton Belt served the Arsenal (1) is still in place and connected to the Arsenal track at the south end of the Arsenal, and (2) was owned by SP/Cotton Belt at the time of the UP/SP merger.

Entergy also learned that Cotton Belt had an industrial spur that connected with its line serving the Arsenal trackage. This spur trackage, known as the Gaylord Spur (or the "Dierks Paper Lead"), was constructed in the mid-1950's for the purpose of serving private industry in the area. The Gaylord Spur began at what was then Cotton Belt milepost 272.8, just south of the Arsenal, and continued in a southeasterly direction for several thousand feet. A crossover just north of the Gaylord Spur connected the Cotton Belt track to MP's Pine Bluff-Little Rock

main line (now UP's main line) near MP milepost 383.24. It is my understanding that Cotton Belt owned a portion of the Gaylord Spur track independently, and that it shared joint ownership with MP for the remaining portions. In addition, Cotton Belt owned approximately 310 feet of the crossover from its line to the MP right-of-way, and MP owned the remaining 312 feet to its main line.

A number of industries currently remain on the line, including Gaylord Container Paper, Hoover Treated Wood Products, and Mid America Packaging, Inc. -- a division of Gaylord. Prior to the UP/SP merger, these shippers had access to rail service from both MP and SP. It is also my understanding that these shippers, as well as the Pine Bluff Arsenal, have been designated as 2-to-1 shippers, and are consequently able to be served by BNSF pursuant to conditions set forth by the Board in the UP/SP merger decision.

Following Black & Veatch's evaluation of several possible routes to connect White Bluff to former SP lines, we determined that the most desirable route consisted of:

- (1) constructing trackage extending south from our White Bluff plant and connecting to trackage at the Pire Bluff Arsenal;
- (2) upgrading certain portions of the Arsenal trackage and the former Cotton Belt

trackage in the Gaylord Spur area in order to accommodate coal trains; and

(3) constructing a new crossover track from the former Cotton Belt trackage to UP's main line in the vicinity of Milepost MP 383.6 to enable coal trains to enter the new line from the south.

Although coal trains would still be able to access the new line without this new connection, such access would require backing the trains off of the UP line via the existing crossover and then proceeding north onto the Arsenal trackage for ultimate delivery to the plant. The connection will provide for more efficient and safe movement of Entergy's coal trains, and will minimize any potential disruption to UP service over its main line.

There are several benefits to this routing over the other considered routes. First, the length of the proposed build-out is approximately 8.6 miles, of which new right-of-way would be needed for only 4.4 miles. An additional 4.2 miles of new rail will be constructed on Arsenal property. By comparison, the other routes that we considered were either impractical or significantly longer. Second, the additional miles contemplated by the other routes would require possible condemnation of property in residential areas in and around Pine Bluff. Third, the proposed route would eliminate the need to restore a section of former Cotton Belt trackage near downtown Pine Bluff that

would involve closing streets and laying track over roads presently used by vehicular traffic. (This portion of track was removed in the mid-1980's in connection with a track consolidation project in Pine Bluff that relocated the Cotton Belt's main line and provided for Cotton Belt to run over the MP to reach its track connecting with the Arsenal and Gaylord Spur industries. To my knowledge, however, the Cotton Belt trackage was never formally abandoned.)

Fourth, the proposed route would eliminate the need to run coal trains through a residential area near downtown Pine Bluff, a prospect that Entergy believes would draw considerable community opposition. Fifth, the proposed route would substantially reduce the potential build-out costs to Entergy. Finally, the proposed route would benefit the United States Government through the rehabilitation and expansion of its Arsenal trackage and improvement of rail connections to that facility.

In January of 1999, Entergy decided to proceed with plans to design and obtain permits to construct the White Bluff build-out. We contacted the Union Pacific in early January and informed them of our plans to construct trackage connecting to the Arsenal track. Exhibit No. __ (CWJ-3). We noted that we were providing notice of the proposed build-out pursuant to Section 13 of the April 18, 1996 Agreement between UP, ENSF and the Chemical Manufacturers Association. The parties corresponded on several occasions, but UP refused to cooperate with the proposed build-out.

On July 30, 1999, Entergy submitted a Petition for Exemption to Construct the above project. In support of this Petition, I submitted another verified statement dated July 28, 1999. In that statement I noted that it was Entergy's view that the proposed build-out is contemplated by the Board's relief to Entergy in the UP/SP merger preserving Entergy's White Bluff build-out option by requiring the BNSF agreement to be amended so that if the build-out was ever completed by an entity other than UP, "BNSF [would be allowed to] transport coal trains to and from White Bluff via the White Bluff-Pine Bluff build-out line." Union Pacific Corp. - Control and Merger - Southern Pacific Rail Corp. et. al, ("UP/SP Merger"), Finance Docket No. 32760, Decision No. 44, at 185 (Decision served August 12, 1996). As I further explained, it is Entergy's view that the build-out option is also preserved by Section 13(a) of the CMA agreement as incorporated by the Board in Decision No. 44, and is consistent with the Board's stated intent "to allow BNSF to replicate the competition that would otherwise be lost when SP is absorbed into UP." Id. at 145.

"agree that the Pine Bluff Arsenal is a '2-to-1' facility to which BNSF has access currently under the merger settlement agreements and conditions." Letter dated October 28, 1998 form Peter J. Rickershauser to Daniel B. Gray (Exhibit No. __ (CWJ-4)). BNSF further confirmed its view that it "can serve this facility either (a) directly, (b) through reciprocal switch

provided by UP, or (c) with UP's prior agreement, using a third party contractor to perform switching for either BNSF or for both railroads." Id. BNSF has never suggested that there are any limitations to its ability to use its trackage rights under the BNSF settlement agreement to reach the Arsenal and Gaylord Spur shippers that were formerly served by SP.

In conclusion, the White Bluff build-out project is essential to Entergy's future. As described above, and in our past filings, this project will not only introduce competition for a portion of our PRB coal movements, but will also give us a level of protection from possible repetition of the disastrous service treatment and contract breaches we have experienced with UP over the last five years.

Exhibit No. _ (CWJ-1)

U.S. D'STRICT COURT IN THE UNITED STATES DISTRICT COURT FOR THE OF HEBRASICA

DISTRICT OF NEBRASKA

99 Jan 28 PM 1:21

ENTERGY SERVICES, INC. and ENTERGY ARKANSAS, INC.,

GARY C. HEFARLAND

Plaintiffs,

8:97CVC0345

V.

UNION PACIFIC RAILROAD COMPANY,

MEMORANDUM AND ORDER

Defendant.

This case involves a breach of contract suit by Entergy Services, Inc. ("ESI") and Entergy Arkansas, Inc. ("EAI") (hereinafter collectively referred to as "Entergy") against Union Pacific Railroad ("UP") based on Rail Transportation Agreements whereby UP was to transport coal from the Powder River Basin ("PRB") in Wyoming and Montana to Entergy's coal-fired power plants in Arkansas. Entergy originally brought this suit seeking liquidated damages, actual damages and judicial cancellation of the contract for UP's alleged failure to deliver coal. Also contained in this law suit is an allegation that UP breached itscovenant of good faith. However, discovery on the issue of good faith has been postponed until Phase II of this case. At the conclusion of Phase I, Entergy filed a motion for Partial Summary Judgment (Filing No. 76) and UP filed a Motion for Summary Judgment (Filing No. 74). In short, the parties ask the Court to interpret their contract and determine (1) whether UP breached the contract, and (2) whether the liquidated damages provision in the contract provides Entergy's exclusive remedy.

FACTS

For purposes of these motions, the following facts appear to be undisputed. Entergy operates two coal-fired power plants designed to burn low-sulphur coal. One is located near Redfield, Arkansas, in Jefferson County ("White Bluff Station") and one is located near Newark, Arkansas, in Independence County ("Independence Station"). Prior to Entergy's contract with UP, Entergy (formerly known as Arkansas Power & Light Company ("AP&L")) had its coal delivered to both plants pursuant to a joint-line common carrier tariff, which provided for coal movement via the Burlington Northern Railroad Company ("BN") from the PRB to Kansas City, Missouri, and then via the Missouri Pacific Railroad ("MP") from Kansas City to the Entergy Stations. In 1980, Congress passed the Staggers Rail Act which gave the railroads the ability to enter into rail transportation contracts with shippers, rather than requiring all rail traffic to move pursuant to tariff and regulatory rules. (Gough Affidavit § 5). Entergy began looking for competitive bids for a rail . transportation contract to replace its tariff arrangement. (Plaintiff's Counter-Statement of Facts 4). Besides considering its current transportation via BN and MP, Entergy investigated transporting coal under an arrangement with the Chicago & North Western Transportation Company ("CNW"), Western Railroad Properties ("WRPI") (a wholly-owned subsidiary of CNW), UP, and MP. Under such an arrangement, WRPI would be responsible for transporting the coal over rail lines it owned from the PRB

through Shawnee Junction, Wyoming, and then to South Morrill,
Nebraska. (See Exhibit 5 to Gough Affidavit). UP would then be
responsible for transporting the coal over rail lines it owned
from South Morrill, Nebraska, to Kansas City, Missouri. Id.
Finally, the last leg of the trip required shipment via MP from
Kansas City, Missouri, to both of Entergy's Stations in Arkansas.
Id. Entergy also considered a third option of transporting its
coal via a proposed coal slurry pipeline that was being developed
by Energy Transportation System, Inc. ("ETSI"). (Plaintiff's
Counter-Statement of Facts ¶ 5). Entergy received bids under all
three of these transportation plans. After the bidding process,
Entergy awarded a rail transportation contract to UP/CNW/MP.
Negotiations between Entergy and UP/CNW/MP ensued over the next
few years to draft acceptable contract terms.

As a result of these negotiations, two separate agreements were entered into in 1983 to govern the transportation of coal to Entergy's plants. Each agreement covered a separate geographic portion of the coal movement. The 1983 Rail Transportation Agreement between AP&L (now Entergy), UP, WRPI, and CNW (the "1983 UP Agreement") covered the movement of coal from the coal mines in the PRB to Kansas City, Missouri. A separate rail transportation agreement between AP&L (hereinafter "Entergy") and MP (the "1983 MP Agreement") governed the movement of coal from Kansas City, Missouri, to the White Bluff and Independence Stations. The 1983 UP Agreement obligated Entergy to ship a minimum of 90% of all PRB coal with these railroads.

(1983 UP Agreement, Articles VI.A, VI.B). In exchange, UP agreed to transport these amounts of coal within certain Elapsed Transit Times.¹ (1983 UP Agreement, Article IX.A). The original term of the 1983 Agreements was twenty years with option periods available. The parties subsequently agreed to a duration of thirty years also with option periods available. The 1983 Agreements also contained a choice of law provision providing that the contract shall be governed according to Arkansas law. (See 1983 UP Agreement, Article XIX, incorporated by the 1991 Interim Agreement § 20; 1983 MP Agreement, Article XX). In December of 1982, during the negotiations of the 1983 agreements, UP merged with MP. (Gough Deposition at 16). At some point, UP also combined with CNW (WRPI), and UP is currently the sole railroad party to the Entergy contractual agreements. (Jensen Affidavit ¶ 3).

In May of 1989, UP closed its "Carthage Subdivision"
line, which was the route from Kansas City, Missouri, through
Pleasant Hill, Missouri, and Carthage, Missouri, and then through
the Ozark Mountains to Newark, Arkansas, where the Independence
plant is located. (Jensen Affidavit ¶ 7). Although the movement

The term "Elapsed Transit Time" as used in the original 1983 Agreement and as it continues to be used in the 1991 Interim Agreement, refers to the number of hours required for a round trip between the coal mine and the power plant, excluding loading and unloading time, delays attributable to force majeure conditions, delays attributable to Entergy, time the train is held on constructive placement, delays attributable to the train's own derailment and time when the train is not in UP's possession. (1991 Interim Agreement § 8.A.1). This time period is sometimes also referred to as a "cycle time."

of coal to the White Bluff Station was unaffected by the closure of the Carthage Subdivision (Jensen Affidavit § 8), the closure resulted in coal trains having to approach the Independence Station from the south, i.e. from Kansas City then south via Okay Junction, Oklahoma, to North Little Rock, Arkansas, and then north from there to Newark, Arkansas. (Jensen Affidavit § 8, Exhibits 7, 8). The new route to the Independence Station was 353 miles longer round trip than the old Carthage Subdivision route. (Jensen Affidavit § 9). UP offered Entergy a refund of 8 cents per ton for all coal transported to the Independence Station via the longer route to compensate for increased wear and terr on the railcars. Id. After the closure of the Carthage Subdivision, the parties did not amend the Elapsed Transit Time of 133 hours for the Independence Plant in the 1983 agreement. Id.

In 1991, Entergy was looking at shipping alternatives, including: (1) coal by wire, (2) obtaining some coal via BN and (3) an option to burn more coal. (Jacob Deposition at 130-32). Discussions were subsequently held between Entergy and the UP railroads whereby Entergy agreed to ship 100% of its PRB coal or 10 million tons annually after 1990 via WRPI, UP and MP in exchange for reduced rates. (1991 Interim Agreement § 5.A.)

² A system whereby the coal is shipped to a nonowned power plant, used to generate electricity which is then sold to plaintiff.

These agreements were reflected in the 1991 Interim Agreement ("Interim Agreement").

Under the 1991 Interim Agreement, Entergy agreed to provide a notice to UP, within thirty (30) days of the upcoming month, stating the total number of tons of coal it would tender during that month -- i.e., the "Shipper's Declared Monthly Volume Commitment." (Interim Agreement § 5.F.2). The total number of tons contained in three consecutive Shipper's Declared Monthly Volume Commitment notices constituted the "Shipper's Declared Quarterly Volume Commitment" for each calendar quarter. (Interim Agreement § 5.F.3). UP then was required to deliver these amounts of coal during that quarter without exceeding the Elapsed Transit Times of 160 hours for the White Bluff Station, and 133 hours for the Independence Station. (Interim Agreement § 8.A.2). If UP was deficient in transporting the Declared Quarterly Volume Commitment during a calendar quarter due to a failure to meet these Elapsed Transit Times, a Deficit Tonnage was calculated. (Interim Agreement § 8.B). UP was allowed to make up the deficits in the next quarter by using its own rail cars, or if it lacked sufficient railcars, the railroad could use Entergy railcars at Entergy's option by paying a lease rate. (Interim

The Interim Agreement expires on Dec. 31, 1999. (Jensen Affidavit ¶ 12).

Deficit Tonnage was calculated as the lesser of (i) the difference between the number of Tons actually transported and the Shipper's Declared Quarterly Volume Commitment; or (ii) the following formula: Total Service Shortfall divided by the Railroad's Service Standard multiplied by 11,730 Tons. (Interim Agreement § 8.B.2).

Agreement §§ 8.B.3, 8.B.7.) If the deficit was still not made up in the next quarter, the Interim Agreement provided that UP would pay certain liquidated damages to Entergy. (Interim Agreement § 8.B.5.)

The Interim Agreement, while superseding certain provisions in the 1983 agreements, incorporates other provisions from the 1983 agreements. One of these incorporated provisions is the clause found in the Interim Agreement § 22 entitled "Termination." This clause was retained from the 1983 UP Agreement and provides: "Termination of this Agreement for any reason shall not release any party from any obligation that may have accrued prior to such termination, nor shall it preclude any party from exercising any remedies it may have in law or equity to enforce such obligations." (1983 UP Agreement, Article XXI).

The parties proceeded with transportation under this
Interim Agreement, but in the summer of 1993, the Missouri and
Mississippi Rivers flooded the Midwest, damaging numerous rail
lines. (Jensen Affidavit ¶ 20). In addition, Entergy increased
its demand for coal in early 1994. (Jensen Affidavit ¶ 22,
Exhibit 20). Due to the floods and increased demand, UP was
unable to deliver Entergy's Declared Volume Commitments,
resulting in Deficit Tonnage in 1994. (Jensen Affidavit ¶ 23).
To deal with these deficits, Entergy and UP entered into a letter
agreement dated December 18, 1995. This letter agreement
addressed, in part, the 1994 deficit of 2.7 million tons of coal.
UP agreed that it would transport to Entergy not less than 12.5

million tons of coal during the calendar year 1995, and not less than 13.5 million tons of coal during the calendar year 1996.

(Answer ¶ 7). Operating under this 1995 letter agreement, UP failed to deliver 312,233 of the tons in 1995 for which UP paid Entergy approximately \$1.1 million in liquidated damages.

(Entergy's Response to Interrogatory No. 1; Plaintiff's Counter Statement of Facts ¶ 20). In 1996, the parties reduced the tonnage to 12.85 million tons for 1996, which is what UP delivered in that year. (Jersen Affidavit ¶ 27). Thus, the parties agree that there were no deficits for 1996.

During the first six months of 1997, Entergy was engaged in an inventory reduction program, and therefore did not have a need for its usual volumes of coal deliveries. (Plaintiff's Counter-Statement of Facts ¶ 27(a)). Entergy's coal inventory reduction program contained a target of reducing its inventory to one million tons by the end of 1997. Deposition at 181). By September of 1997, UP was experiencing system-wide service difficulties. (Gough Affidavit ¶ 32). UP contends that it delivered all the coal Entergy was willing to accept during the first half of 1997. (UP's Response to Plaintiff's Statement of Facts Not in Dispute ¶ 26.) On the other hand, Entergy claims that UP created Deficit Tonnage during the first half of 1997. It is undisputed that UP failed to makeup some deficits from 1997 and the first half of 1998. (UP's Brief in Support of Summary Judgment at 12; UP's Response to Entergy's Statement of Material Facts Not in Dispute at ¶ 26).

The exact amounts of the deficits and the amounts UP claims to have made-up in 1997 and 1998 are disputed. However, a determination of the actual deficits for 1997 and 1998 and the amounts made-up are not material to these summary judgment motions. UP further acknowledges that at some point in time during 1997, it was not achieving the contractual Elapsed Transit Times. (Gough Affidavit ¶ 31). However, the parties also dispute when and how many times UP exceeded these contractual cycle times. These disputes also are not material to this Court's determination of these summary judgment motions. 5

Entergy filed a motion for Partial Summary Judgment, asking the Court to find that (1) UP breached the Rail
Transportation Agreements with Entergy by incurring and not making up deficits in the transportation of coal to Entergy, and (2) the liquidated damages specified in the Rail Transportation
Agreements are not Entergy's exclusive remedy for UP's breaches of contract. UP filed a motion for summary judgment, asking the court to dismiss Entergy's complaint for breach of contract because UP did not breach the contract and the liquidated damages provision in the Rail Transportation Agreement constituted Entergy's exclusive remedy for coal-delivery shortfalls. These are the two motions which the Court will address in this

It seems to this Court that the parties' differences regarding the calculations of Elapsed Transit Times and Deficit Tonnages, including Entergy's contribution to deficits by refusing to use Distributed Power during UP's service crisis (See Gough Affidavit ¶ 33) are issues which should be addressed when determining damages and are not appropriate for these summary judgment motions.

memorandum and order.

II. DISCUSSION

In its motion, Entergy alleges that UP breached its obligations under the agreements in the last two quarters of 1997 and the first two quarters of 1998 by (1) failing to deliver the quantities of coal nominated, and (2) failing to make up deficits. Entergy alleges that from the first quarter of 1997 through the second quarter of 1998, UP failed to deliver almost three million tons of coal. (Jewell Affidavit dated Sept. 28, 1998 ¶ 20.) As a result of UP's breach of contract, Entergy alleges that it was forced to curtail electricity generation at both plants for nine months. (Jewell Affidavit dated Sept. 28, 1998 ¶ 19). Entergy believes that UP's past breaches of contract rise to the level of material breach and entitle it to judicial cancellation of the contract or at least the right not to perform, actual damages, and liquidated damages.

UP contends that failing to deliver the coal within the average Elapsed Transit Times specified in the Interim Agreement does not constitute a "breach" because the Elapsed Transit Times are not stand-alone contractual guarantees. Rather, UP contends that the Elapsed Transit Times are one of the elements contained in the remedial provisions of the contract which determine

Fintergy also alleges that over the course of several years, UP has breached its duty of good faith by engaging in the practice of "rolling deficits," by creating a monopoly, and by UP's performance targets and traffic prioritization, but these issues have been postponed until Phase II of this litigation, after a determination of this summary judgment motion.

whether Deficit Tonnages have occurred. While UP admits that there were shortfalls in coal delivery, UP contends that these shortfalls do not constitute a "breach." UP argues that it did not breach its duty to deliver coal because it views its duty under the contract as a duty to deliver coal, and if it could not, to pay liquidated damages as compensation for Entergy obtaining alternate fuel. UP argues that even if there was a breach, cancellation of the contract is not available as a remedy. UP contends that the liquidated damages clause under the contract is Entergy's sole and exclusive remedy, precluding actual damages and cancellation.

As a result of the parties' divergent views of their contract, this Court is asked on summary judgment to interpret the Entergy-UP contract as a matter of law. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The mere existence of an alleged factual dispute between the parties will not defeat a motion for summary judgment. Guinness Import Co. v. Mark VII Distrib., Inc., 153 F.3d 607, 611 (8th Cir. 1998) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986)). Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Id.

Summary judgment is particularly appropriate where the unresolved issues are primarily legal rather than factual. Schuver v.

MidAmerican Energy Co., 154 F.3d 795, 799-800 (8th Cir. 1998).

The meaning of an unambiguous contract presents a question of law appropriate for summary judgment. McCormack v. Citibank, N.A.,

100 F.3d 532, 538 (8th Cir. 1996). On a motion for summary judgment, the court must view all evidence and inferences in the light most favorable to the nonmoving party. Anderson, 477 U.S. at 250.

ENTERGY'S MOTION

A. Breach of Contract

under a contract is contemplated, any nonperformance of a duty is a breach. Zufari v. Architecture Plus, 914 S.W.2d 756, 761 (Ark. 1996) (citing Restatement (Second) of Contracts § 235(2)). However, this case requires a determination of exactly what constituted UP's duty under these contracts. The interpretation of a contract is controlled by the intention of the parties.

Les-Bil Inc. v. General Waterworks Corp., 511 S.W.2d 166, 169 (Ark. 1974). Entergy contends that UP's duty was to deliver coal to Entergy's stations in Arkansas. UP contends that its duty was to deliver coal or to compensate Entergy through liquidated damages. UP essentially asks this Court to interpret the contract as one which allows UP to render alternative performances, i.e., either to deliver coal or to pay liquidated damages. A contract is considered an alternative contract where

"it is found that the parties have agreed that either one of the two alternative performances is to be given by the promisor and received by the promisee as the agreed exchange and equivalent for the return performance rendered by the promisee." 5 A. Corbin, Corbin on Contracts § 1082, at 464 (1964). However, "[w] here a contractor promises to render a certain performance or, in default thereof, to pay a definite sum as liquidated damages, he has not made an alternative contract." Id. at § 1082, at 462. For the reasons that follow, the Court believes that the Entergy-UP contract falls into this latter category of a non-alternative contract.

The court's duty is to interpret instruments by trying to make all parts of the instrument harmonize, and stand together, if possible, so as to ascertain the intention of the parties. Anadarko Petroleum Co. v. Venable, 850 S.W.2d 302, 306 (Ark. 1993). Under the Entergy-UP contract, UP's duty was to deliver coal and to pay liquidated damages when it defaulted in doing so. The structure of the Interim Agreement supports the interpretation that the performance Entergy bargained for was delivery of coal. The contract further provided for certain payments in case of a default to serve as compensation for obtaining alternate fuel supply. The Interim Agreement begins by stating UP's contract obligations, or "Service Standards," (Interim Agreement § 8.A) followed by separate subsections which deal with calculating deficits and liquidated damages (Interim Agreement § 8.B). UP's contractual obligations to deliver coal

within certain cycle times are not located in the same section as the liquidated damages provision. This suggests that the liquidated damages would apply only when there was a default in delivering coal. In addition, nowhere in either the service standards section or the liquidated damages section does the word "or" appear which would indicate that an alternative performance would be acceptable. In fact, the language in the Service Standards subsection provides that "Railroad shall perform service such that Railroads' Elapsed Transit Time averaged over each fixed calendar quarter . . . shall not exceed one hundred sixty (160) hours for all trains destined for White Bluff, Arkansas, nor one hundred thirty-three (133) hours for all trains destined for Newark, Arkansas." (Interim Agreement § 8.A.2). The use of the word "shall" indicates that UP has an obligation to deliver coal within certain time cycles and negates the argument that the contract allowed UP to either deliver the coal or pay liquidated damages. This language further negates UP's argument that the Elapsed Transit Times were not contractual obligations but merely part of the damages calculation. It is the duty of courts to enforce contracts as they are written and in accordance with the ordinary meaning of the language used and the overall intent and purpose of the parties. Hancock v. Tristate Ins., 858 S.W.2d 152, 154 (Ark. Ct. App. 1993). From the language and structure of the contract, UP must have understood that its primary performance obligation was to deliver the coal to Entergy. The liquidated damage provision establishes the

formula for calculation of liquidated damages as compensation for obtaining alternate fuel supply, in case of default.

The language from the liquidated damages provision also supports this interpretation. If UP failed to deliver the coal within the cycle times that quarter, deficits were calculated and UP was allowed to make-up these deficits in the next quarter. Allowing UP to make-up coal deliveries further evidences that obtaining coal was central to the contract. Under the Entergy-UP contract, the liquidated damages became applicable only when UP defaulted in its performance of making up the deficits. contract provides that "if, at the end of the succeeding quarter . . . Railroads have failed to make-up all Deficit Tonnage . . . Railroad shall pay . . . liquidated damages." (Interim Agreement § 8.B.5) (emphasis added). This language conforms to the common understanding that liquidated damages by definition are an agreed-upon remedy in the event of a breach. The Court finds that the liquidated damages were intended to be an agreedupon remedy for UP's breach, and not an alternative performance.

Northern Railroad Co., 53 F.3d 1090, 1098 (10th Cir. 1995), the Tenth Circuit interpreted contract language in a Coal Transportation Agreement which was remarkably similar to the contract between Entergy and UP. In the Public Service Co. contract, a utility company agreed to tender a minimum amount of coal via Burlington Northern Railroad (BN) annually and agreed to provide notices to BN declaring such amounts. In exchange, BN

agreed to transport the coal at a base rate annually. liquidated damages provision in that case provided that "[i]n the event Utility fails to tender to BN for transportation the agreed to minimum annual volume requirement for any calendar year as required under this Agreement, Utility shall have a 'tonnage shortfall.' In such event, Utility agrees to pay the following sum to BN as liquidated damages, and not as a penalty." Public Service Co., 53 F.3d at 1098. The parties shipped the agreedupon amounts of coal annually under the Agreement until 1992 when the high rate for hauling coal under the Acreement made it economically advantageous for the Utility to pay the railroad liquidated damages. Id. at 1095. The Utility brought a declaratory judgment action alleging, among other things, that it had not breached the agreement. The Tenth Circuit held that the utility company's commitment to ship coal was not one of two acceptable performances and that the utility company did not have the option to pay liquidated damages to BN as an acceptable performance. Id. at 1099.

While the roles are reversed in Public Service Co. from the parties in this case, nevertheless, the Tenth Circuit's construction of those rail transportation contracts is applicable to this case. In a situation where it became economically advantageous not to perform a duty under the contract, the court held that the language of the contract established the parties had duties to perform and nonperformance of those duties resulted in a breach of the contract by that party. That is the case in

the Entergy-UP agreement. UP had a duty to deliver coal and for each month in which deficits were not made-up, UP breached its duties under the contract. Accordingly, to that extent, the first part of plaintiff's motion for summary judgment will be granted.

UP'S MOTION

B. Liquidated Damages as the Exclusive Remedy

UP seeks a determination that the liquidated damages clause in the Interim Agreement provides Entergy's sole remedy for UP's breach. Entergy seeks a ruling that its remedies for UP's breaches are not limited to recovery of liquidated damages.

A liquidated damages provision is generally "not a limit on remedies, but instead provide[s] an agreed-upon measure of damages." Eastern Elec. Apparatus Repair Co., Inc. v.

Jefferson Smurfit Corp., 1994 WL 419851 *2 (S.D.III. 1994)

(emphasis added), aff'd by 29 F.3d 306 (7th Cir. 1994). For example, it has been held that a "liquidated damages clause does not . . . preclude other remedies available at law or equity, absent the clear intention of the parties to the contrary."

Baybank Middlesex v. 1200 Beacon Properties, Inc., 760 F. Supp.
957, 964 (D.Mass. 1991); Fletcher v. United States, 303 F. Supp.
583, 587 (N.D.Ind. 1967), aff'd, 436 F.2d 413 (7th Cir. 1971); 5A

A. Corbin, Corbin on Contracts § 1213 (stating that "[t]he fact that a contract contains a provision for the payment of a penalty or of liquidated damages in case of breach does not in itself make specific performance unavailable as a remedy."). There is

no language in the Interim Agreement § 8.B.5 indicating that liquidated damages are to be the sole remedy in the event of a breach. The liquidated damages clause of the Interim Agreement provides as follows:

. . if, at the end of the succeeding calendar quarter . Railroads have failed to make up all Deficit Tonnage to a Destination for reasons solely attributable to Railroad, Railroads shall pay to Shipper, in accordance with Section 15, not as a penalty but as compensation for obtaining alternate fuel supply in the form of liquidated damages, agreed upon as reasonable, a Deficit Service Payment for all remaining Deficit Tonnage to Newark, Arkansas and/or White Bluff, Arkansas, equal to 20% of the weighted average Agreement Rate . . .

(Interim Agreement § 8.B.5) (emphasis added). The liquidated damages provision contains no words of exclusivity indicating that it was intended to be the exclusive remedy for breach. In fact, § 8.3.5 can be compared with the liquidated damages provision in the 1991 Interim Agreement implicated when Entergy fails to perform. This liquidated damages provision states that in the event the Shipper (i.e., Entergy) fails to perform, the Shipper shall pay "as compensation for lost traffic volumes or added service expenses in the form of liquidated damages, agreed upon as reasonable, and intended by the parties to be in full settlement for Shipper's failure to meet its Minimum Annual Volume Requirement." (Interim Agreement § 5.D). It is apparent from this provision that the parties clearly knew how to draft a

liquidated damages provision which was intended to be in full settlement for a breach. In interpreting a contract, the whole context is to be considered even though the immediate object of inquiry is the meaning of an isolated clause. North v. Philliber, 602 S.W.2d 643, 645 (Ark. 1980). Thus, this liquidated damages clause does not preclude all other remedies available at law or equity to Entergy.

Moreover, the liquidated damages provision does not preclude Entergy's common law right not to perform if UP's breach amounts to a material breach. A material failure of performance operates as the non-occurrence of a condition. Restatement (Second) Contracts § 237 cmt. a. This non-occurrence of a condition either prevents performance of duties from becoming due or discharges the non-breaching party from performing its duty. Restatement (Second) Contracts § 225. If Entergy can prove that UP materially breached this contract, it is entitled to not perform its remaining duties under the contract. See Economy Swimming Pool Co. v. Freeling, 370 S.W.2d 438, 440 (Ark. 1963) (stating that where there is a material breach of contract or substantial nonperformance, the injured party is entitled to

Typ argues that the absence of a termination-upon-default clause, which was omitted from the contract as part of the pre1983 contract negotiations, precludes Entergy from canceling the contract. This argument is without merit. General contract law provides that parties "are not required to state in the agreement all of the remedies which the law gives them and which they may seek, and merely because they specifically provided for a certain remedy does not preclude other remedies available to them under the law in the event of a breach." Brian McDonagh v. Moss, 565 N.E.2d 159, 161 (Ill. Ct. App. 1990).

rescission of the contract); Grayling Lumber Co. v. Hemingway, 194 S.W. 508, 509 (Ark. 1917) (providing that it is basic contract law that "The failure of one party to a contract to comply with its terms releases the other party from compliance with it."). As Entergy notes, determining materiality of the breach is a fact question and cannot be decided on summary judgment.

C. Liquidated Damages Provision as Affecting Actual Damages

Although the liquidated damages provision is not Entergy's exclusive remedy, the provision precludes Entergy from seeking its actual monetary damages to a certain extent. The language of the liquidated damages clause in § 8.B.5 provides that UP "shall" pay to Entergy liquidated damages. "A 'shall' provision for liquidated damages gives the party who does not breach the contract only one option: he can sue for specific performance, but he cannot sue for actual damages; the stipulated figure is the only option he has for damages." See McMaster v. McIlroy Bank, 654 S.W.2d 591, 594 (Ark Ct. App. 1983). The court in McMaster found that the word "shall" is contrary to using the word "may" which would give the non-breaching party the added option of suing for actual damages or for the liquidated damages amount. Id. In another case, the court found that where the contract language used the word "shall," the non-breaching party

Whether the 1995 Letter Agreement precludes Entergy from presenting evidence of UP failures to deliver coal prior to 1997 in order to establish a material breach is an issue to be addressed in conjunction with the materiality issue.

was entitled only to the liquidated sum and not the actual amount of damages. Hearell v. Rogers, 646 S.W.2d 703 (Ark. Ct. App. 1983). See also In re ATG Electronics, Inc., 1997 WL 563609, *1 (Bankr. W.D.Tenn. 1997) (because the contract contained a provision for liquidated damages which used the word "shall" in the event of a breach, the non-breaching party was limited to that contractual term and was precluded from seeking actual damages); Brewer v. Myers, 545 S.W.2d 235, 237 (Tex. Ct. App. 1976) (making a stipulation for liquidated damages binds the shipper "to accept such sum as compensation for its loss resulting from the happening of the contingency named, and therefore the shipper cannot sue for actual damages."). Thus, the liquidated damages provision prevents Entergy from arguing that it has the option of electing either the liquidated amount or the actual damages.

However, it is possible that a liquidated damages clause is exclusive as to one kind of harm, but that it does not cover other harms at all, as to which normal damages would be recoverable. 3 Dan E. Dobbs, Law of Remedies, § 12.9(5) at 266

Pentergy claims that liquidated damages would amount to only \$3.7 million when the actual cost of replacing lost coalfired generation with alternate generation using other fuels would be \$30 million (Jewell Afficavit dated Sept. 28, 1998 13). In a footnote, Entergy mentions that liquidated damages which are too low in comparison with the reasonably anticipated actual damages are held void if they are unconscionable. (Entergy Memorand in Opposition to UP's Motion for Summary Judgment at 11 n. 3) (citing Restatement (Second) Contracts \$347, cmt. a). In the event Entergy's footnote can be construed as a point of law upon which Entergy wishes the court to make a ruling, the court lacks sufficient evidence of undisputed facts to make such a determination.

(2d ed. 1992). In other words, a stipulated damages clause may address only one of several possible breaches. Id. at 268. The liquidated damages provision at issue in this case provides that if UP fails to make up its Deficit Tonnage, UP shall pay liquidated damages to Entergy "not as a penalty but as compensation for obtaining alternate fuel supply." (Interim Agreement § 8.8.5) (emphasis added). The express language of this provision states that UP will pay the stipulated amount of liquidated damages for Entergy's cost of obtaining alternate fuel. Thus, Entergy cannot claim as actual damages the amount it spent to obtain alternate fuel supplies because this amount is covered by the liquidated damages provision.

Entergy from seeking any other damages which it may have sustained as a result of UP's failure to deliver coal. E.g. In re Ilana Realty, Inc., 154 B.R. 21, 28 (S.D.N.Y. 1993) (consequential damages that arose as a consequence of the breach by subjecting the non-breaching party to defend a law suit plus interest and taxes were recoverable in addition to the liquidated damages for the breach of contract for selling real estate). If Entergy can show that it incurred consequential damages which were not part of the cost of obtaining alternate fuel supplies, Entergy may be able to seek actual damages for these amounts. 10

provision does not cover actual damages for UP's breach of its duty of good faith. If it is later determined that UP had a duty of good faith which it breached, Entergy may be able to pursue actual damages resulting from a breach of good faith as long as the damages do not directly relate to the costs of obtaining alternate fuel supplies.

Having determined that the liquidated damages clause does not provide Entergy's exclusive remedy, UP's motion for summary judgment is denied to the extent that it seeks to dismiss the case. However, as discussed above, Entergy is precluded from seeking actual damages directly relating to the cost of obtaining alternate fuel supplies. Accordingly,

IT IS ORDERED:

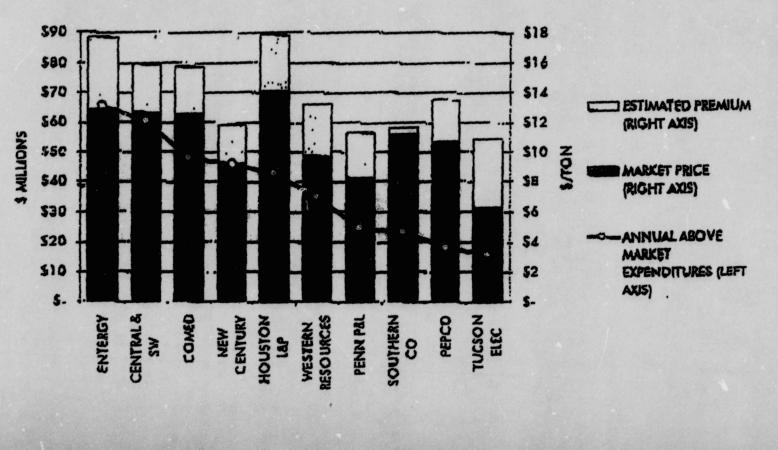
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- 1) Plaintiff's motion for partial summary judgment
 (Filing No. 76) is granted as to plaintiff's claim that UP
 breached the interim agreement by failing to transport all coal
 tendered by plaintiff, therefore creating deficits and in failing
 to make up deficit tonnage within the succeeding calendar
 quarter. In all other respects, said motion is denied.
- 2) Defendant's motion for summary judgment (Filing No. 74) is denied.
- 3) The parties shall advise the Court, in writing, on or before February 22, 1999, whether or not they are ready for the status conference provided in Paragraph 4 of the order of the magistrate judge filed March 17, 1998.

DATED this 28 day of January, 1999.

BY THE COURT:

MILE E. STROM, Senior Judge United States District Court



RESOURCE DATA INTERNATIONAL INC



Exhibit No. — (CWJ-3) Page 1 of 2

1)

Entergy Services, Inc. Partwood II Building, Suite 300 10055 Grogans Mill Road The Woodlands, TX 77380 Tel 281 297 3562

Charles W. Jewell, Jr. Director Coal Supply

HAND DELIVERED

January 4, 1999

Mr. Arthur W. Peters
Senior Vice President &
General Manager
Union Pacific Railroad Company
1416 Dodge Street, Room 500
Omaha, NE 68179

Dear Mr. Peters:

This letter constitutes notice to Union Pacific Railroad Company ("UP") of Entergy Services, Inc.'s ("Entergy") intent to build out from its White Bluff plant to be able to obtain direct rail service from the Burlington Northern and Santa Fe Railway Company ("BNSF"). Entergy plans to build new trackage from its plant to connect with existing track owned by the Pine Bluff Arsenal. The Arsenal trackage will be rehabilitated to allow unit coal train operations. A connection from the Arsenal trackage will be built to connect with an existing track that was owned pre-merger by the St. Louis Southwestern Railway Company, a subsidiary of the Southern Pacific Transportation Company ("SP"). An additional connection will also have to be constructed from that track to the UP line. A map showing the line and connections is attached hereto.

This notice is being sent pursuant to Section 13 of the Agreement dated April 18, 1996, between UP, BNSF and the Chemical Manufacturers Association ("CMA"). Under that section and the decisions of the Surface Transportation Board in the UP/SP proceeding, Entergy has the right to build out from its White Bluff plant on the UP to a point on a line owned by the SP. UP is also obligated to grant BNSF trackage rights to enable BNSF to reach the point at which the build-out line connects with the SP track. BNSF will require trackage rights over the UP from its connection in Pine Bluff to the former SP Memphis line to the connection with the build-out line as described above. BNSF currently has trackage rights over the UP route between Little Rock and Pine Bluff that are being used for local service between those points. UP only needs to grant BNSF the additional ability to enter and exit this line at the build-in/build-out point.

See Decision No. 44, 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 Cande Western Railroad Company, served August 12, 1996.

Mr. Arthur W. Peters Page 2 1/4/99

))

Entergy is proceeding with plans for construction and future service based on rights provided in the CMA Agreement and the STB's decisions, and assumes UP will cooperate in implementing those rights. If that is not the case or if you have any questions about this notice, please give me a call by January 15, 1999.

.).)

Sincerely,

CWA ib

Attachment

cc:

Mr. Sami Shalah Assistant Vice President **East Coal Marketing** Burlington Northern Santa Fe Railroad P. O. Box 961051

Fort Worth, TX 76161-0051

Messrs. Bud Storey

Tom Phillips Mike Loftus Keith Dickerson Gene Thomas Janan Honeysuckle

Ms. Kelly Cupero



PETER J. RICKERSHAUSER
Vice President UP/SP Lines & Mexico

Burlington Northern Santa Fe

2650 Lou Menk Drive P.O. Box 961065 Fort Worth, TX 76161-0065 817 352-6686 Fax 817 352-7154

October 28, 1998

Mr. Daniel B. Gray
Dan Gray Consulting, Inc.
15 Long Hearth Place
The Woodlands, TX 77382

Dear Dan:

It was a pleasure meeting you this morning and discussing details of the proposed build-in to Entergy's White Bluff, AR facility.

Per our conversation, attached is a copy of the "Chemical Manufacturers' Agreement", which was imposed as a condition on the UP/SP merger by the Surface Transportation Board. Item #13 deals with the subject of build ins/build-outs, and was broadened by the Board in its decision by (a) making this provision applicable to all shippers, and (b) removing the time limit to which this provision is subject (Finance Docket No. 32760, Decision No. 44, p. 146).

Also, since our meeting I have confirmed that we and UP agree that the Pine Bluff Arsenal is a "2-to-1" facility to which BNSF has access currently under the merger settlement agreements and conditions. Consequently, at our election and with UP's concurrence, BNSF can serve this facility either (a) directly, (b) through reciprocal switch provided by UP, or (c) with UP's prior agreement, using a third party contractor to perform switching for either BNSF or for both railroads.

I and Burlington Northern Santa Fe look forward to working with you on further advancing this exciting project.

Sincerely,

Attachment

cc: Tom Epich Mike Roper

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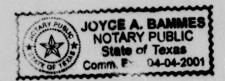
VERIFICATION

State of Texas)
) ss:
County of Montgomery)

Charles W. Jewell, Jr., being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated to the best of his knowledge, information, and belief.

Charles W. Vewell, Jr.

Subscribed and sworn to before me this 16th day of September, 1999



Notary Public Banenes

My Commission expires: 4-4-2001

BEFORE THE SURFACE TRANSPORTATION BOARD

UNION FACIFIC 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 GRAND WESTERN
RAILROAD COMPANY

Finance Docket Nos. 32760

VERIFIED STATEMENT OF PETER J. SMYKLA, JR.

My name is Peter J. Smykla, Jr. I am the same Peter Smykla that submitted a Verified Statement in support of Entergy's "Petition for an Exemption From 49 U.S.C. § 10901 to Construct and Operate a Rail Line Between White Bluff and Pine Bluff, Arkansas" dated July 30, 1999. My background and experience are summarized in that statement.

Entergy has asked me to submit this statement in support of its "Petition for Enforcement of Merger Condition" to address the circumstances surrounding my acquisition of a portion of the St. Louis Southwestern Railway Company's ("SSW") so-called "Arsenal Lead" near Pine Bluff, Arsenal. In particular, in December of 1992, SSW sold approximately three miles of the Arsenal Lead to Mid-State Corporation (a non-carrier), which is a corporation that I own and control. I have attached a copy of the Agreement between SSW and Mid-State Corporation to this

statement as Exhibit No. _ (PJS-1). (This copy has been redacted to remove the purchase price of the line).

Therein, the parties specified that the portion of the Arsenal Lead that I was purchasing included the "railroad right-of-way and track and track support structure from Paperton, Mile Post 272.81 (ES 223+10) to end of track at Mile Post 269.84 (ES 66+06)." The parties also expressed their mutual understanding that SSW would remain the common carrier on the line with obligation to provide service if requested to do so. In particular, a specific clause was incorporated into the agreement to prevent Mid-State from taking any action to impede SSW's ability to meet its common carrier obligation:

Buyer is not a common carrier and is desirous of acquiring the Arsenal Spur intact and not for the purpose of common carrier rail transportation and is agreeable to leave the track substantially in place should future common carrier rail service be required by shippers, potential shippers, SSW or the United States Government in the interests of national security for a period of twenty five (25) years.

Exhibit No. _ (PJS-1) at 1.

As reflected in this language, it was the parties' understanding that SSW would remain obligated to serve any "potential shippers" that requested service over the line.

AGREEMENT FOR THE SALE OF THE ARSENAL SPUR

THIS AGREEMENT, made this 1742 day of Docombor, 1992, by and between the ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, a Missouri corporation ("SSW" or "Seller") and MID-STATE CORPORATION ("Buyer");

whereas, SSW owns a line of railroad known as the Arsenal Spur of from extending some 3.2 miles all within the city limits of Little of

WHEREAS, Buyer is not a common carrier and is desirous of acquiring the Arsenal Spur intact and not for the purpose of common carrier rail transportation and is agreeable to leave the track substantially in place should future common carrier rail service be required by shippers, potential shippers, SSW or the United States Government in the interests of national security for a period of twenty five (25) years;

NOW, THEREFORE, in consideration of the mutual covenants herein entered into, the parties agree as follows:

1. Definitions:

"Improvements" shall mean all buildings, structures and fixtures, other than Track and Track Support Structures now owned by Seller and located on or within the Real Property (excluding locomotives, rolling stock, mechanical and maintenance of way machinery, which is retained by Seller).

"Incidental Interests" shall include all agreements, licenses, easements and permits to be assigned involving the Real Property and Track and Track Support Structures located on the Properties on the Closing Date.

"Track and Track Support Structures" shall mean the track structure of Seller, including but not limited to signals, signal systems, communications, rail and fastenings, switches and frogs complete, bumpers, ties, ballast, roadbed, embankment, bridges, trestles, culverts and other structures or things necessary for support of and entering into construction thereof, and if any

Page 2 of 7

portion thereof is located in a thoroughfare, the term shall include pavement, crossing planks and other similar materials or facilities used in lieu of pavement or other street surfacing material at vehicular crossings of tracks, culverts, drainage facilities, crossing warning facilities, and all changes in and/or additions thereto, now or in the future located as are required or desirable for the operation of trains.

"Arsenal Spur" shall mean the railroad right-of-way and track and track support structure from Paperton, Mile Post 272.81 (ES 223+10) to end of track at Mile Post 269.84 (ES 66+06) all as indicated on Exhibit A, as marked in yellow.

"Properties" shall include the Improvements, Incidental Interests and Track and Track Support Structures.

"Purchase Price" shall mean of the United States.

lawful currency

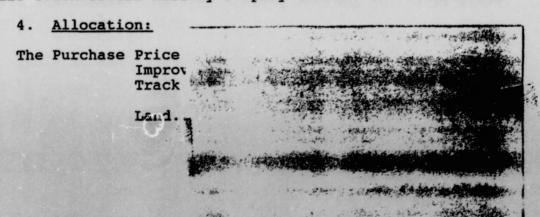
"Real Property" shall mean that part of the Arsenal Spur which comprises land and interests in land.

2. Properties To Be Conveyed:

Seller hereby agrees to sell, assign, transfer, and convey to Buyer on the Closing Date and Buyer hereby agrees to purchase from Seller, the Arsenal Spur, including the Real Property and Incidental Interests, all Improvements and Track and Track Support Structures. Seller shall convey its interests in the Track and Track Support Structures by a Bill of Sale, as shown on Exhibit B and its interest in the real property by quitclaim deed, as shown on Exhibit C. Seller hereby states that there are no record of any Incidental Interests to assign to Buyer.

3. Payment:

The Purchase Price shall be paid on the Closing Date in Federal funds to Bank of America, ABA 121000358, Main Office, 345 Montgomery Street, San Francisco, California, for credit to ST. Louis Southwestern Railway Company Account No. 12336-03693.



Page 3 of 7

5. Condition of Properties:

SELLER HEREBY DISCLAIMS ANY REPRESENTATION OR WARRANTY, EITHER EXPRESS OR IMPLIED, AS TO ANY MATTER WHATSOEVER, INCLUDING WITHOUT LIMITATION, THE DESIGN OR CONDITION OF THE PROPERTIES, THEIR MERCHANTABILITY OR THEIR FITNESS FOR ANY PARTICULAR PURPOSE OR COMPLIANCE WITH FEDERAL RAILROAD ADMINISTRATION REGULATIONS, THE QUALITY OF THE MATERIAL OR WORKMANSHIP OF THE PROPERTIES OR CONFORMITY OF THE PROPERTIES TO THEIR INTENDED USE NOR SHALL THE SELLER BE LIABLE FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES (INCLUDING STRICT LIABILITY AND TORT) AND SELLER OFFERS, AND BUYER ACCEPTS, THE PROPERTIES IN AS IS, WHERE IS CONDITION. SELLER MAKES NO WARRANTY, EXPRESS OR IMPLIED, AS TO THE MERCHANTABILITY OF THE PROPERTIES.

6. Related Agreements:

The following related Exhibits and documents are attached hereto as exhibits and incorporated herein by reference:

Exhibit A - "Map of Properties"
Exhibit B - "Bill of Sale"
Exhibit C - "Quitclaim Deed"

7. Conditions:

The closing is conditional on the happening of the following events:

- a. At the Closing Date neither a court, agency or the Interstate Commerce Commission has imposed a condition or requirement which is a material, adverse condition. If such a material, adverse condition is imposed which affects either party in such manner, the party that is adversely, materially affected ("Affected Party"), at its sole option, may terminate this Agreement without liability hereunder if written notice is provided to the other party within five (5) days, excluding Saturdays, Sundays and holidays, after the Affected Party received notice of the imposition of the material, adverse condition.
- b. At the Closing Date, the execution by the appropriate party or both parties of the related agreements and documents described in Section 6 above.

8. Warranties of Buyer:

The Buyer warrants effective as of the Closing Date that:

Page 4 of 7

- a. It has full power to own the Properties and its performance, execution and delivery of this Agreement is within the authority of the Buyer and duly authorized by all necessary and proper government proceedings;
- b. This Agreement, when and as executed and delivered, shall constitute a valid and binding obligation of the Buyer enforceable against the Buyer in accordance with the terms hereof.

9. Warranties of Seller:

The Seller warrants effective on Closing that:

- a. It is a corporation in good standing, validly existing and organized in Missouri;
 - b. It is able to do business in Arkansas;
 - c. It has full power to transfer the Properties to Buyer;
- d. This Agreement, when and as executed and delivered shall constitute a valid and binding obligation of the Seller enforceable against the Seller in accordance with the terms hereof.

10. Indemnification for Non-income Taxes:

Buyer agrees to indemnify and hold Seller harmless from all taxes imposed by any Federal, State, or local government or governmental subdivision in the United States, upon or with respect to any aspect of the transfer of Properties, governed by this Agreement, excluding however, the documentary stamp transfer and taxes of the United States or of any state or political subdivision thereof to the extent imposed on or measured by the net income or excess profits of the Seller, or franchise taxes, to the extent imposed in lieu of any such taxes, imposed on or measured by the net income.

11. Applicable Law:

This Agreement shall be governed by and construed in accordance with the laws of the State of Arkansas.

12. Notices:

All notices, demands, requests, or other communications which may be or are required to be given, served or sent by either party to the other pursuant to this Agreement shall be in writing and shall be deemed to have been properly given or sent.

Page 5 of 7

a. If intended for Seller, mail by registered or certified mail, return receipt requested, with postage prepaid, addressed to Seller at:

Vice President - Strategic Planning Southern Pacific Transportation Company One Market Plaza San Francisco, CA 94105

With a copy to:

Mr. W. E. Fowler Director-Contracts & Joint Facilities Southern Pacific Transportation Company One Market Plaza, Room 1004P San Francisco, CA 94105

b. If intended for Buyer, mail by registered or certified mail, return receipt requested, with postage prepaid, addressed to Buyer at:

Peter Smykla Mid-State Corporation P.O. Box 1892 Pine Bluff, AR 71613

13. Entire Agreement, Severability, Amendments:

- a. This Agreement, including the Exhibits appended, is the entire agreement between the parties and supersedes any oral or other understanding or representation of the parties. If any paragraph, sentence, clause, phrase, or word shall become unenforceable with operation of law or otherwise, the balance of this Agreement shall remain in full force and effect.
- b. No modification, addition or amendment hereto shall be effective until such modification, addition or amendment is reduced to a writing executed by the authorized officers of each party.

14. Litigation:

Seller shall be responsible for all litigation or claims arising from, without limitation, its ownership, operation, maintenance or reconstruction of the Properties prior to the Closing Date or arising from claims based upon agreements or obligations to which the Seller is bound. Buyer shall be responsible for litigation arising from its ownership, operation, maintenance or reconstruction of the Properties after the Closing Date or arising from claims based upon agreements or obligations to which Buyer is bound. To that end, it is the express intention of

Page 6 of 7

Seller and Buyer that each party hereby indemnifies the other and holds the other harmless from and against all loss, costs, liability and expense, including without limitation, reasonable attorney's fees, which such other party incurs in connection with litigation for which the other party is responsible as set forth herein.

15. Assignment, Successors:

This Agreement is intended solely for the benefit of and shall be binding on the parties hereto, and their successors and assigns, and is not intended nor shall it be construed to be for the benefit of any other party.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the day and year first herein written.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY (SELLER)

Bv

Title

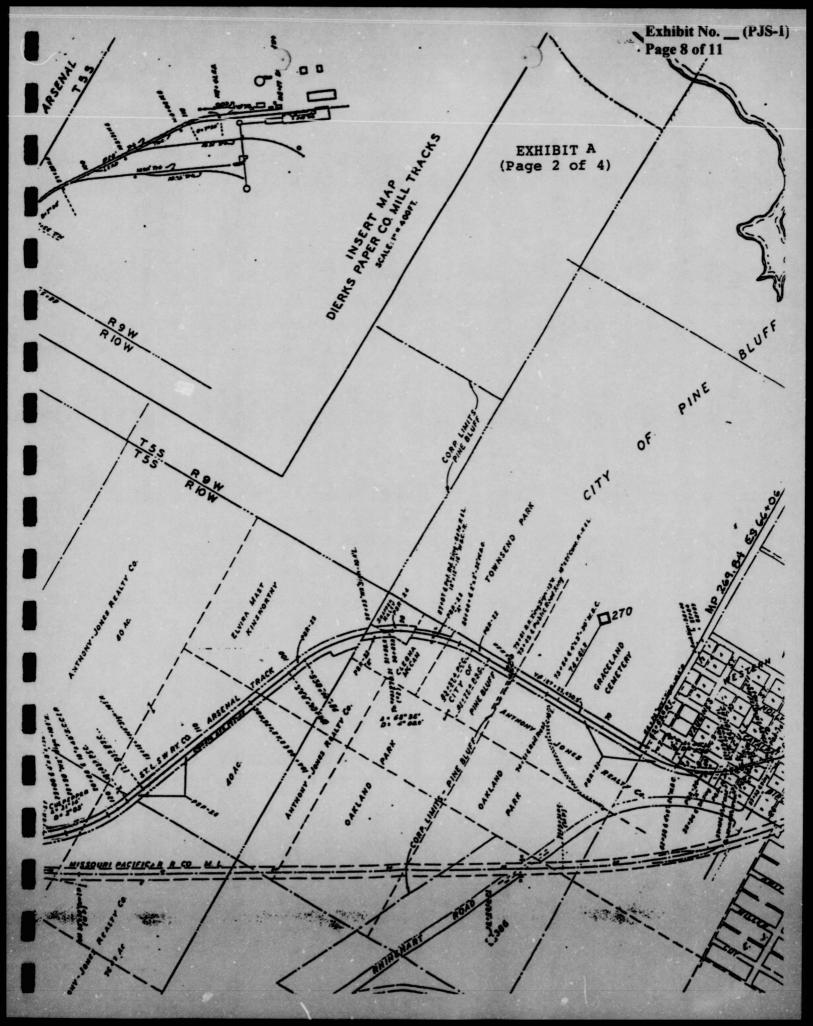
MID-STATE

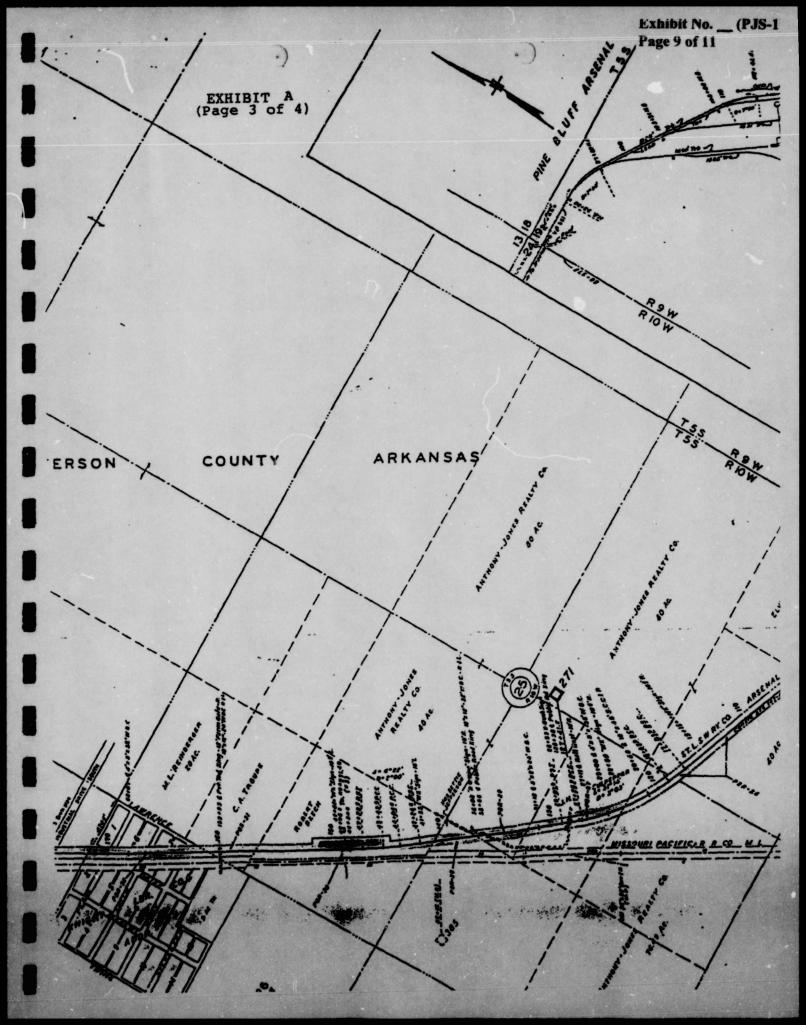
(BUYER)

Ву

(Title)

RESIDENT





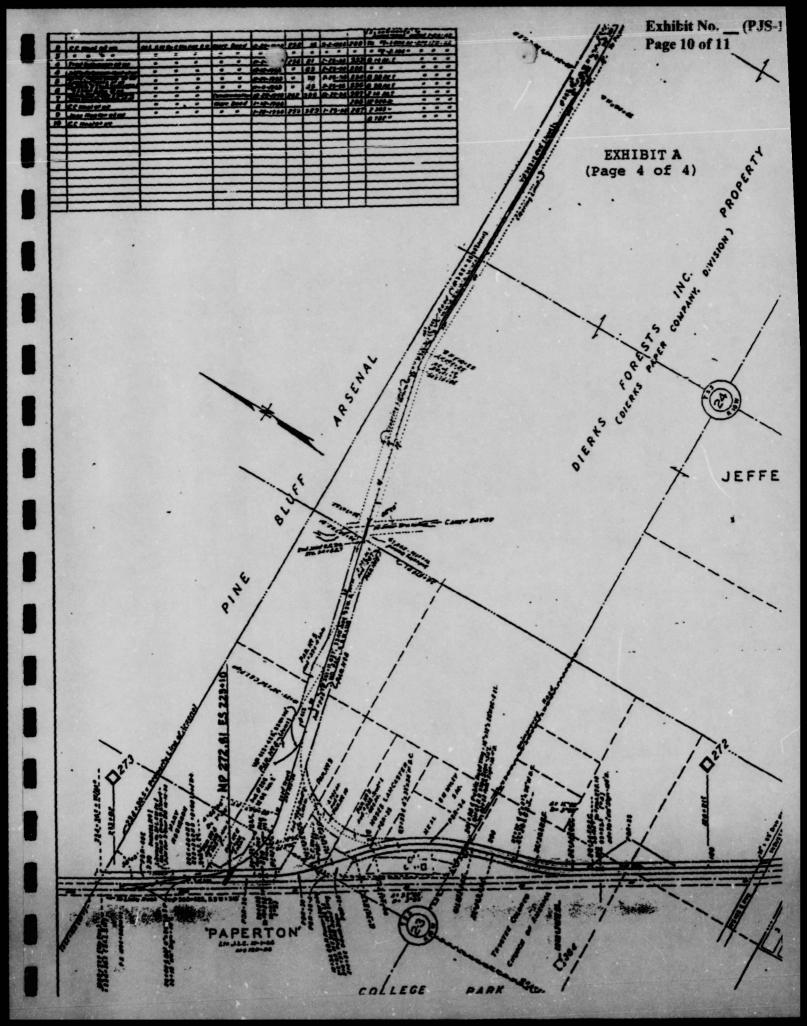


EXHIBIT B

BILL OF SALE

In consideration of one dellar (\$1.00) and other valuable consideration, receipt of which is hereby acknowledged, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, a Missouri corporation ("Seller"), hereby sells, transfers and delivers (in place) to MID-STATE CORPORATION ("Buyer"), approximately 3.2 miles of Track and Track Support Structures on the Seller's Arsenal Spur between Milepost 272.81 at or near Paperton to Milepost 269.84, all within Jefferson County, in the State of Arkansas, in the location shown on the Attachment A, attached and hereby made a part hereof.

The term "Track" as used herein shall include all appurtenances thereof, consisting of rail and fastenings, switches and frogs complete, bumpers, ties, ballast and roadbed.

The term "Track Support Structures" shall mean those properties necessary for use or support of Track including signals, bridges, culverts, other structures, tunnels, grading, embankments, dikes, pavements and drainage facilities.

SAID TRACK AND TRACK SUPPORT STRUCTURES ARE SOLD AS IS IN ITS PRESENT LOCATION WITH ALL FAULTS. NO WARRANTY, EXPRESS OR IMPLIED, IS MADE BY SELLER AS TO THE CONDITION OF MERCHANTABILITY OF SAID TRACK AND TRACK SUPPORT STRUCTURES OR THE FITNESS FOR ANY PARTICULAR PURPOSE THEREOF FOR USE OR OTHERWISE OR FOR THEIR COMPLIANCE WITH FEDERAL RAILROAD ADMINISTRATION REGULATIONS.

The right-of-way underlying said Track and Track Support Structures are the subject of a separate indenture between these same parties.

IN WITNESS WHERE, Seller has signed these presents this 174 day of Decimber, 1992.

ST. LOUIS SOLITHWESTERN RAILWAY COMPANY

ttest: Secretary

STATE OF CALIFORNIA

) ss.

CITY AND COUNTY OF SAN FRANCISCO

On this 17 day of Acc, in the year 1992 before me T.E. Tucces, a Notary Public in and for the City and County of San Francisco, State of California, personally appeared personally known to me to be the person who executed the within instrument on behalf of the Corporation therein named and acknowledged to me that the Corporation executed it.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

J. E. JURGENS

ACTARY PUBLIC-CALIFORNIA
Principal Place of Business in
CITY AND COUNTY OF
SAN FRANCISCO

My Commission Expires Jan. 15, 1994

Notary Public in and for the City and County San Francisco, State of California

VERIFICATION

County of Jefferson)	
State of Arkansas) ss:	

Peter J. Smykla, Jr., being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true as stated to the best of his knowledge, information, and belief.

Peter J. Smykla, Jr.

Subscribed and sworn to before me this / 6
day of September, 1999

Notary Partic Ellins

My Commission expires 8/18/2000

CERTIFICATE OF SERVICE

I hereby certify that this 20th day of September, 1999, I have caused a copy of the foregoing "Petition for Enforcement of Condition" to be served by first-class mail, postage-prepaid, upon all parties to the service list in this proceeding.

Andrew B. Kolesar III

32760 6-14-=99 I 194766 194766 MAYER, BROWN & PLATT

1909 K STREET, N.W.

WASHINGTON, D.C. 20006-1101

MAIN TELEPHONE

202-263-3000

MAIN FAX 202-263-3300

ERIKA Z. JONES DIRECT DIAL (202) 263-3232 ejones@inayerbrown.com

> ENTERED Office of the Secretary June 14, 1999

JUN 15 1999

By Hand

Part of Public Record

Honorable Vernon A. Williams Secretary Surface Transportation Board 1925 K Street, N.W. **Room 711** Washington, DC 20423

> 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 Petition for Leave to File and Reply of The Burlington Northern and Santa Fe Railway Company in Support of BNSF's Petition for Clarification (BNSF-87). Also enclosed is a 3.5 inch disk containing the text of the pleading in WordPerfect 6.1 format.

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

Enclosures

All Parties of Record cc:

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

PETITION FOR LEAVE TO FILE AND
REPLY OF THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY
IN SUPPORT OF BNSF'S PETITION FOR CLARIFICATION

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

The Burlington Northern and Santa Fe Railway Company 3017 Lou Menk Drive P.O. Box 961039 Ft. Worth, Texas 76161-0039 (817) 352-2353

and

1700 East Golf Road Schaumburg, Illinois 60173 (847) 995-6887 Erika Z. Jones Adrian L. Steel, Jr. Adam C. Sloane Mayer, Brown & Platt 1909 K Street, NW Washington, DC 20006-1101 (202) 263-3000 BNSF-87

Attorneys for The Burlington Northern and Santa Fe Railway Company

June 14, 1999

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

PETITION FOR LEAVE TO FILE AND
REPLY OF THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY
IN SUPPORT OF BNSF'S PETITION FOR CLARIFICATION

The Burlington Northern and Santa Fe Railway Company ("BNSF")^{1/2} respectfully petitions for leave to file this Reply to "UP's Reply to BNSF's Petition for Clarification" (UP/SP-365) ("UP's Reply") in order to correct several misstatements in UP's Reply so that the Board will have a complete and accurate record on which to determine whether BNSF's request for a clarification of the "new facilities" and "transload" conditions imposed by the Board in approving the UP/SP merger should be granted.^{2/2}

The acronyms used herein are the same as those used in Appendix B to Decision No. 44.

In this regard, UP has itself already submitted a reply to the replies filed by The National Industrial Transportation League (NITL-25) and The Society of the Plastics Industry (SPI-26) in the form of a letter from Michael L. Rosenthal to Secretary Williams, dated June 8, 1999. UP should therefore have no objection to the Board's acceptance of this Reply by BNSF.

In its Petition, BNSF seeks a clarification that new facilities and transloads, such as the new Four Star Sugar Co. ("Four Star Sugar") facility at EI Paso, TX, which are located adjacent to spurs, industrial leads or yard tracks that are, in turn, served by a trackage rights line should be deemed to be "on" a trackage rights line and, therefore, open to BNSF service. In its Reply, UP contends that BNSF does not have trackage rights over the line described in BNSF's Petition as running through the former SP Dallas Street Yard at EI Paso and that, instead, BNSF's trackage rights are exclusively on a line that is on the north side of the yard. See, e.g., UP Reply at 3, 10-11. UP also contends that the activity of the Dallas Street Yard (through which, according to UP, BNSF would have to move to serve the Four Star Sugar facility), the location of the facility on the south side of the yard, and the need to use an "active, multipurpose line of railroad" on which BNSF does not have trackage rights to access the facility should preclude a finding that the Four Star Sugar facility is "on" a trackage rights line. See UP Reply at 11-15. These contentions concerning the Four Star Sugar facility -- many of which UP had never before addressed

As we show below, UP's claim that BNSF's trackage rights are restricted to the former SP line north of the yard is immaterial to the dispute here. Nevertheless, it is notable that UP's rendition of the facts is far from established. The pertinent BNSF/UP trackage rights agreement does not assign specific tracks for BNSF's trackage rights operations in the area of the Dallas Street Yard. To the contrary, the trackage rights agreement, which is attached hereto as Attachment A, refers to and grants BNSF trackage rights over "a line of railroad consisting of track structure extending between El Paso, Texas, in the vicinity of Owner's Milepost 829.2, and Sierra Blanca, Texas, in the vicinity of Owner's Milepost 738.2, as shown by dashed lines on the attached print dated June 1, 1996". As a review of that print reveals, there is no precise designation of specific tracks for BNSF's trackage rights operations at the Dallas Street Yard. Similarly, the BNSF Agreement contains only a general grant of trackage rights over "SP's line between El Paso and Sierra Blanca" (§ 4(a)), and a figure submitted with the Applicants' Operating Plan (Figure 13-29) in Volume 3 (UP/SP-24) of their Application identifies both the line on the north side of the yard as well as the line through the middle of the yard as part of the SP trackage at El Paso. (A copy of Figure 13-29 is attached hereto as Attachment B.)

to BNSF -- provide no support for UP's argument against BNSF access to the Four Star Sugar facility.

1. Pre-merger UP-versus-SP siting competition existed regardless of the exact manner by which each carrier would have served a new facility. If UP and SP could compete for a shipper to locate a facility to take advantage of adjacent main line operations (or, by the same token, if a shipper could use siting alternatives to play the two carriers off against each other in negotiations for rail service), indirect siting competition existed. As explained in BNSF's Petition (at 15), the preservation of such indirect siting competition was a principal purpose of the new facilities and transload conditions, which gave BNSF the right to serve any new facility or transload located "on" (that is, in a position to receive service via) a trackage rights line. See also Letter from Randy Speight, CMA, to Secretary Williams, dated June 10, 1999, at 1 (copy attached hereto as Attachment C) (new facilities and transload conditions were imposed "to replicate important forms of 'indirect' competition").

It is undisputed that the Four Star Sugar facility was located where it was in order to receive main line service via the former SP line on which BNSF has trackage rights. This fundamental fact, which underlies the application of the new facilities condition, is unaffected by the operations necessary to serve the Four Star Sugar facility or the location of the specific trackage to be utilized under the trackage rights agreement. Thus, none of UP's contentions about the need to use an active railroad line to access the Four Star Sugar facility from the trackage rights line (an issue that could be fully addressed by UP agreeing to serve the facility via reciprocal switch for BNSF), the location of the Four Star Sugar facility at the south side of the Dallas Street Yard, or the precise location of the

trackage (even if correct (see note 3, supra)) diminishes the force of BNSF's argument that the Four Star Sugar facility is "on" a trackage rights line for purposes of the new facilities condition, and that therefore BNSF's access to the facility is necessary in order to preserve pre-merger indirect siting competition.⁴

In advocating a case-by-case approach to clarification of the new facilities and 2. transload conditions, UP also inaccurately depicts the magnitude of the problems caused by a lack of predictability in the application of the conditions. Contrary to UP's argument, the number of disputes brought to the Board's attention does not provide an accurate picture of the scope of uncertainty among shippers concerning the application of the new facilities and transload conditions. See also NITL-25 at 5 (stating, in reply in support of BNSF's Petition, that the issue presented by BNSF's Petition has "extremely broad implications for shippers' access to competition provided or to be provided by BNSF"). Shippers are often understandably reluctant to initiate administrative proceedings against their sole provider of railroad freight transportation services, and BNSF has exercised restraint in taking access disputes to the Board. Moreover, as reflected in the reply of SPI in support of BNSF's Petition, the lack of certainty concerning the application of the conditions imposes a substantial burden on shippers. See SPI-26 at 4 ("The shipper community in the West, as well as BNSF, require certainty with regard to the application of the 'new facilities' and 'transloads' conditions adopted by the Board. * * * Producers and

Importantly, it should be noted that nowhere in its Reply does UP contend that the manner of service, the location of a new facility, or any of the other factors it cites affect the question of whether pre-merger indirect siting competition between UP and SP existed. The reason it does not do so is obvious -- as reflected in the Verified Statements of Peter J. Rickershauser, F.E. (Skip) Kalb, and Robert A. Sieffert of Cerestar USA, Inc., such competition existed regardless of those factors.

shippers must be in a position to clearly understand the rights as they determine where to locate new facilities and transloads."). See also Letter from Lee Williams, Roquette America, Inc., to Secretary Williams, dated June 9, 1999 (copy attached hereto as Attachment D) (stating, in support of BNSF's Petition, that "it is important that the Surface Transportation Board ensure that the issues of what new facilities along the trackage rights lines, and to what facilities BNSF has access, are clarified so that . . . shippers are in a position to know what competitive alternatives are available"). Accordingly, UP's argument that there is no need for the Board to adopt a general standard for determining when a new facility is "on" a trackage rights line should be rejected.⁵

Furthermore, while UP argues that a general definition of when a new facility should be deemed to be "on" a trackage rights line is not necessary or appropriate, UP's position as to the Four Star Sugar facility will, if adopted by the Board, surely be used by UP in the future to deny shippers access to BNSF service. UP's position -- which essentially is that

Decision No. 10 in the oversight proceeding (Sub-No. 21), which UP cites (see UP Reply at 2, 5-6), does not support a case-by-case approach to the issue raised by BNSF's Petition. In Decision No. 10, the Board rejected a request by both BNSF and UP for a blanket rule for the determination of which facilities qualified as "new facilities." Here, by contrast, there is no dispute as to whether the Four Star Sugar facility is a "new facility". Instead, BNSF merely seeks a confirmation that indisputably new facilities that are located adjacent to spurs, industrial tracks or yard tracks that are, in turn, served by trackage rights lines should be deemed to be "on" the trackage rights lines for purposes of the new facilities and transload conditions. Moreover, unlike the issue of how to define "new facilities", the question of whether a facility is "on" a trackage rights line is amenable to a simple, straightforward resolution: If a new facility is sited to receive rail service via a trackage rights line, it is "on" that line, and the facts pertaining to exactly how the facility is connected to the trackage rights line are immaterial since pre-merger siting competition existed regardless of the manner by which a new facility was to be connected to and served by the competing carrier's main line. If, as UP contends, this standard would encompass a "very large portion" of new facilities on BNSF's trackage rights lines, that is only a reflection of the fact that there was widespread siting competition between UP and SP before the merger.

a facility is not "on" a trackage rights line if (i) it is in a yard or can only be reached by a movement through a yard (UP Reply at 10-11); (ii) it is necessary to move on or across a line which is used for other purposes in addition to reaching the new facility (UP Reply at 10, 12-13); and (iii) the line which must be used to reach the facility is not a trackage rights line (UP Reply at 13) -- would effectively mean that the only new facilities which would qualify as being "on" a trackage rights line would be those that could be reached by a "single purpose" line connecting directly to the trackage rights line on which no traffic moved other than traffic to and from the particular facility. UP Reply at 14. Thus, UP, too, is, in effect, seeking to develop a general rule governing the application of the conditions, but its proposed rule would result in the elimination of a significant amount of the premerger siting competition which existed between UP and SP.⁵⁹

Star Sugar facility at El Paso and that there is therefore no need to afford BNSF access to the facility. See UP Reply at 15-17. UP's argument is without merit for several reasons. First, while it is true that BNSF attempted to compete with UP for the new Four Star Sugar facility, BNSF was unable to successfully do so because it could identify no location at El Paso which would satisfy Four Star Sugar's commercial and logistics needs. In this respect, the situation is identical to the situation involving R.R. Donnelley & Sons ("Donnelley") at Reno, NV, where the Board granted BNSF access to a new transload

In addition, UP is not even willing to stand by the rule that its position reflects. See UP Reply at 15. Rather, shippers and BNSF must in each case await UP's "informed analysis" before knowing whether to proceed. As SPI has noted (SPI-26 at 4), this approach injects an element of subjectivity into the process, and it provides UP with the ability, whether intentional or not, to deter competition by BNSF through a lack of certainty and predictability and through delay.

facility on a former SP line. As the Board recognized, Donnelley had received service via BNSF in conjunction with a truck transload from McCloud, CA, although this service option had become impractical (because of increased production at Donnelley's Reno facility). See Decision No. 75, at 4 n.9. Nevertheless, the Board accorded BNSF access to the new transload facility on the former SP line in order to preserve the indirect competition which that line provided pre-merger to the nearby UP line. Id. at 4; see also NITL-25 at 5 (discussing Donnelley decision). Therefore, UP's argument that BNSF should not be given access to the Four Star Sugar facility because El Paso is, in UP's view, a "3-to-2" point is incorrect and contrary to Decision No. 75.^{2/2}

Second, and more importantly, as BNSF pointed out in its Petition (at 18 n.11), the fact that BNSF has a line at El Paso does not preclude shippers at El Paso from enjoying the benefits of the new facilities and transload conditions. Those conditions do not restrict the right of access to shippers whose pre-merger siting options were limited to UP and SP lines. The language of the conditions explicitly provides that BNSF shall have access to "any" new facility on "any" UP or SP line over which it receives trackage rights. See Decision No. 61 at 7. There is no exception to the rights granted by the conditions based

UP also inaccurately characterizes the reference to the "traffic density" issue in BNSF's Petition. See UP Reply at 7 n.2. As BNSF made clear in its Petition (at 17), it was not relying on traffic density considerations to justify BNSF's access to the particular Four Star Sugar facility, but rather to describe the "sweeping adverse effects on BNSF's ability to attain adequate traffic density on the trackage rights lines" that would result from the adoption of UP's circumscribed interpretation of the scope of the conditions. Further, the Board's finding that BNSF is providing competitive service in every major rail corridor does not militate against the relief sought in BNSF's Petition. Although BNSF is competing vigorously in every corridor, individual shippers in those corridors are entitled to benefits of the siting competition that existed between UP and SP before the merger, and to deny them BNSF access because BNSF is competing otherwise in the rail corridor in which they are located would be to deny them the benefits of that competition.

on the presence of BNSF tracks or yards in the area. Similarly, no such exception was provided for in the CMA Agreement which formed the basis for the new facilities and transload conditions.

Having accepted the new facilities and transload conditions and implemented its merger and having struck a deal with CMA to secure CMA's support of the merger, UP should not now be allowed to walk away from the very specific language in those conditions and in the CMA Agreement that provices BNSF with the right to serve "any" new facility or transload on "any" UP or SP line over which it receives trackage rights.

Accordingly, BNSF's Petition for Clarification should be granted.

Respectfully submitted,

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

The Burlington Northern and Santa Fe Railway Company 3017 Lou Menk Drive P.O. Box 961039 Ft. Worth, Texas 76161-0039 (817) 352-2353

and

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Attorneys for The Burlington Northern and Santa Fe Railway Company

June 14, 1999

CERTIFICATE OF SERVICE

I hereby certify that copies of the Petition for Leave to File and Reply of The Burlington Northern and Santa Fe Railway Company in Support of BNSF's Petition for Clarification (BNSF-87) have been served on all Parties of Record.

Som Jack a

ATTACHMENT A

EL PASO, TEXAS TO SIERRA BLANCA, TEXAS TRACKAGE RIGHTS AGREEMENT

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

WITNESSETH:

WHEREAS, Owner owns a line of railroad consisting of track structure extending between El Paso, Texas, in the vicinity of Owner's Milepost 829.2, and Sierra Blanca, Texas, in the vicinity of Owner's Milepost 738.2, as shown by dashed lines on the attached print dated June 1, 1996 (and identified as Exhibit "A") (Figure 3-1) and further described in Section 1.7 of Exhibit "B", which shall be referred to herein as the "Joint Trackage"; and

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

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

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

1. General Conditions:

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

2. Rights of User:

- (a) Subject to the terms and conditions contained herein, Owner grants to User the nonexclusive right to use the Joint Trackage for the limited operation of Equipment in User's account over the Joint Trackage in common with Owner and such other railroad company or companies as Owner has heretofore admitted or may hereafter at any time in the future admit to the joint use of all or part of the Joint Trackage (provided that such future admittance shall not materially hinder or obstruct the fair and reasonable exercise of the rights granted in this Agreement), such other railroad company or companies to hereinafter be considered Owner for the purposes of this Agreement, it being understood and agreed that User shall not have the right to:
 - (i) Switch industries upon the Joint Trackage, except as hereinafter provided;
 - (ii) Set out, pick up or store Equipment upon the Joint Trackage, or any part thereof, except as otherwise provided in Sections 2.12, 2.13 and 2.14 of Exhibit B;
 - (iii) Serve any industry, team or house track, intermodal or auto facility now existing or hereafter located along the Joint Trackage, except as otherwise provided in this Section 2;
 - Permit or admit any third party to the use of all or any portion of the Joint Trackage, nor, under the guise of doing its own business, contract or make any agreement to handle as its own Equipment over or upon the Joint Trackage, or any portion thereof, the Equipment of any such third party which in the normal course of business would not be considered the Equipment of User; provided, however, that the foregoing shall not prevent User, pursuant to a run-through agreement with any railroad, from using the locomotives and cabooses of another railroad as its own under this Agreement; or
 - (v) Connect with or interchange with any other railroad except as may hereinafter provided.

- (b) The rights granted in Section 2 (a) shall be for rail traffic of all kinds and commodities, both carload and intermodal.
- by UP and SP and no other railroad directly, by reciprocal switching, joint facility or other arrangements, (b) serve any new shipper facility on any SP-owned line over which BNSF receives trackage rights pursuant to this Agreement, and (c) subject to the geographic limitations set forth below, serve new shipper facilities, future transloading facilities and to establish and exclusively serve intermodal and auto facilities at points listed on Exhibit A to the Settlement Agreement. The geographic limitations applicable to subparagraph (c) above shall generally correspond to the territory within which, prior to the merger of UP and SP, a new customer could have constructed a facility that would have been open to service by both UP and SP either directly or through reciprocal switch. Where switching districts have been established they shall be presumed to establish these geographic limitations.

User shall participate in fifty percent (50%) of Owner's cost and expense of any connecting and access tracks and switches ("Improvements") for such new shipper facilities upon User's election to directly serve such new shipper facility which then shall become part of the Joint Trackage. Should User decline to participate in the cost and expense of Improvements required to serve any new shipper facility, User shall be denied access to such new shipper facility and the Improvements then shall not be part of the Joint Trackage; provided, however, should User elect at a later date to serve such new shipper facility, such right shall be granted to User by Owner upon payment of fifty percent (50%) of Owner's initial cost and expense of the Improvements plus per annum interest equal to the average paid on 90-day Treasury bills of the United States government as of the date of completion until the date of use by User commences. Per annum interest shall be adjusted annually on the first day of the twelfth (12th) month following the date of completion and every year thereafter on such date, based on the percentage increase or decrease, in the average yield of 30-year U.S. Treasury Notes for the prior year compared to their average yield in first year of completion of the access to such industry or industries. Each annual adjustment shall be subject, however, to a "cap" (up or down) of two percentage points of the prior year's interest rate (i.e., adjustment may not exceed an amount equal to two percentage points of the immediately preceding year's interest rate).

If User wishes to provide rail service to any new shipper facility at the locations set forth in this Section 2 (c), User shall provide Owner with written notice of its plans including a proposed rail service plan to the new shipper facility and Owner shall, within thirty (30) days of its receipt of such notice and plan, notify User of its approval or disapproval of User's plans for construction of trackage necessary to serve such new shipper facility ("Access Trackage"), which approval Owner shall not unreasonably withhold. In the event a request is approved by Owner, Owner shall construct and maintain the Access Trackage at User's sole cost and expense, provided, that Owner, subject to the provisions of the

second paragraph of this Section 2(c) regarding payment of fifty percent (50%) of the cost thereof plus interest, if applicable, may elect to participate in the cost of Access Trackage at that time or in the future.

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

(d) User shall have the right to establish crew points at various locations along the Joint Trackage as may be mutually agreed to in writing between the parties from time to time.

However, User agrees that if sufficient trackage is not available at such location(s) to facilitate crew changes of User, Owner may require User to construct additional trackage in the vicinity of such location as may be required in the reasonable judgment of Owner, the cost and expense of which shall be borne by User. In the event such trackage is constructed at the cost and expense of User, and Owner shall choose to use such trackage, Owner shall pay User fifty percent (50%) of the cost of constructing such trackage, plus interest as calculated pursuant to Section 2 (c) above.

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

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

- (g) User shall have the right to inspect the Joint Trackage and require Owner to make such reasonable improvements as User deems necessary to facilitate its operations at User's sole cost and expense. Any such inspection must be completed and improvements identified to Owner within one (1) year of the effectiveness of this Agreement.
- (h) User shall have the right to connect, for movements in all directions, with its present lines (including existing trackage rights) at points where its present lines (including existing trackage rights) intersect with lines it will purchase or be granted trackage rights over pursuant to the Settlement Agreement.
- (i) User agrees that when entering, exiting, setting out or picking up from its existing lines of railroad or trackage rights lines ("User's Operations"), it shall do so without unreasonable interference or impairment of the Joint Trackage. However, User agrees that if sufficient trackage is not available at such location(s) to facilitate User's Operations, Owner may require User to construct additional trackage in the vicinity of such location(s) as may be required in the reasonable judgment of Owner, the cost and expense of which shall be borne solely by User. In the event such trackage is constructed at the cost and expense of User, and Owner shall choose to use such trackage, Owner shall pay User fifty percent (50%) of the cost of constructing such trackage plus interest as calculated pursuant to Section 2 (c) above.

3. GTM Rates:

- (a) In addition to other payments to be made under this Agreement, User shall remit to Owner for the use of the Joint Trackage in the operation of its Equipment therealong and thereover, the total amount of the following sums monthly, which sums per GTM ("GTM Rates") shall be deemed to include ordinary and programmed maintenance of the Joint Trackage, Changes in and/or Additions to the Joint Trackage (to the extent required by the first sentence of Section 2.2 of the General Conditions), operating expenses, interest rental, depreciation and taxes:
 - (i) 3.1 mills per GTM for all Equipment, except as provided in Subsection (a)(ii) of this Section 3.
 - (ii) 3.0 mills per GTM for unit trains (trains consisting entirely of sixty-seven (67) or more rail cars of bulk freight of a single commodity (except for intermodal shipments, unless of a single commodity), loaded or empty ("Unit Trains").
- (b) For the purpose of computing the GTM Rates under this Section 3, it is mutually agreed that the distance between the designated points of the Joint Trackage

shall be determined by reference to SPT's Station Pair Master File, which shall be subject to verification by User.

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

The GTM Rates shall be adjusted upward or downward effective July 1 of each year during the term of this Agreement by the 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 GTM Rates. "URCS costs" shall mean costs developed using the Uniform Rail Costing System.

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

4. Reciprocal Switching Charges:

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

- (a) Except as provided in Subsection 4(b) below, Owner shall receive One Hundred Thirty Dollars (\$130) per rail car for rail cars of certain commodities switched to and from an industry directly served by either SP or UP (such charge to apply once for the movement in and out).
- (b) Owner shall receive Sixty Dollars (\$60) per rail car for rail cars constituting part of a Unit Train switched to and from an industry directly served by either SP or UP (such charge to apply once for the movement in and out) that contain commodities within the following Standard Transportation Commodity Codes ("STCC"): 01131, 01132, 01133, 01135, 01136, 01137, 01139 and 01144.

Charges set forth in this Section 4 shall be adjusted July 1 of each year during the term of this Agreement to reflect fifty percent (50%) of increases or decreases in the Rail Cost Adjustment Factor ("Index"), not adjusted for changes in productivity ("RCAF-U"), published by the STB or successor agency or other organization. In the event the RCAF-U is no longer maintained, the parties shall select a substantially similar index and failing to

agree on such an index, the matter shall be referred to binding arbitration under Section 6 of the General Conditions. The ratic between the Index for the year immediately prior to any year in which an increase or decrease is to be made effective and the Index for the year 1995 shall be developed, and the reciprocal switching charge shall be increased or decreased in direct proportion to 50% of such ratio, but under no circumstances shall the adjusted rate be less than the initial reciprocal switching charges provided in this Agreement.

5. Additions:

- (a) Owner and User shall conduct a joint inspection to determine what connections ("Connections") and sidings or siding extensions associated with Connections ("Sidings") are necessary to implement the rights granted under Section 2 of this Agreement. User, at its sole cost and expense, shall pay the cost of such Connections and Sidings. In the event Owner shall elect to use such Connections and Sidings, Owner shall pay to User fifty percent (50%) of the cost to User of constructing the Connections and Sidings, plus interest as calculated pursuant to Section 2 above. Owner shall maintain the part of any Connection or Siding on its property at its sole cost and expense, and User, at its sole cost and expense, shall maintain the part of any Connection or Siding on its property or property of others.
- (b) Except as provided in Section 5(a) above, expenditures for any future Changes in and/or Additions to the Joint Trackage, such as, but not limited to, sidings (other than improvements), Centralized Traffic Control, grade separations, and future connections (other than Connections), shall be handled as follows:
 - Owner shall bear the cost of all Changes in and/or Additions to the Joint Trackage that are necessary to achieve the benefits of the consolidation of UP and SP as outlined in the application filed with the STB in Finance Docket No. 32760 for UP to control SP. The operating plan filed by UP and SP in support of that application shall be given presumptive weight in determining what Changes in and/or Additions to the Joint Trackage are necessary to achieve these benefits.
 - (ii) Any Changes in and/or Additions to the Joint Trackage other than those covered by subparagraph (b)(i) of this Section 5 above shall be shared by Owner and User on the basis that the parties' respective GTMs operated over the Joint Trackage bear to total GTMs operated over the Joint Trackage for the twelve (12) month period immediately prior to the month work on the project is commenced; provided, that User shall not be required to share in the cost of any Changes in and/or Additions to the Joint Trackage under the provision of this

subparagraph (ii) for eighteen (18) months following UP's acquisition of control of SP as outlined in the application filed with the STB in Finance Docket No. 32760. The use of Joint Trackage by any third party shall be attributed to Owner for purposes of computing respective GTMs for purposes of this Section 5 (b).

6. Notices:

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

If intended for UP/SP:

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

If intended for User:

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

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

With a copy to:

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

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

7. <u>Settlement Agreement</u>.

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

8. Other Agreements.

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

[SIGNATURES APPEAR ON NEXT PAGE]

JUN 27'96 14:34 FR UPRR OMAHA LAW DEPT 402 271 5610 TO 913038125093 P 13-28

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

SOUTHERN PA	CIFIC TRANS	SPORTATION .
By: has	ofree 8	
BURLINGTON COMPANY	NORTHERN	RAILROAD
By: hts:		
THE ATCHISON RAILWAY COMP		SANTA FE
By:		

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JUN 27'96 04:12FM B/N SHOP SLPT 482 271 5616 TO 514824584352 P.13,13/28
JUN 27'96 14:54 FR UPRR OMAHA LAW DEPT 482 271 5616 TO 514824584352

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

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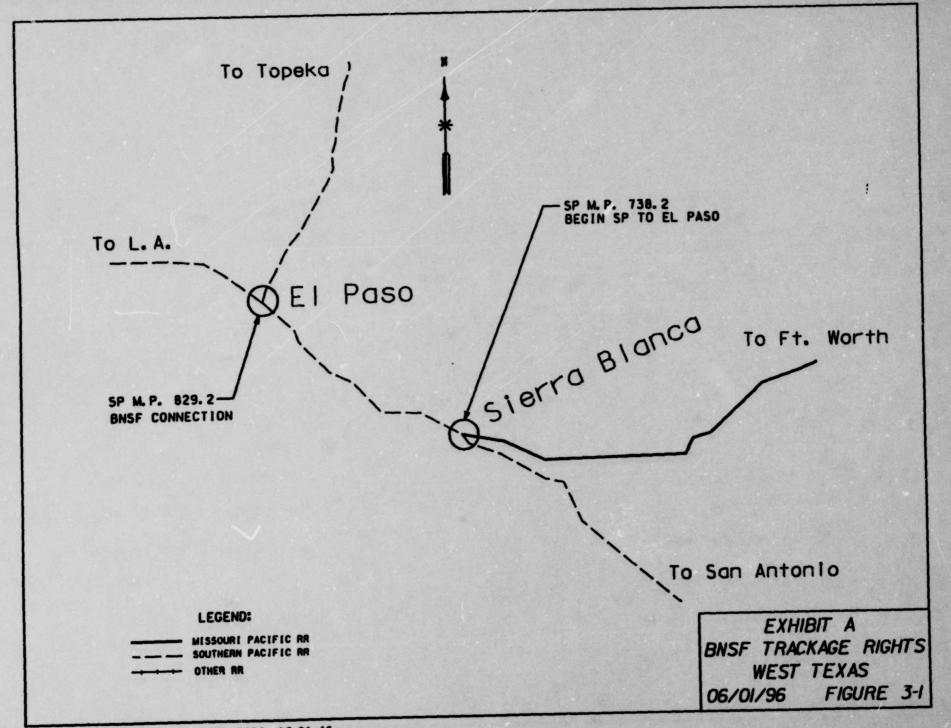


EXHIBIT "B" GENERAL CONDITIONS

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Section 1. DEFINITIONS

- 1.1 "Agreement" shall mean that certain agreement dated June 1, 1996 to which this Exhibit "B" is appended.
 - 1.2 "Annual" shall mean a calendar year.
- 1.3 "Car" shall mean one (1) rail car, provided, however, that each platform in an articulated rail car of two (2) or more platforms shall be counted as one (1) rail car, subject to modification by mutual agreement of the parties based upon changes in railroad technology.
- 1.4 "Changes in and/or Additions to" shall mean work projects and retirements, the cost of which is chargeable in whole or in part to Property Accounts during the term of this Agreement.
- 1.5 "Equipment" shall mean trains, locomotives, rail cars (loaded or empty), intermodal units (loaded or empty), cabooses, vehicles, and machinery which are capable of being operated on railroad tracks or on right-of-way for purpose of the maintenance or repair of such railroad tracks.
- 1.6 "GTM" shall mean gross ton mile which is the weight in tons for Equipment and lading transported over one (1) mile of track included in the Joint Trackage.
- 1.7 "GTM Handled Proportion" shall mean the GTMs handled over the Joint Trackage by or for a party divided by the total number of GTMs handled by or for all parties using the Joint Trackage, during the same period. For the purpose of computing such GTM's Handled Proportion, Equipment engaged in work service pertaining to construction, maintenance or operation of the Joint Trackage or Changes in and/or Additions to the Joint Trackage shall not be counted and GTMs of third parties shall be attributed to the Owner.

- 1.8 "Joint Trackage" shall mean the track structure of Owner as described in the Agreement including necessary right-of-way and all appurtenances, signals, communications, and facilities of Owner and all Changes in and/or Additions to said track structure now or in the future located as are required or desirable for the operation of the Equipment of the parties hereto.
 - 1.9 "Mill" shall mean one-tenth of a cent (\$0.001 US).
 - 1.10 "Owner" shall have the meaning given to it in the Agreement.
- 1.11 "Property Accounts" shall mean accounts so designated under the Uniform System of Accounts for Railroad Companies prescribed by the Interstate Commerce Commission, or any replacement of such system prescribed by the applicable federal regulatory agency, if any, and used by the parties hereto.
- 1.12 "STB" shall means the Surface Transportation Board of the United States
 Department of Transportation or any successor agency.
 - 1.13 "User" shall have the meaning given to it in the Agreement.

Section 2. MAINTENANCE, ADDITIONS, OPERATION, AND CONTROL

- Owner shall have sole charge of the maintenance and repair of the Joint Trackage with its own supervisors, labor, materials and equipment. Owner, from time to time, may make such Changes in and/or Additions to the Joint Trackage as shall be required by any law, rule, regulation or ordinance promulgated by any government body having jurisdiction, or as Owner, in its sole discretion, shall deem necessary, subject to Section 2.2. Such Changes in and/or Additions to the Joint Trackage shall become a part of the Joint Trackage or in the case of retirements shall be excluded from the Joint Trackage.
- Unless otherwise mitually agreed to by the parties in writing, Owner shall, (i) keep and maintain the Joint Trackage on a consistent basis at no less than the track standard designated in the timetable in effect on the date of the Agreement, including special instructions for the Joint Trackage as of the date of the Agreement, (ii) maintain at least the physical capacity of the Joint Trackage as of the date of the Agreement (i.e., number of main tracks, support tracks, signal systems, rail weight, line clearances, etc.), and (iii) be responsible for any Changes in and/or Additions to the Joint Trackage as shall be necessary to accommodate the traffic of Owner and User while maintaining existing service standards (including transit times) in effect on the date of the Agreement. In the event that User desires that the Joint Trackage be improved to a condition in excess of the standard set forth in this Section 2.2, or desires that other Changes in and/or Additions to be made to the Joint Trackage, Owner agrees to make

such Changes in and/or Additions to the Joint Trackage if funded in advance by User. Thereafter, such Changes in and/or Additions to the Joint Trackage shall become part of the Joint Trackage and shall be maintained by Owner in such improved condition.

- 2.3 Owner shall employ all persons necessary to construct, operate, maintain, repair and renew the Joint Trackage. Owner shall be bound to use reasonable and customary care, skill and diligence in the construction, operation, maintenance, repair and renewal of the Joint Trackage and in managing of the same. Owner shall make its best effort to ensure that User is given the same advance notice of maintenance plans and schedules as is provided to Owner's personnel.
- The trackage rights granted hereunder shall give User access to and joint use of the Joint Trackage equal to that of Owner. The management, operation (including dispatching) and maintenance of the Joint Trackage shall, at all times, be under the exclusive direction and control of Owner, the movement of Equipment over and along the Joint Trackage shall at all times be subject to the exclusive direction and control of Owner's authorized representatives and in accordance with such reasonable operating rules as Owner shall from time to time institute, but in the management, operation (including dispatching) and maintenance of the Joint Trackage, Owner and User shall be treated equally. All operating, dispatching and maintenance decisions by Owner affecting the movement of Equipment on the Joint Trackage shall be made pursuant to the BNSF-UP/SP Dispatching Protocols attached hereto as Attachment 1. User shall, at User's sole cost and expense, obtain, install and maintain necessary communication equipment to allow User's Equipment to communicate with Owner's dispatching and signaling facilities the same as Owner's trains so utilize. Owner shall consult with User prior to the adoption of new communication or signaling systems to be employed on the Joint Trackage, which have not theretofore been generally adopted in the railroad industry.
- 2.5 A Joint Service Committee ("Committee"), comprised of the chief transportation officers of Owner and User (or their designees) shall be established, and shall be responsible for establishing rules or standards as appropriate to ensure equitable and non-discriminatory treatment, appropriate maintenance and efficient joint use of the Joint Trackage. The Committee shall meet on a regular basis, but not less often than every three (3) months during the first year of operation under this Agreement, and thereafter when any party serves upon the other party thirty (30) days' written notice of its desire to meet to review the overall performance of Equipment on the Joint Trackage, conflicts, if any, experienced between Equipment of Owner and Equipment of User, grievances over the handling of particular Equipment or operational events, maintenance of the Joint Trackage, ways in which future conflicts may be minimized, ways of improving operations and maintenance of the Joint Trackage and such other relevant matters as the Committee may decide to consider. The Committee may issue standards or rules to prevent unnecessary interference or impairment of use

of the Joint Trackage by either party or otherwise ensure fair and equal treatment as between Owner and User. Either party may request a special meeting of the Committee on reasonable notice to the other. Informal telephonic conferences shall be held by the Committee where appropriate to address immediate concerns of either party. It is expected that the work on the Committee shall be undertaken in a spirit of mutual cooperation consistent with the principles expressed in the Agreement.

- 2.6 If the use of the Joint Trackage shall at any time be interrupted or traffic thereon or thereover be delayed for any cause, neither party shall have or make any claim against the other for loss, damage or expense caused by or resulting solely from such interruption or delay.
- 2.7 Owner may from time to time provide any track or tracks on the Joint Trackage other than those delineated in Exhibit A to the Agreement for use by User provided there shall at all times be afforded User a continuous route of equal utility for the operations of its Equipment between the termini of the Joint Trackage. When such tracks which are not part of the Joint Trackage are used as provided herein, the Agreement shall govern for purposes of direction and control and liability as if all movement had been made over the Joint Trackage.
- 2.8 Each party shall be responsible for furnishing, at its sole cost and expense, all labor, fuel and train and other supplies necessary for the operation of its own Equipment over the Joint Trackage. In the event a party does furnish such labor, fuel or train and other supplies to another party, the party receiving the same shall promptly, upon receipt of billing therefor, reimburse the party furnishing the same for its reasonable costs thereof, including customary additives.
- 2.9 User shall be responsible for the reporting and payment of any mileage, per diem, use or rental charges accruing on Equipment in User's account on the Joint Trackage. Except as may be specifically provided for in this Agreement, nothing herein contained is intended to change practices with respect to interchange of traffic between the parties or with other carriers on or along the Joint Trackage.
- 2.10 Except as otherwise may be provided in the Agreement, User shall operate its Equipment over the Joint Trackage with its own employees, but before said employees are assigned or permitted to operate Equipment over the Joint Trackage as herein provided, and from time to time thereafter as and when reasonably requested by Owner, they shall be required to pass the applicable rules examinations required by Owner of its own employees. Owner shall delegate to specified User's officers the conduct of such examinations in the event User chooses to conduct such examinations. If an Owner officer conducts such examinations of employees of User, User shall pay Owner a reasonable fee for each employee so examined, such fee to be mutually agreed upon by the parties from time to time in a separate agreement. Notwithstanding

any such examination, User shall be responsible for ensuring that its employees are qualified and have taken all such rules examinations. During the initial start-up period, User shall allow Owner's pilot, at User's sole cost and expense, to accompany User over the Joint Trackage as Owner may in its reasonable judgment deem necessary. Should Owner ever require a pilot on User's Equipment after the initial start-up period on a frequent basis, that matter shall be referred to the Committee for resolution.

....

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

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

2.12 If any Equipment of User is bad ordered enroute on the Joint Trackage and (i) it is necessary that it be set out, and (ii) only light repairs to the Equipment are required, such bad ordered Equipment shall be promptly repaired, and, thereafter, be promptly removed from the Joint Trackage by User. Owner may, upon request of User and at User's sole cost and expense, furnish the required labor and material and perform light repairs to make such bad ordered Equipment safe for movement. The employees and Equipment of Owner while in any manner so engaged or while enroute to or returning to Owner's terminal from such an assignment shall be considered Sole Employees (as hereinafter defined) of User and Sole Property (as hereinafter defined) of User. However, should Owner's employees after repairing such bad ordered Equipment for User move directly to perform service for Owner's benefit rather than return to Owner's terminal, then User's exclusive time and liability will end when Owner's employees depart for work to be performed for Owner's benefit. In the case of such repairs by Owner to freight cars in User's account, billing therefor shall be in

accordance with the Field and Office Manuals of the Interchange Rules, adopted by the Association of American Railroads ("AAR"), hereinafter called "Interchange Rules", in effect on the date of performance of the repairs. Owner shall then prepare and submit billing directly to and collect from the car owner for car owner responsibility items as determined under said Interchange Rules, and Owner shall prepare and submit billing directly to and collect from User for handling line responsibility items as determined under said interchange Rules. Owner also shall submit billing to and collect from User any charges for repair to freight cars that are User's car owner responsibility items as determined under said Interchange Rules, should said car owner refuse or otherwise fail to make payment therefor. Repairs to locomotives shall be billed as provided for in Section 3 of these General Conditions.

- 2.13 If Equipment of User shall become derailed, wrecked, or otherwise disabled while upon the Joint Trackage, it shall be rerailed or cleared by Owner, except that employees of User may rerail User's derailed Equipment on the Joint Trackage whenever use of motorized on or off track equipment is not required; however, in any such case, employees of User shall consult with and be governed by the directions of Owner. Owner reserves the right to rerail Equipment of User when, in the judgment of Owner, Owner deems it advisable to do so to minimize delays and interruptions to train movement. The reasonable costs and expenses of rerailing or clearing derailed, wrecked or disabled Equipment shall be borne by the parties in accordance with Section 5 of these General Conditions. Services provided under this section shall be billed in accordance with Section 3 of these General Conditions.
- 2.14 In the event Equipment of User shall be forced to stop on the Joint Trackage, and such stoppage is due to insufficient hours of service remaining among User's employees, or due to mechanical failure of User's Equipment (other than bad ordered Equipment subject to light repairs pursuant to Section 2.12), or to any other cause not resulting from an accident or derailment (including the failure of User to promptly repair and clear bad ordered Equipment pursuant to Section 2.12), and such Equipment is unable to proceed, or if a train of User fails to maintain the speed required by Owner on the Joint Trackage, or if, in emergencies, disabled Equipment is set out of User's trains on the Joint Trackage, Owner shall have the option to furnish motive power or such other assistance (including but not limited to the right to recrew User's train) as may be necessary to haul, help or push such Equipment, or to properly move the disabled Equipment off the Joint Trackage. The reasonable costs and expenses of rendering such assistance shall be borne by User. Services provided under this section shall be billed in accordance with Section 3 of these General Conditions.
- 2.15 User shall pay to Owner reasonable expenses incurred by Owner in the issuance of timetables made necessary solely by changes in the running time of the trains of User over the Joint Trackage. If changes in running time of trains of Owner or

third parties, as well as those of User, require the issuance of timetables, then User shall pay to Owner that proportion of the expenses incurred that one tears to the total number of parties changing the running time of their trains. If changes in running time of trains of Owner or third parties, but not those of User, require the issuance of timetables, then User shall not be required to pay a proportion of the expenses incurred in connection therewith.

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

Section 3. BILLING

- 3.1 Billing shall be accomplished on the basis of data contained in a billing form mutually agreed to between the parties. Such billing forms shall contain sufficient detail to permit computation of payments to be made hereunder. Billing shall be prepared according to the rules, additives, and equipment rental rates as published by the Owner. User shall pay to Owner at the Office of the Treasurer of Owner, or at such other location as Owner may from time to time designate in writing, all the compensation and charges of every name and nature which in and by the Agreement User is required to pay in lawful money of the United States within staty (60) days after the rendition of bills therefor. Bills shall contain a statement of the amount due on account of the expenses incurred, properties and facilities provided and services rendered during the billing period.
- 3.2 Errors or disputed items in any bill shall not be deemed a valid excuse for delaying payment, but shall be paid subject to subsequent adjustment; provided, no exception to any bill shall be honored, recognized or considered if filed after the expiration of three (3) years from the last day of the calendar month during which the bill is rendered and no bill shall be rendered later than three (3) years (i) after the last day of the calendar month in which the expense covered thereby is incurred, or (ii) in the case of claims disputed as to amount or liability, after the amount is settled and/or the liability is established. This provision shall not limit the retroactive adjustment of billing made pursuant to exception taken to original accounting by or under authority of the STB or retroactive adjustment of wage rates and settlement of wage claims.
- 3.3 So much of the books, accounts and records of each party hereto as are related to the subject matter of this Agreement shall at all reasonable times be open to inspection by the authorized representatives and agents of the parties hereto. All books, accounts, and records shall be maintained to furnish readily full information for each item in accordance with any applicable laws or regulations.

- 3.4 Should any payment become payable by Owner to User under the Agreement, the provisions of Sections 3.1 and 3.2 of these General Conditions shall apply with User as the billing party and Owner as the paying party.
- 3.5 Either party hereto may assign any receivables due it under this Agreement; provided, however, that such assignments shall not relieve the assignor of any rights or obligations under the Agreement.

Section 4. COMPLIANCE WITH LAWS

- 4.1 With respect to operation of Equipment on the Joint Trackage, each party shall comply with all applicable federal, state and local laws, rules, regulations, orders, decisions and ordinances ("Standards"), and if any failure on the part of any party to so comply shall result in a fine, penalty, cost or charge being imposed or assessed on or against another party, such other party shall give prompt notice to the failing party and the failing party shall promptly reimburse and indemnify the other party for such fine, penalty, cost or charge and all expenses and attorneys' fees incurred in connection therewith, and shall upon request of the other party defend such action free of cost, charge and expense to the other party.
- 4.2 User agrees to comply fully with all applicable Standards concerning "hazardous waste" and "hazardous substances" ("Hazardous Materials"). User covenants that it shall not treat or dispose of Hazardous Materials on the Joint Trackage. User further agrees to furnish Owner (if requested) with proof, satisfactory to Owner, that User is in such compliance.

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

In the event of a Derailment, Owner shall assume responsibility for cleaning up any release of Hazardous Materials from User's Equipment in accordance with all federal, state, or local regulatory requirements. User may have representatives at the scene of the Derailment to observe and provide information and recommendations concerning the characteristics of Hazardous Materials release and the cleanup effort. Such costs shall be borne in accordance with Section 5 of these General Conditions.

If a Hazardous Materials release caused by a derailment involving Equipment of User, or on a train operated by User, results in contamination of real property or water

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

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

- 4.3 The total cost of clearing a Derailment, cleaning up any Hazardous Materials released during such Derailment, and/or repairing the Joint Trackage or any other property damaged thereby shall be borne by the party or parties liable therefor in accordance with Section 5 of these General Conditions.
- 4.4 In the event of release of Hazardous Materials caused by faulty Equipment or third parties, cleanup will be conducted as stated in Sections 4.2 and 4.3 of these General Conditions.

Section 5. LIABILITY

5.1 General. The provisions of this Section 5 shall apply only as between the parties hereto and are solely for their benefit. Nothing herein is intended to be for the benefit of any person or entity other than the parties hereto. It is the explicit intention of the parties hereto that no person or entity other than the parties hereto is or shall be entitled to bring any action to enforce any provision hereof against any of the partes hereto, and the assumptions, indemnities, covenants, undertakings and agreements set forth herein shall be solely for the benefit of, and shall be enforceable only by, the parties hereto. Notwithstanding anything contained in this Section 5, no provisions hereof shall be deemed to deprive Owner or User of the right to enforce or shall otherwise restrict any remedies to which they would otherwise be entitled under other provisions of this Agreement as a result of the other party's failure to perform or observe any other obligation or duty created by this Agreement. The provisions of this Section 5 shall apply as between the parties hereto irrespective of the terms of any other agreements between the parties hereto and other railroads using the Joint

Trackage, and the allocation of liabilities provided for herein shall control as between the parties hereto.

- 5.2 <u>Definitions and Covenants</u>. The parties agree that for the purposes of this Section 5:
 - (a) The term "Employee(s)" of a party shall mean all officers, agents, employees and contractors of that party. Such Employees shall be treated either as "Sole Employees" or "Joint Employees", as hereinafter specified;
 - (b) "Sole Employees" and "Sole Property" shall mean one or more Employees, Equipment, tools and other equipment and machinery while engaged in, en route to or from, or otherwise on duty incident to performing service for the exclusive benefit of one party. Pilots furnished by Owner to assist in operating Equipment of User shall be considered the Sole Employees of User while engaged in such operations. Equipment shall be deemed to be the Sole Property of the party receiving the same at such time as deemed interchanged under AAR rules or applicable interchange agreements, or when such party is responsible for the car hire or per diem for the Equipment under agreement between the parties;
 - (c) "Joint Employee" shall mean one or more Employees while engaged in maintaining, repairing, constructing, renewing, removing, inspecting or managing the Joint Trackage or making Changes in and/or Additions to the Joint Trackage for the benefit of both of the parties hereto, or while preparing to engage in, en route to or from, or otherwise on duty incident to performing such service for the benefit of both parties;
 - (d) "Joint Property" shall mean the Joint Trackage and all appurtenances thereto, and all Equipment, tools and other equipment and machinery while engaged in maintaining, repairing, constructing, renewing, removing, inspecting, managing or making Changes in and/or Additions to the Joint Trackage for the benefit of both of the parties hereto, or while being prepared to engage in, en route to or from, or otherwise incident to performing such service:
 - (e) "Loss and/or Damage" shall mean injury to or death of any person, including Employees of the parties hereto, and loss or damage to any property, including property of the partes hereto and property being transported by the parties, which arises out of an incident occurring on, the Joint Trackage and shall include liability for any and all claims, suits.

demands, judgments and damages resulting from or arising out of such injury, death, loss or damage, except liability for punitive and exemplary damages as specified in the next following sentence. Loss and/or Damage shall include all costs and expenses incidental to any claims, suits, demands and judgments, including attorneys' fees, court costs and other costs of investigation and litigation. Loss and/or Damage shall further include the expense of clearing wrecked or derailed Equipment and the costs of environmental protection, mitigation or clean up necessitated by such wreck or derailment and shall include any liabilities for any third-party claims for personal injury or death, property damage, natural resource damage, or any penalties, judgments or fines associated with a release of any contaminants resulting from such wreck or derailment. Loss and/or Damage shall be reduced by any amount recovered from third parties;

- (f) Operating Employees of Owner whose service may be jointly used by the parties hereto for the movement of trains over the Joint Trackage, including, but not limited to, train dispatchers, train order operators, operator clerks and watchmen shall at the time of performing their services be deemed to be Sole Employees of the party hereto for whose benefit said services may be separately rendered (during the time they are so separately rendered) and be deemed to be Joint Employees of the parties hereto at such time as their services may be rendered for the parties' joint benefit;
- (g) All Employees, Equipment, tools and other equipment and machinery other than as described in (b), (c), (d) or (f) above or in Section 5.4. shall be deemed the Sole Employees of the employing party and the Sole Property of the using party;
- (h) Any railroad not a party to this Agreement heretofore or hereafter admitted to the use of any portion of the Joint Trackage, shall, as between the parties hereto, be regarded in the same light as a third party. Without limiting the generality of the foregoing, neither of the parties hereto assumes any responsibility to the other under the provisions of this Agreement for any Loss and/or Damage occasioned by the acts or omissions of any employees of any such other railroad, or for any Loss and/or Damage which such other railroad shall be obligated to assume in whole or in part pursuant to law or any agreement relating to such other railroad's use of any portion of the Joint Trackage;
- (i) For the purpose of this Section 5, Equipment of foreign lines being detoured over the Joint Trackage, and all persons other than Joint

Employees engaged in moving such Equipment, shall be considered the Equipment and Employees of the party hereto under whose detour agreement or other auspices such movement is being made.

- 5.3 Reimbursement and Defense. The parties agree that:
- (a) Each party hereto shall pay promptly Loss and/or Damage for which such party shall be liable under the provisions of this Section 5, and shall indemnify the other party against such Loss and/or Damage, including reasonable attorneys' fees and costs. If any suit or suits shall be brought against either of the parties hereto and any judgment or judgment shall be recovered which said party is compelled to pay, and the other party shall under the provisions of the Agreement be solely liable therefor, then the party which is so liable shall promptly repay on demand to the other party paying the same any monies which it may have been required to pay, whether in the way of Loss and/or Damage, costs, fees or other expenses; and if the Loss and/or Damage in such case or cases is joint or allocated between the parties to the Agreement, the party defendant paying the same or any costs, fees or other expenses shall be reimbursed by the other party as allocated pursuant to this Agreement;
- (b) Each party covenants and agrees with the other party that it will pay for all Loss and/or Damage, both as to persons and property, and related costs which it has herein assumed, or agreed to pay, the judgment of any court in a suit by third party or parties to the contrary notwithstanding, and will forever indemnify and save harmless the other party, its successors and assigns, from and against all liability and claims therefor, or by reason thereof, and will pay, satisfy and discharge all judgments that may be rendered by reason thereof, and all costs, charges and expenses incident thereto;
- (c) Each party hereto shall have the sole right to settle, or cause to be settled for it, all claims for Loss and/or Damage for which such party shall be solely liable under the provisions of this Section 5, and the sole right to defend or cause to be defended all suits for the recovery of any such Loss and/or Damage for which such party shall be solely liable under the provisions of this Section 5;
- (d) User shall provide written notice to Owner of any accidents or events resulting in Loss and/or Damage within seven (7) days of its discovery or receipt of notification of such occurrence;

- In the event both parties hereto may be liable for any Loss and/or (e) Damage under the provisions of this Section 5 ("Co-Liable"), and the same shall be settled by a voluntary payment of money or other valuable consideration by one of the parties Co-Liable therefor, release from liability shall be taken to and in the name of all the parties so liable: however, no such settlement in excess of the sum of One Hundred Thousand Dollars (\$100,000) shall be made by or for any party Co-Liable therefor without the written consent of the other parties so liable, but any settlement made by any party in consideration of One Hundred Thousand Dollars (\$100,000) or a lesser sum shall be binding upon the other parties and allocated in accordance with Section 5.5; and no party shall unreasonably withhold its consent to a settlement proposed by the other party; provided, however, that failure by a party to secure consent from the other shall not release such other party to the extent the party who failed to obtain such consent demonstrates that the other party was not prejudiced by such failure.
- In case a claim or suit shall be commenced against any party hereto for or (f) on account of Loss and/or Damage for which another party hereto is or may be solely liable or Co-Liable under the provisions of this Section 5. the party against whom such claim or suit is commenced shall give to such other party prompt notice in writing of the pendency of such claim or suit, and thereupon such other party shall assume or join in the defense of such claim or suit as follows: If the claim or suit involves Loss and/or Damage to the Sole Employees or Sole Property of a party or its invitee or property in its care, custody or control, that party shall assume and control the investigation and defense of such claim or suit if the claim or suit involves Loss and/or Damage to third parties. Joint Employees or the Joint Trackage, the party whose Sole Employees or Equipment were involved in the incident shall investigate and defend such claim or suit and if such claim or suit involves Loss and/or Damage to third parties. Joint Employees or the Joint Trackage and neither or both party's Equipment and Sole Employees were involved in the incident. Owner shall investigate and defend such claim or suit; provided that the other party also may participate in the defense of any of the foregoing if it may have liability as a result of such incident
- (g) No party hereto shall be conclusively bound by any judgments against the other party, unless the former party shall have had reasonable notice requiring or permitting it to investigate and defend and reasonable opportunity to make such defense. When such notice and opportunity shall have been given, the party so notified and the other party shall be conclusively bound by the judgment as to all matters which could have

been litigated in such suit, including without limitation a determination of the relative or comparative fault of each.

5.4 Wrecks and Derailment. The cost and expense of repairing bad ordered Equipment, clearing wrecks or otherwise disabled Equipment or rerailing Equipment (and the costs of repair or renewal of damaged Joint Trackage or adjacent properties) shall be borne by the party whose Equipment was wrecked, disabled, or derailed or caused such damage. All Employees or Equipment, while engaged in, en route to or from, or otherwise incident to operating wrecker or work trains clearing wrecks, disabled Equipment or Derailments or engaged in repair or renewal of the Joint Trackage subsequent to any such wreck, disability or Derailment, shall be deemed to be Sole Employees and/or Sole Property of the party whose Equipment was wrecked, disabled or derailed. However, such Employees or Equipment, while en route from performing such clearing of wrecks, disabled Equipment or Derailments or repairing or renewing the Joint Trackage to perform another type of service, shall not be deemed to be performing service incident to the instant wreck, disability or Derailment.

5.5 Allocation.

- (a) Each party shall bear all costs of Loss and/or Damage to its Sole Employees or its Sole Property, or property in its care, custody or control or its invitees without regard to which party was at fault.
- (b) Loss and/or Damage to third parties (i.e., any person or entity other than a party hereto, a Sole Employee of either party, a Joint Employee or an invitee of either party) or their property, to Joint Employees or their property or to Joint Property shall be borne by the parties hereto as follows:
 - (i) If the Loss and/or Damage is attributable to the acts or omissions of only one party hereto, that party shall bear and pay all of such Loss and/or Damage.
 - (ii) If such Loss and/or Damage is attributable to the acts or omissions of more than one party hereto, such Loss and/or Damage shall be borne and paid by those parties in accordance with a comparative negligence standard, whereby each such party shall bear and pay a portion of the Loss and/or Damage equal to the degree of causative fault or percentage of responsibility for the Loss and/or Damage attributable to that party without regard to laws limiting recovery if one party is more than fifty percent (50%) at fault.

- (iii) Loss and/or Damage to third parties or Joint Employees occurring in such a way that it cannot be determined how such Loss and/or Damage came about shall be apportioned equally between the parties, provided that, without limitation, User shall not bear or incur any liability for claims, suits, demands, judgments, losses or damages resulting from environmental contamination of or hazardous material on or released from the Joint Trackage, except contamination or a release of hazardous materials from User's own Equipment or caused by or arising from the actions or omissions of User or User's Employees, and then only in accordance with the other provisions hereof.
- (c) The parties agree that the characterization herein of certain Employees as "Sole Employees" or "Joint Employees" is only for the purpose of allocating Loss and/or Damage suffered by those Employees. Except as specified in subsection (a) of this Section 5.5. (which provides for the allocation of certain Loss and/or Damage between the parties without regard to fault), no party shall be liable for the acts or omissions (negligent or otherwise) of any other party's Employee.
- 5.6 OWNER AND USER EXPRESSLY INTEND THAT WHERE ONE PARTY IS TO INDEMNIFY THE OTHER PURSUANT TO THE TERMS OF THIS AGREEMENT, SUCH INDEMNITY SHALL INCLUDE (1) INDEMNITY FOR THE NEGLIGENCE OR ALLEGED NEGLIGENCE, WHETHER ACTIVE OR PASSIVE, OF THE INDEMNIFIED PARTY WHERE THAT NEGLIGENCE IS A CAUSE OF THE LOSS OR DAMAGE: (2) INDEMNITY FOR STRICT LIABILITY OF THE INDEMNIFIED PARTY RESULTING FROM A VIOLATION OR ALLEGED VIOLATION OF ANY FEDERAL, STATE OR LOCAL LAW OR REGULATION BY THE INDEMNIFIED PARTY, INCLUDING BUT NOT LIMITED TO THE FEDERAL EMPLOYERS LIABILITY ACT ("FELA"), THE SAFETY APPLIANCE ACT, THE BOILER INSPECTION ACT, THE OCCUPATIONAL SAFETY AND HEALTH ACT ("OSHA"), THE RESOURCE CONSERVATION AND RECOVERY ACT ("RCRA"), THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT ("CERCLA"). THE CLEAN WATER ACT ("CWA"), THE OIL POLLUTION ACT ("OPA"), AND ANY SIMILAR STATE STATUTE IMPOSING OR IMPLEMENTING SIMILAR STANDARDS: AND (3) INDEMNITY FOR ACTS OR ALLEGED ACTS OF GROSS NEGLIGENCE OF THE INDEMNIFIED PARTY, OR OTHER CONDUCT ON THE PART OF THE INDEMNIFIED PARTY FOR WHICH PUNITIVE DAMAGES MIGHT BE SOUGHT.

Section 6. ARBITRATION

6.1 If at any time a question or controversy shall arise between the parties hereto in connection with the Agreement upon which the parties cannot agree, such question or controversy shall be submitted to and settled by arbitration. Unless other

procedures are agreed to by the parties, arbitration between the parties pursuant to this Section 6 shall be governed by the rules and procedures set forth in this Section 6. The parties acknowledge that other procedures have been agreed to for resolution of disputes concerning compliance with the BNSF-UP/SP Dispatching Protocols (attached hereto as Attachment 1) which procedures are set forth in Paragraph 13 thereof.

- 6.2 If the parties to the dispute are able to agree upon a single competent and disinterested arbitrator within twenty (20) days after written notice by one party of its desire for arbitration to the other party, then the question or controversy shall be submitted to and settled by that single arbitrator. Otherwise, any party (the notifying party) may notify the other party (the noticed party) in writing of its request for arbitration and nominating one arbitrator. Within twenty (20) days after receipt of said notice, the noticed party shall appoint an arbitrator and notify the notifying party in writing of such appointment. Should the noticed party fail within twenty (20) days after receipt of such notice to name 's arbitrator, said arbitrator may be appointed by the Chief Judge (or acting Chief Judge) of the United States District Court for the District of Columbia upon application by either party after ten (10) days' written notice to the other party. The two arbitrators so chosen shall select one additional arbitrator to complete the board. If the arbitrators so chosen fail to agree upon an additional arbitrator, the same shall, upon application of a party, be appointed by said judge in the manner heretofore stated.
- 6.3 Upon selection of the arbitrator(s), said arbitrator(s) shall, with reasonable diligence, determine the questions as disclosed in said notice of arbitration, shall give both parties reasonable notice of the time and place (of which the arbitrator(s) shall be the judge) of hearing evidence and argument, may take such evidence as the arbitrator(s) shall deem reasonable or as either party may submit with witnesses required to be sworn, and hear arguments of counsel or others. If an arbitrator declines or fails to act, the party (or parties in the case of a single arbitrator) by whom the arbitrator was chosen or said judge shall appoint another to act in the arbitrator's place.
- 6.4 After considering all evidence, testimony and arguments, said single arbitrator or the majority of said board of arbitrators shall promptly state such decision or award and the reasoning for such decision or award in writing which shall be final, binding, and conclusive on all parties to the arbitration when delivered to them. The award rendered by the arbitrator(s) may be entered as a judgment in any court having jurisdiction thereof and enforced as between the parties without further evidentiary proceeding, the same as entered by the court at the conclusion of a judicial proceeding in which no appeal was taken. Until the arbitrator(s) shall issue the first decision or award upon any question submitted for arbitration, performance under the Agreement shall continue in the manner and form existing prior to the rise of such question. After delivery of said first decision or award, each party shall forthwith comply with said first decision or award immediately after receiving it.

- 6.5 Each party to the arbitration shall pay all compensation, costs, and expenses of the arbitrator appointed in its behalf and all fees and expenses of its own witnesses, exhibits, and counsel. The compensation, cost, and expenses of the single arbitrator or the additional arbitrator in the board of arbitrators shall be paid in equal shares by all partes to the arbitration.
- 6.6 The parties may obtain discovery and offer evidence in accordance with the Federal Rules of Civil Procedure Rules 26 37, and Federal Rules of Evidence, as each may be amended from time to time.
- 6.7 Interest computed annually, at a rate equal to the Prime Rate plus two (2) percentage points, shall be applied to any and all arbitrator's awards requiring the payment of money and shall be calculated from thirty (30) days following the date of the applicable arbitration decision. The term "Prime Rate" shall mean the minimum commercial lending rate charged by banks to their most credit-worthy customers for short-term loans, as published daily in the Wall Street Journal.

Section 7. GOVERNMENTAL APPROVAL and ABANDONMENT

- 7.1 Owner and User shall, at their respective cost and expense, initiate by appropriate application or petition and thereafter diligently prosecute proceedings for the procurement of all necessary consent, approval or authority from any governmental agency for the sanction of the Agreement and the operations to be carried on or conducted by User thereunder. User and Owner agree to cooperate fully to procure all such necessary consent, approval or authority.
- 7.2 In the event Owner shall be involuntarily dispossessed, including by threat of condemnation by competent public authority, of the right to operate upon and maintain any portion of its Joint Trackage and Owner fails or declines to replace said Joint Trackage, Owner shall have no obligation hereunder to provide tracks in replacement of such Joint Trackage for User's use, and User shall have and shall make no claim of any kind, legal or otherwise, against Owner for failure to provide such Joint Trackage for User's use.
- 7.3 To the extent that Owner may lawfully do so, Owner reserves to itself the exclusive right, exercisable at any time during the life of the Agreement without concurrence of User, to elect to abandon all or any part of the Joint Trackage by giving six (6) months' prior written notice to User of its intention so to do ("Notice of Abandonment").

Owner shall, concurrent with its Notice of Abandonment, if legally able to do so, give to User the option to purchase the part or parts of the Joint Trackage thereof to be abandoned at the Net Liquidation Value thereof, on the date of said notice. "Net

Liquidation Value" shall mean fair market value of land and salvage value of track components and other facilities less estimated cost of removal. User shall have three (3) months from the date of receipt of Owner's notice to exercise its option and shall evidence the exercise of its option by giving Owner written notice thereof. Thereafter User shall immediately make appropriate application to secure all necessary governmental authority for such transaction. Within thirty (30) days following the effective date of all requisite governmental approval of the transaction, User shall pay to Owner the amount of money required to purchase said Joint Trackage to be abandoned at the aforesaid Net Liquidation Value. Upon the receipt of payment of such sum, the Agreement shall terminate as to the part of the Joint Trackage so purchased by User. Contemporaneously with such payment, by instrument or instruments, Owner shall convey and assign by good and sufficient quit claim deed or deeds, bills of sale or other instruments, all of Owner's right, title, interest and equity, in and to the Joint Trackage so purchased. Owner agrees that it shall promptly take all necessary action to obtain from the trustees of its mortgages all releases or satisfactions covering the same and shall deliver to User such instruments.

If User fails to exercise the option herein granted within the time and in the manner above specified, Owner may forthwith proceed free of all obligation to User to abandon the portion of Joint Trackage or make appropriate application, if necessary, to secure all necessary governmental authority for such abandonment. User agrees that at such time it shall concurrently make application for all necessary governmental authority for abandonment of its right to operate over such Joint Trackage. The Agreement shall terminate as to the section of Joint Trackage so abandoned upon the effective date of such approval by governmental authority.

7.4 Owner and User each shall be responsible for and shall bear labor claims, and employee protection payable to, its own respective employees (and employees of its respective affiliated companies) including any amounts that either Owner or User may be required to pay to its own respective employees pursuant to labor protective conditions imposed by the STB.

Section 8. CATASTROPHIC EXPENSE

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Catastrophic expense to the Joint Trackage, such as, but not limited to, that arising from flood, earthquake or acts of God, etc., in excess of One Hundred Thousand Dollars (\$100,000) for each occurrence shall be billed in addition to the GTM Rates and apportioned on the basis of the parties' GTMs operated over the Joint Trackage for the twelve (12) month period ending immediately prior to the first day of the month of occurrence.

Section 9. TERM

9.1 The Agreement shall be effective upon execution for a term of ninety-nine (99) years, provided, however, the trackage rights granted to User pursuant to the Agreement shall not become effective until the acquisition of control of SP by Up pursuant to STB Finance Docket No. 32760, and provided also that in the event the acquisition by UP of control of SP is finally disapproved by the STB and the time for any appeal has passed or, if the disapproval was affirmed on appeal, the trackage rights granted pursuant to the Agreement shall be of no force and effect and the Agreement shall terminate. User shall have the right to terminate the Agreement upon twelve (12) months' prior written notice to Owner. Liabilities created under this Agreement, if it becomes effective and is later terminated, shall survive such termination.

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9.2 Upon termination of the Agreement, or any partial termination, as the applicable case may be, however the same may occur. User shall be released from any and all manner of obligations and shall be deemed to have forever relinquished. abandoned, surrendered and renounced any and all right possessed by User to operate over that part of the Joint Trackage to which such termination applied, and as to such part, User shall forever release and discharge Owner of and from any and all manner of obligations, claims, demands, causes of action, or suits which User might have, or which might subsequently accrue to User growing out of or in any manner connected with, directly or indirectly, the contractual obligations of Owner under the Agreement, in all events provided, however, the aforesaid relinquishment abandonment, surrender, renunciation, release and discharge by User shall not in any case affect any of the rights and obligations of either Owner or User which may have accrued, or liabilities accrued or otherwise, which may have arisen prior to such termination or partial termination. Upon any termination, Owner shall remove from Owner's right of way any connecting track, and any exclusive facility of User, at User's expense with salvage to be delivered to and retained by User. Upon any partial termination of the Agreement, however the same may occur, the terms and conditions hereof shall continue and remain in full force and effect for the balance of the Joint Trackage.

Section 10. ASSIGNMENT

Except as provided in Section 3.5 and in the sentence immediately following, the Agreement and any rights granted hereunder may not be assigned in whole or in part by Owner or User without the prior written consent of the other. The Agreement may be assigned by Owner or User without the prior written consent of the other only (i) as a result of a merger, corporate reorganization, consolidation, change of control or sale of substantially all of its assets, or (ii) to an affiliate of the assigning party where the term "affiliate" means a corporation, partnership or other entity controlled,

controlling or under common control with the assigning party. In the event of an authorized assignment, the Agreement and the operating rights hereunder shall be binding upon the successors and assigns of the parties.

Section 11. DEFAULT

- 11.1 Notwithstanding the provisions of Section 3 of these General Conditions, either party hereto claiming default of any of the provisions of the Agreement (including these General Conditions) shall furnish notice and written demand to the other party for performance or compliance with the covenant or condition of the Agreement claimed to be in default, which notice shall specify wherein and in what respect such default is claimed to exist and shall specify the particular Section or Sections of the Agreement under which such claim of default is made.
- 11.2 If the default shall continue for an additional period of thirty (30) days after receipt of such written notice and demand, and such default has not been remedied within said thirty (30) day period, or reasonable steps have not been nor continue to be taken to remedy a failure or default which cannot reasonably be remedied within said thirty (30) day period, and such default relates to the provisions and terms of the Agreement, either party shall resort to binding arbitration provided that the arbitrator shall not have the authority to amend, modify or terminate the Agreement.
- 11.3 Failure of a party to claim a default shall not constitute a waiver of such default. Either party hereto entitled to claim default may waive any such default, but no action by such party in waiving such default shall extend to or be taken to effect any subsequent defaults or impair the rights of either party hereto resulting therefrom.

Section 12. OTHER CONSIDERATIONS

- 12.1 The Agreement and each and every provision hereof is for the exclusive benefit of the parties hereto and not for the benefit of any third party. Nothing herein contained shall be taken as creating or increasing any right in any third person to recover by way of damages or otherwise against any of the parties hereto.
- 12.2 If any covenant or provision of the Agreement not material to the right of User to use the Joint Trackage shall be adjudged void, such adjudication shall not affect the validity, obligation or performance of any other covenant or provision which is in itself valid. No controversy concerning any covenant or provision shall delay the performance of any other covenant or provision. Should any covenant or provision of the Agreement be adjudged void, the parties shall make such other arrangements as will effect the purposes and intent of the Agreement.

- 12.3 In the event there shall be any conflict between the provisions of these General Conditions and the Agreement, the provisions of the Agreement shall prevail, except that the definition of Joint Trackage set forth in Section 1.7 of these General Conditions shall prevail.
- 12.4 All section headings are inserted for convenience only and shall not affect any construction or interpretation of the Agreement.
- 12.5 Reference to any agency or other organization shall include any successor agency or organization, and reference to any index or methodology (e.g., RCAF-U, URCS, etc.), if such index or methodology ceases to exist or is no longer available, shall include any substantially similar index or methodology selected by the parties or, if the parties fail to agree on such, one determined by binding arbitration under Section 6 of these General Conditions.

END OF EXHIBIT "B"

BNSF - UP/SP DISPATCHING PROTOCOLS

As agreed: Dave Cathon - BNSF

Heak Jay - SP Steve Barkley - UP

- 1. Scope: These protocols apply on all rail line argments where Burlington Northern Railroad Company or The Atchison, Topoka & Senta 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: BNSP 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 senset, the owner will make available computer terminals, facilities or espablishes 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.
- 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 estegory 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 expabilities 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 planted 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 certific more than the other.

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- Specific Instructions: The owner will permit the tenent to transmit instructions
 regarding the requirements of specific trains and shipments to designated dispatching
 center employees responsible for headling those trains.
- 7. Train Princities/Run These 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 mains 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. Empry to Joint Trackage: At points where tenent trains enter joint trackage, entry will be provided by the owner on a first-come, first-corved 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.
- Access to Dispatching Centery: Appropriate officials of either railroad will be admitted at any time to dispatching facilities and personnel responsible for dispatching joint trackage to review the headling of trains on joint trackage and will be provided an office in the other railroad's dispatching conter (although both subroads 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.

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- 11. Performance Measurement: BNSF and UP/SP will cooperate to develop train performance evaluation methods under which train performance of tenent trains on joint trackage segments can be compared to train performance of the owner's trains on the same segments for the same train energy and priority.
- 12. Permanel Incentives and Evaluation: In evaluating the performance of employees and supervisors responsible for dispatching joint stackage, 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 bouners, 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.
- Disagramments: The designated councit supervisors are expected to mise questions, disagramments, 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 astisfaction 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. Medifications: As the ultimate objective of these protocols is the equal, flexible and efficient handling of all trains of both suitouds on joint trackage, these protocols may be medified at any time by muonal agreement, consistent with that objective.

ATTACHMENT B

EL PASO, TEXAS

11/95

ATTACHMENT C



CHEMICAL MANUFACTURERS ASSOCIATION

June 10, 1999

Honorable Vernon A. Williams Secretary Surface Transportation Board 1925 K Street, N.W. Room 711 Washington, DC 20423

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

Dear Secretary Williams:

The Chemical Manufacturers Association ("CMA") strongly supports the Petition for Clarification filed by the Burlington Northern and Santa Fe Railway Company ("BNSF") on May 12, 1999. The "new facilities" and "transload" conditions, which the Surface Transportation Board ("Board") imposed in UP/SP merger Decision No. 44, clearly allow BNSF to serve the new transload facility of Four Star Sugar Co. ("Four Star") at El Paso, Texas. In addition to resolving that particular situation, the Petition for Clarification also gives the Board the opportunity to provide carriers and shippers with guidance on how its merger conditions are to be interpreted.

CMA is a non-profit trade association whose member companies account for 90% of the productive capacity for basic industrial chemicals in the United States. (Four Star is not a CMA member.) The chemical industry depends heavily on railroads for the safe and efficient transportation of raw materials and finished products, which typically move in tank cars and covered hopper cars that are owned or leased by shippers. CMA was a party of record in the Board's original UP/SP merger docket.

Four Star's El Paso facility is plainly "on" a trackage rights line, even if it is served via an industrial lead track, spur, or yard track. Such facilities are not unusual in the rail industry. To the contrary, they constitute key portions of the rail industry's infrastructure, especially in the areas that are most likely to attract new industrial facilities and new transloading operations.

CMA requests that the Board grant the Petition for Clarification. While BNSF's trackage rights maintained direct rail-to-rail competition at two-to-one points, the Board also expected to replicate important forms of "indirect" competition by means of the conditions at issue in the Petition for Clarification. Those conditions were designed to foster competition for the siting of new rail-served facilities and for the transloading of commodities to or from the rail system.



The public interest is not well served if Board-imposed merger conditions are subsequently construed so narrowly that their purpose is frustrated. CMA respectfully requests the Board to apply the new facilities condition and transload condition to allow BNSF to serve Four Star's facility at El Paso. Beyond resolving that specific situation, the Board should clarify that its pro-competitive merger conditions will be interpreted to provide meaningful alternatives for rail customers.

Sincerely

Randy Speight

Co-Leader, Distribution Team

cc: Erika Z. Jones, Esq. Arvid E. Roach II, Esq.

ATTACHMENT D



June 9, 1999

The Honorable Vernon Williams Surface transportation Board 1925 K Street N. W. Washington, D. C. 20423 – 0001

My name is Lee Williams I am Director of Logistics for Roquette America, Inc. Roquette is a corn wet miller with manufacturing facilities in Rookuk, IA and Gurnee, IL. We produce in excess of 2 billion pounds of finished products each year. Substantial portions of this finished product are corn syrups used in the baking and beverage industries. Roquette employs over 500 employees at the Keokuk and Gurnee plants.

I am writing to express Roquette's support of the Burlington Northern and Santa Fe Railway Company's request that the Surface Transportation Board issue an order stating the BNSF may serve the new Four Star transload facility in El Paso, TX.

We believe the conditions imposed as part of the UP/SP merger were intended to provide for competition post merger. We think that it is important that the Surface Transportation Board ensure that the issues of what new facilities along the trackage rights lines, and to what facilities BNSF has access, are clarified so that these problems do not arise again and shippers are in a position to know what competitive alternatives are available.

Very truly yours,

Lee Williams

Director of Logistics

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89382

SLOVER & LOFTUS

ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N. W. WASHINGTON, D. C. 20006

83 ster letter

February 3, 1997

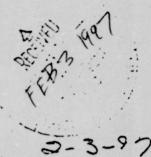
202 347-7170

DY HAND DELIVERY

C. MICHAEL LOPTUS

DONALD O. AVERY
JOHN H. LE SEUR
EELVIN J. DOWD
ROBERT L. ROSENBERG
CHRISTOPHER A. MILLS
FRANK J. PEROOLIZZI
ANDREW B. KOLESAR III

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Branch
12th Street & Constitution Avenue, N.W.
Washington, D.C. 20423



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

Dear Mr. Secretary:

Enclosed for filing please find an executed original and twenty (20) copies of pleadings denominated.TUE-21, TUE-22. and TUE-23. An extra copy of each pleading is enclosed. Kindly indicate receipt and filing by time-stamping this copy and returning it to the bearer of this letter.

. Also enclosed is a diskette in Word Perfect 5.1 format containing the text of these pleadings.

Thank you for your attention to this matter.

Sincerely,

Mn.H. LeSeur

ENTERED Attorney for Texas Utilities

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Office of the Society ic Company

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S Pont Record

JHL:mfw Enclosures

8935:2

TUE-22

BEFORE THE SURFACE TRANSPORTATION BOARD

UNION PACIFIC CORPORATION, UNION FACIFIC RAILROAD COMPANY, AND MISSOUR1 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

2-3-97

Finance Docket No. 32760

ENTERED Office of the Secretary

FEB 4 1997

S Public Record

MOTION FOR LEAVE TO FILE A REPLY TO APPLICANTS' TUE CONDITION SUBMISSION

OF COUNSEL:

WORSHAM, FORSYTHE & WOOLDRIDGE 1601 Bryan Street 30th Floor Dallas, Texas 75201

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

Dated: February 3, 1997

By: John W. McReynolds
Worsham, Forsythe & Wooldridge
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 Texas Utilities Electric Company

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing Reply to Applicants' TUE Condition Submissions on counsel for UP/SP, BNSF and KCS via hand delivery.

Dated this 3rd day of February, 1997 at Washington, D.C.

John H. LeSeur

Item No._

ARLES H. MONTANGE Page Count_ ATTORNEY AT LAW

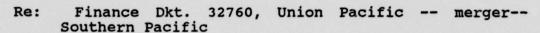
426 NW 162ND STREET

SEATTLE, WASHINGTON 98177

(206)546-1936 FAX: (206) 546-3739

4 April 1996

Hon. Vernon Williams Secretary. Surface Transportation Board 12th & Constitution Ave., N.W. Washington, D.C. 20423



Dear Mr. Williams:

Per request, I enclose herewith a computer disk on which are recorded the following pleadings filed on behalf of Rails to Trails Conservancy (RTC) and Madison County Transit (MCT) in this proceeding:

RTC-1 RTC's notice of intent to participate RTC-2 RTC's Letter to Elaine Kaiser (SEE-STB) Comments and Conditions on behalf of RTC, 29 Mar. RTC-3 "Statement of Willingness" for RTC in AB-12 (Sub 188) RTC-4 Same for RTC in AB-12 (Sub 189X) Same for RTC in AB-12 (Sub 184X) Same for RTC in AB-3 (Sub 130) RTC-5

RTC-6 RTC-7 RTC-8

Same for RTC in AB-33 (Sub 96)

RTC-9 Same for RTC in AB-3 (Sub 131)

MCT-1 MCT's Comment and Condition Letter of 28 Mar.

MCT-2 MCT's "Statement of Willingness" for AB-33 (Sub 97X)

MCT-3 Same for AB-33 (Sub 98X)

This encompasses all pleadings filed on behalf of RTC and MCT in the merger. The documents are recorded in WP 4.2, which I believe is compatible with recovery in systems designed for WP 5.

Please return a copy of the enclosed letter to me in the enclosed stamped envelope, after file-stamping, so I may verify receipt for my records. Thank you for your assistance.

> Very truly/ Charles H. Montange for RTC and MCT

ENTERED Office of the Secretary

APR 1 0 1996

Part of **Public Record**

Encl.

cc. Andrea Ferster, Esq. (w/o encl.)