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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 32760 (Sub-No. 46)

BNSF RAILWAY COMPANY  
— TERMINAL TRACKAGE RIGHTS —  
KANSAS CITY SOUTHERN RAILWAY COMPANY AND  
UNION PACIFIC RAILROAD COMPANY

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**UNION PACIFIC RAILROAD COMPANY'S REPLY STATEMENT  
REGARDING COMPENSATION FOR BNSF'S USE OF THE ROSEBLUFF LEAD**

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Union Pacific and KCS jointly own the Rosebluff Lead. In Decision No. 3, the Board granted BNSF’s application for terminal trackage rights over the Lead pursuant to 49 U.S.C. § 11102(a).<sup>1</sup> Section 11102(a) requires the carrier that is granted use of terminal facilities owned by another carrier to compensate the facilities’ owner for use of the facilities. As applied to this proceeding, § 11102(a) requires BNSF, as the carrier granted use of the Lead, to compensate KCS, as the owner of the Lead. Yet BNSF insists *Union Pacific* should pay KCS any amount due to KCS for BNSF’s use of the Lead.<sup>2</sup> The Board should apply § 11102(a) and order BNSF to compensate KCS for BNSF’s use of trackage rights over the Lead.<sup>3</sup>

BNSF does not dispute the requirements of § 11102(a). BNSF offers two reasons why the Board should disregard the law. First, BNSF claims Union Pacific breached its obligation

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<sup>1</sup> *BNSF Ry. – Terminal Trackage Rights – Kansas City S. Ry.*, FD 32760 (Sub-No. 46) (STB served July 5, 2016).

<sup>2</sup> See BNSF’s Opening Statement and Evidence on Compensation at 1 (Jan. 26, 2021).

<sup>3</sup> To simplify the proceeding, Union Pacific is not seeking compensation for BNSF’s use of the Lead. Union Pacific is therefore leaving arguments about the appropriate level of compensation to KCS and BNSF. See Union Pacific Railroad Company’s Opening Statement Regarding Compensation for BNSF’s Use of the Rosebluff Lead (Jan. 26, 2021).

under the Restated and Amended BNSF Agreement (“RASA”)<sup>4</sup> to grant BNSF trackage rights over the Lead for payment of a Board-approved trackage rights fee (“Prescribed Fee”).<sup>5</sup> BNSF also claims requiring it to pay more than the Prescribed Fee would frustrate conditions the Board imposed on the UP/SP merger to ensure BNSF could provide competitive service to shippers on the Lead.<sup>6</sup> BNSF’s claims are inaccurate, and the Board cannot disregard § 11102(a).

**I. Section 11102(a) requires BNSF to compensate KCS if BNSF exercises its terminal trackage rights over the Rosebluff Lead.**

Section 11102(a) requires BNSF to compensate KCS for use of terminal trackage rights over the Rosebluff Lead that BNSF obtained through Decision No. 3. Section 11102(a) allows the Board to require terminal facilities owned by a rail carrier to be used by another rail carrier under certain circumstances, but provides that the user must appropriately compensate the owner and that the Board may establish compensation terms if the two cannot agree. Section 11102(b) reinforces the user’s obligation to compensate the owner by providing that the owner is entitled to recover “damages” from the user “for compensation for the use . . . in a civil action . . . if the amount of the compensation is not paid promptly.” 49 U.S.C. § 11102(b).

Board precedent confirms that § 11102’s “user pays” rule applies when the user obtains terminal trackage rights to implement a merger condition. In fact, the Board applied the “user pays” rule where Union Pacific granted BNSF trackage rights over KCS as part of the original UP/SP merger proceeding. Specifically, the Board required BNSF to compensate KCS when it granted BNSF’s application for rights to use certain KCS-owned terminal trackage in Beaumont,

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<sup>4</sup> The RASA is the current version of the “BNSF agreement” – the settlement agreement entered into by BNSF, Union Pacific, and Southern Pacific in connection with the UP/SP merger. A copy of the RASA is attached as Exhibit A.

<sup>5</sup> See BNSF’s Opening Statement at 10.

<sup>6</sup> See *id.*

Texas, and Shreveport Louisiana, so BNSF could replace service provided by Southern Pacific (which had operated using trackage rights over KCS).<sup>7</sup> BNSF and KCS subsequently entered into the trackage rights agreement attached as Exhibit B.<sup>8</sup>

Similarly, in *Union Pacific – Control – Missouri Pacific; Western Pacific*, 366 I.C.C. 459 (1982), Denver & Rio Grande Western Railroad (“DRGW”) obtained rights to operate over Missouri Pacific Railroad’s route between Pueblo, Colorado, and Kansas City to mitigate the loss of competition resulting from consolidation of Union Pacific, Missouri Pacific, and Western Pacific Railroad. However, Missouri Pacific’s route included a 12-mile segment between Pueblo and Nyberg, Colorado, that was owned by Atchison, Topeka, and Santa Fe Railway (“ATSF”). The Interstate Commerce Commission closed the gap by granting DRGW terminal trackage rights over the 12-mile ATSF segment, and it left DRGW and ATSF to negotiate appropriate compensation. *See id.* at 572–76; *see also id.* at 576 n.114. ATSF and DRGW subsequently entered into the trackage rights agreement and supplements attached as Exhibit C.<sup>9</sup>

In its Opening Statement, BNSF acknowledged Union Pacific’s argument that BNSF was obligated to compensate KCS under § 11102(a).<sup>10</sup> However, BNSF never tried to explain how its assertion that *Union Pacific* should pay can be reconciled with § 11102(a) and Board precedent. BNSF offered no explanation because none exists. Section 11102(a) requires a rail

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<sup>7</sup> *See Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233, 449 (1996) (“Section [11102(a)] provides that the carriers are responsible for establishing the conditions and compensation applicable to terminal trackage rights awarded under [Section 11102], and we will therefore allow BNSF and KCS an opportunity to reach an agreement respecting such matters.”).

<sup>8</sup> The KCS-BNSF trackage rights agreement in Exhibit B was designated “Confidential” when KCS produced it in discovery. It is the only Confidential material in this filing.

<sup>9</sup> DRGW and ATSF operated for many years under an “interim” trackage rights agreement. An agreement was never finalized, and the rights became unnecessary once Union Pacific acquired DRGW in the UP/SP merger.

<sup>10</sup> BNSF Opening Statement at 9.



carrier that obtains rights to use another carrier's trackage to pay the owner for the rights, even if the carrier obtains those rights as a merger condition.

**II. If BNSF wants to assert a contract-based claim against Union Pacific to recover compensation BNSF must pay KCS pursuant to § 11102(a), its claims should be addressed in a separate proceeding.**

BNSF never tried to reconcile its undisputed obligation to pay for using KCS trackage in Beaumont and Shreveport with its claim that Union Pacific should pay KCS for BNSF's use of the Rosebluff Lead, but its claim appears to be based on contract law. BNSF apparently would say it implicitly accepted the obligation to pay KCS for the Beaumont and Shreveport rights in its settlement agreement with Union Pacific, but it never agreed to pay more than the Prescribed Fee for rights over the Lead.<sup>11</sup> In other words, BNSF's position appears to be that if the Board orders it to pay KCS for rights over the Lead, it would not get the benefit of its bargain with Union Pacific. BNSF foreshadowed a contract claim against Union Pacific in its opening statement, warning: "If the Board ultimately orders BNSF to pay any amount greater than the Prescribed Fee for use of the terminal trackage rights, BNSF reserves the right to seek reimbursement from UP for such amount."<sup>12</sup>

Union Pacific disagrees with BNSF's implicit claim that Union Pacific is contractually bound to ensure BNSF pays no more than the Prescribed Fee for trackage rights over the Lead.

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<sup>11</sup> The RASA actually does not address BNSF's need for terminal trackage rights over KCS's Beaumont and Shreveport trackage. The RASA only provides for BNSF trackage rights over "SP's line between Houston and Iowa Junction in Louisiana" (RASA § 5(a)), which included the Beaumont segments, and "SP's line between Houston, TX and Fair Oaks, AR via Cleveland and Pine Bluff, AR" (RASA § 6(a)), which included the Shreveport segment. See Exhibit A.

BNSF, Union Pacific, and Southern Pacific did, however, jointly file an application for BNSF terminal trackage rights over KCS's Beaumont and Shreveport trackage, which Union Pacific and Southern Pacific submitted with their merger application. See *Union Pacific/Southern Pacific Merger*, 1 S.T.B. at 256.

<sup>12</sup> BNSF Opening Statement at 11.

As Union Pacific explained earlier in these proceedings, when Union Pacific and BNSF entered into their settlement agreement, they recognized they might not be able to identify in advance all situations in which another party might claim Union Pacific lacked the authority to grant BNSF certain trackage rights. They therefore provided in Section 8(n) of their agreement that if Union Pacific lacked sufficient legal authority to grant promised trackage rights, Union Pacific would provide BNSF with an alternative means of access of commercially equivalent utility – which Union Pacific has done.<sup>13</sup> BNSF thus has no valid contract claim against Union Pacific.<sup>14</sup>

In addition, BNSF knew before Union Pacific consummated the UP/SP merger that it might have to pay KCS to use trackage rights over the Lead. It accepted that possible outcome. From BNSF’s perspective, access to the Lead was a windfall. BNSF access to the Lead was not included in BNSF’s original settlement with Union Pacific. BNSF access to the Lead was not included in Union Pacific’s settlement with the Chemical Manufacturers Association (“CMA”). Union Pacific agreed to extend BNSF’s access under the CMA agreement’s terms to shippers on the Lead in its brief supporting the UP/SP merger application.<sup>15</sup> BNSF could have immediately declined the extra rights. BNSF also could have declined the rights after KCS challenged Union Pacific’s authority to grant them, which happened before the Board’s decision authorizing the

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<sup>13</sup> See Union Pacific’s Reply to BNSF’s Opening Statement and Evidence at 19-20 & Verified Statement of John H. Rebensdorf at 3 (Aug. 24, 2015). Copies of relevant portions of these pleadings are attached as Exhibits D & E.

<sup>14</sup> If BNSF actually believed the RASA obligated Union Pacific to provide BNSF with trackage rights over the Lead, BNSF would have brought such a claim long ago. BNSF did not do that. Instead, it sought and was granted terminal trackage rights under § 11102(a). BNSF must now fulfill its obligations under § 11102(a), which include the obligation to compensate KCS for using the trackage rights it was granted.

<sup>15</sup> See *Union Pacific/Southern Pacific Merger*, 1 S.T.B. at 427–28.

UP/SP merger took effect – before Union Pacific consummated the merger.<sup>16</sup> Instead, BNSF voluntarily accepted the rights. If BNSF had been unwilling to proceed knowing that its access to the Lead might be blocked, or that it might need to pay KCS for terminal trackage rights – like it pays for its Beaumont and Shreveport rights<sup>17</sup> – it should have informed Union Pacific and the Board before Union Pacific consummated the merger. BNSF said nothing. It willingly accepted the opportunity to serve shippers on the Lead. It has successfully served those shippers without using trackage rights for nearly 25 years. If BNSF now wants to use trackage rights granted pursuant to § 11102(a), it must pay KCS.

As the Board made clear in Decision No. 3, Board proceedings are not a forum for resolving contract disputes.<sup>18</sup> The Board should thus apply § 11102(a) and require BNSF to compensate KCS.<sup>19</sup> If BNSF believes it has a valid contract claim against Union Pacific

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<sup>16</sup> KCS first asserted its right to veto BNSF access to the Lead in a petition to reopen the Board’s decision approving the UP/SP merger filed on September 3, 1996. A copy of relevant, non-confidential portions of KCS’s petition is attached as Exhibit F. The Board’s decision was scheduled to become effective on September 11, 1996. *See Union Pacific/Southern Pacific Merger*, 1 S.T.B. at 554.

<sup>17</sup> KCS’s petition noted that BNSF might need to apply for terminal trackage rights. *See* Exhibit F at 3 (“UP/SP did not have authority to provide BNSF, in the CMA Agreement, access to the Lake Charles facilities without KCS’s consent or without requiring BNSF to file a terminal trackage rights application under 49 U.S.C. § 11102 (formerly § 11103).”).

<sup>18</sup> The Board said that, regardless of parties’ intent in agreeing to Section 8(n), it would enforce its own intent that BNSF would always be able to use promised trackage rights. *See* Decision No. 3 at 12 (“While informative, arguments concerning whether the parties intended to apply Section 8(n) in such situations are not controlling here because Section 8(n) was imposed by the Board as a merger condition.”); *see also id.* at 12 n.8 (“Thus, the Board is not interpreting a private contract, which the agency has concluded is a matter generally reserved for the courts.”).

<sup>19</sup> Even under the Board’s interpretation of Section 8(n), BNSF should compensate KCS. The Board said that where Union Pacific could not secure necessary consent of a third party before offering trackage rights to BNSF – as was the case with the Lead because Union Pacific was not aware of the issue until after offering the rights to BNSF – Union Pacific should “coordinate with BNSF in filing a terminal trackage rights application.” Decision No. 3 at 13. That is how Union Pacific and BNSF addressed the Beaumont/Shreveport trackage rights issue, and in that case, the

following a final decision by the Board, it can pursue its claim in an appropriate forum.<sup>20</sup> Union Pacific would vigorously defend against any such claim.

**III. Section 11102(a)'s requirement that BNSF compensate KCS for using the Rosebluff Lead does not undermine the conditions the Board imposed on the UP/SP merger.**

Perhaps recognizing the Board is not a proper forum for its contract claims, BNSF also argues that requiring it to compensate KCS for using terminal trackage rights on the Lead would frustrate the Board's "carefully calculated conditions."<sup>21</sup> In other words, BNSF claims it cannot serve as a competitive alternative to Union Pacific if it must pay more than the Prescribed Fee for trackage rights over the Lead.<sup>22</sup> However, the Board should have no competitive concern with requiring BNSF to pay an *SSW Compensation*-based fee. *SSW Compensation* principles were developed specifically to establish "compensation for trackage rights granted to redress the effects of a merger." *New England Cent. R.R. – Trackage Rights Order – Pan Am Southern*, FD 35842, slip op. at 4 (Oct. 31, 2017). Thus, BNSF will be able to fulfill the Board's conditions

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Board required BNSF to compensate KCS. Thus, if the Board's interpretation of Section 8(n) applied to this case, BNSF would be obligated to compensate KCS for using the Lead.

<sup>20</sup> The RASA contains an arbitration clause. *See* Exhibit A, RASA § 15.

<sup>21</sup> BNSF Opening Statement at 10.

<sup>22</sup> *See id.* at 11.

Union Pacific and BNSF disagree about the Union Pacific trackage rights fee that would apply to BNSF's use of trackage rights over the Lead. As discussed in the text, Union Pacific has agreed to waive BNSF's payment for trackage rights over the Lead to serve Lyondell, so the dispute is irrelevant.

For the record, Union Pacific believes the applicable fee would be the Board-prescribed fee for trackage rights that the Board ordered Union Pacific to grant BNSF as a condition to the UP/SP merger. BNSF believes the applicable fee would be the fee that the parties negotiated after the merger in the "50/50 Agreement," where Union Pacific and BNSF exchanged 50% ownership interests in their respective main line segments of the Southern Pacific Lafayette Subdivision between Dawes, Texas, and Avondale, Louisiana, and Union Pacific granted BNSF access to certain Southern Pacific branches to which BNSF had not gained access in the UP/SP merger.

and “redress the effects” of the UP/SP merger on the Lead as long as it does not pay more than an *SSW Compensation*-based fee for trackage rights over the Lead.

If the Board adopts an *SSW Compensation*-based trackage rights fee in this proceeding, BNSF will not be required to pay more than an *SSW Compensation*-based fee for trackage rights over the Lead. In fact, BNSF will pay only half the amount of an *SSW Compensation*-based fee. As 50% owner of the Lead, KCS should be entitled to 50% of the fee both owners would collect under *SSW Compensation* principles. Union Pacific is not seeking any fee from BNSF. Union Pacific previously said BNSF should not have to pay Union Pacific more than the Prescribed Fee (which BNSF’s and KCS’s calculations show is less than 50% of an *SSW Compensation*-based fee).<sup>23</sup> However, to remove *any* possibility that BNSF’s total payment to KCS and Union Pacific for using the Lead could exceed the amount of an *SSW Compensation*-based fee, Union Pacific agreed in its Opening Statement to waive BNSF’s obligation to pay the Prescribed Fee for use of the Lead when BNSF operates its own trains directly to Lyondell.<sup>24</sup> Under these circumstances, BNSF can both compensate KCS as required by § 11102(a) and provide competitive service to fulfill the Board’s conditions on the UP/SP merger.

Finally, if BNSF for some reason believes it cannot compete while paying KCS the compensation required by § 11102(a), it can continue serving shippers on the Lead using the same combination of haulage and switch access it has used successfully for nearly 25 years.

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<sup>23</sup> Several assumptions are required, but Union Pacific estimates the Prescribed Fee would be approximately \$3.14 per car, while BNSF’s evidence suggests 50% of an *SSW Compensation*-based fee would be approximately \$27.37 per car for a combined loaded and empty cycle – a difference of approximately \$24 per car. Thus, even if Union Pacific collected the Prescribed Fee, BNSF would be paying far less than 100% of an *SSW Compensation*-based fee, which would be approximately \$54.74 per car.

<sup>24</sup> See Union Pacific Opening Statement at 3.

Respectfully submitted,

/s/ Michael L. Rosenthal

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April 12, 2021

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 12th day of April, 2021, I caused a copy of the foregoing document to be served by email or first-class mail, postage prepaid, on all parties of record in Finance Docket No. 32760 (Sub-No. 46).

/s/ Michael L. Rosenthal

03/01/02

## **RESTATED AND AMENDED AGREEMENT**

This Restated and Amended Agreement ("Agreement") is entered into this \_\_\_\_ day of March, 2002, between UNION PACIFIC RAILROAD COMPANY ("UP"), a Delaware corporation, and THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY ("BNSF"), a Delaware corporation.

### WITNESSETH:

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

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

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



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

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

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

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

#### DEFINITIONS

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

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

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

include all areas within the switching limits of the locations as described in Section 9(g) of this Agreement.

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

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

Trackage Rights Lines shall mean the lines over which BNSF has been granted trackage rights pursuant to this Agreement, but shall not include any other lines over which UP/SP grants



BNSF trackage rights ("Overhead Trackage Rights") solely (i) to facilitate the parties' operation over Trackage Rights Lines, (ii) to permit BNSF's operation between a mutually-agreed upon BNSF junction point and points listed or described in Section 8(i) of this Agreement, or (iii) to permit BNSF's operation between a mutually-agreed upon BNSF junction point and a build-in/build-out line pursuant to Sections 4(a), 6(c) and 8(l) of this Agreement. The mutually-agreed upon junction point will be selected with the objective of minimizing the operating inconvenience to UP, consistent with ensuring that BNSF can provide competitive service. BNSF acknowledges that it shall not have the right to serve any existing or New Shipper Facility on a line over which BNSF has been granted Overhead Trackage Rights unless such right is specified in this Agreement or in any agreement implementing the Overhead Trackage Rights or unless BNSF has the right to serve a build-in/build-out line on such Overhead Trackage Rights line pursuant to the CMA Agreement or the conditions imposed on the UP/SP merger. All Overhead Trackage Rights Lines, as of the date of the execution hereof, are listed in Exhibit F to this Agreement, which exhibit may be amended and replaced from time to time by a new exhibit signed and dated by the parties. New Shipper Facilities shall be deemed to be "on" a Trackage Rights Line if the facility is either (1) adjacent to a Trackage Rights Line or (2) adjacent to a spur, an industrial track, or a yard that is itself served by such Trackage Rights Line. New Shipper Facilities are not "on" a Trackage Rights Line if they can be accessed only via a 49 U.S.C. 10901 "line of railroad" which is not a Trackage Rights Line.

Transload Facilities shall mean Shipper Facilities other than automotive or intermodal facilities or team tracks where freight is transferred from one railcar to another or from one mode to another (short term incidental storage may also occur) as defined by the STB in its decisions

in Finance Docket No. 32760. An "Existing Transload Facility" is a Transload Facility which was in existence on September 25, 1995.

1. **Western Trackage Rights**

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

- SP's line between Denver, CO and Salt Lake City, UT;
- UP's line between Salt Lake City and Ogden, UT;
- SP's line between Ogden and Little Mountain, UT;
- UP's line between Salt Lake City and Alazon, NV;
- UP's and SP's lines between Alazon and Weso, NV;
- SP's line between Weso, and Oakland, CA via SP's line between Sacramento, CA and Oakland referred to as the "Cal-P" (subject to traffic restrictions as set forth in Section 1(g));
- Overhead Trackage Rights on SP's line between Binney Junction, CA and Roseville, CA in the vicinity of SP MP 106.6;
- SP's line between Elvas (Elvas Interlocking) and Stockton, CA (subject to traffic restrictions as set forth in Section 1(g) and also excluding any trains moving over the line between Bieber and Keddie, CA purchased by BNSF pursuant to Section 2(a) of this Agreement);
- UP's line between Weso and Stockton, CA; and
- SP's line between Oakland and San Jose, CA.

(b) The trackage rights granted under this section shall be bridge rights for the movement of overhead traffic only, except for the local access specified herein. BNSF shall receive access on such lines only to (i) "2-to-1" Shipper Facilities and Existing Transload



Facilities at points listed on Exhibit A to this Agreement, (ii) any New Shipper Facilities located subsequent to UP's acquisition of control of SP at points listed on Exhibit A to this Agreement, and (iii) any New Shipper Facilities located subsequent to UP's acquisition of control of SP on the Trackage Rights Lines. BNSF shall also have the right to establish and exclusively serve intermodal and auto facilities at points listed on Exhibit A to this Agreement and at points identified or described in Section 8(i) of this Agreement. BNSF shall also receive the right to interchange with: the BHP Nevada Railroad Company at Shafter, NV; the Utah Railway Company at Utah Railway Junction, UT; Grand Junction, CO; and Provo, UT; the Utah Central Railway Company at Ogden; the Salt Lake, Garfield and Western at Salt Lake City; and the Salt Lake City Southern Railroad Company at Salt Lake City. BNSF shall also receive the right to utilize in common with UP/SP, for normal and customary charges, SP's soda ash Transload Facilities in Ogden and Salt Lake City. BNSF shall also have the right to access any shipper-owned soda ash Transload Facilities in Ogden and Salt Lake City and to establish its own soda ash Transload Facilities along the Trackage Rights Lines. BNSF shall have the same access as UP to all "2-to-1" Shipper Facilities and "2-to-1" Points between Salt Lake City, UT, and SP MP 755.1 north of Woods Cross, UT.

(c) Access to Shipper Facilities at points listed on Exhibit A to this Agreement open to BNSF shall be direct or through reciprocal switch, or, with UP/SP's prior agreement, through a third party contractor. Access to New Shipper Facilities open to BNSF on the Trackage Rights Lines shall be (i) direct; (ii) with UP/SP's prior agreement, through haulage for the shortest period of time necessary to allow BNSF to establish its own direct operating access after initiating service to a New Shipper Facility, but not to exceed the later to occur of 90 days or the date upon which UP completes the construction of and accepts for service any connections,

sidings or other support facilities to be paid for by BNSF that UP is then obligated to construct pursuant to this Agreement or the trackage rights agreements executed pursuant to Section 9(f) of this Agreement; (iii) with UP/SP's prior agreement, reciprocal switching where, at the time BNSF service is to commence, UP/SP already provides reciprocal switching on the portion of the Trackage Rights Line upon which the turnout to the facility is to be located; or (iv) with UP/SP's prior agreement, the use of a third party contractor; PROVIDED, HOWEVER, that it shall be UP/SP's sole decision whether BNSF's service will be provided by either haulage or reciprocal switching; and PROVIDED, FURTHER, that in no case shall UP/SP be required to initiate any new local service or increase its level of service to accommodate the level of service proposed by BNSF. New Shipper Facilities open to BNSF under this Agreement shall be open to both UP/SP and BNSF, subject to the terms of Section 9(c)(v) of this Agreement. The geographic limits within which (x) New Shipper Facilities shall be open to BNSF service at points listed on Exhibit A to this Agreement and (y) BNSF shall have the right to establish and exclusively serve intermodal and auto facilities at points listed in Section 8(i) of and on Exhibit A to this Agreement shall generally correspond to the territory within which, prior to the merger of UP and SP, a new shipper or receiver could have constructed a facility that would have been open to service by both UP and SP either directly or through reciprocal switch. Where switching districts have been established, such districts (as described in Section 9(g)) shall be presumed to establish these geographic limitations.

(d) At least forty-five (45) days before initiating service to (i) a Shipper Facility open to BNSF at a point listed or described on Exhibit A to or in Section 8(i) of this Agreement, or (ii) any New Shipper Facility on a Trackage Rights Line, BNSF shall notify UP of its election, subject to Section 1(c) above, of the manner by which it proposes such service be provided and



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

(e) For Reno area intermodal traffic, BNSF may use SP's intermodal ramp at Sparks, NV with UP/SP providing intermodal terminal services to BNSF for normal and customary charges. If expansion of SP's Sparks intermodal facility is required to accommodate the combined needs of UP/SP and BNSF, then the parties shall share in the cost of such expansion on a pro rata basis allocated on the basis of the relative number of lifts for each party in the 12-month period preceding the date construction begins. If for any reason UP/SP vacates its Sparks intermodal facility, BNSF (i) may vacate the facility and independently establish one of its own, or (ii) shall be permitted by UP/SP to continue to occupy the Sparks facility upon entry into an agreement with UP/SP containing normal and customary terms and conditions (including, without limitation, rental) for the use of similar facilities. If UP elects to offer the Sparks intermodal ramp property for sale to a third party and/or receives an offer UP is willing to accept,

UP will offer to sell the property to BNSF on the same terms and conditions as are applicable to the third party. BNSF shall have thirty (30) days in which to advise UP whether or not it will buy the property on those terms. In the event BNSF declines to buy the property on those terms or fails to advise UP of its intentions within thirty (30) days, BNSF's right of first refusal will be extinguished, and UP may sell the property to the third party. BNSF will then be required to vacate the property within six (6) months, and UP's obligation to furnish BNSF with intermodal terminal services and access to a UP intermodal facility in the Sparks/Reno area will be extinguished.

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

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



access on the identified lines, and such trains shall not be considered in determining whether BNSF is in compliance with such restrictions. If UP grants its prior concurrence, BNSF's overhead through manifest trains shall be allowed to set out and pick up traffic to or from intermediate points on the identified lines.

(h) At BNSF's request, UP/SP shall provide train and engine crews and required support personnel and services in accordance with UP/SP's operating practices necessary to handle BNSF trains moving between Salt Lake City and Oakland. UP/SP shall be reimbursed for providing such employees on a cost plus reasonable additives basis and for any incremental cost associated with providing employees such as lodging or crew transportation expense. BNSF must also give UP/SP reasonable advance notice of its need for employees in order to allow UP/SP time to have adequate trained crews available. All UP/SP employees engaged in or connected with the operation of BNSF's trains shall, solely for purposes of standard joint facility liability, be deemed to be "sole employees" of BNSF. If UP/SP adds to its labor force to comply with a request or requests from BNSF to provide employees, then BNSF shall be responsible for any labor protection, guarantees or reserve board payments for such incremental employees resulting from any change in BNSF operations or traffic levels.

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

(j) If BNSF desires to operate domestic high cube double stacks over Donner Pass, then BNSF shall be responsible to pay for the cost of achieving required clearances. UP/SP shall pay BNSF one-half of the original cost of any such work funded by BNSF (including per annum interest thereon calculated in accordance with section 9(c)(v) of this Agreement) if UP/SP

subsequently decides to begin moving domestic high cube double stacks over this route. If UP/SP initiates and funds the clearance program, then BNSF shall pay one half of the original cost (including per annum interest thereon calculated in accordance with section 9(c)(v) of this Agreement) at such time as BNSF begins to use the line for domestic high cube double stacks.

(k) BNSF agrees to waive its right under Section 9 of the Agreement dated April 13, 1995, and agreements implementing that agreement to renegotiate certain compensation terms of such agreement in the event of a merger, consolidation or common control of SP by UP. BNSF also agrees to waive any restrictions on assignment in the 1990 BN-SP agreement covering trackage rights between Kansas City and Chicago.

2. **I-5 Corridor**

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

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

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

3. **Southern California Access**

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

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

- UP's line between Riverside and Ontario, CA; and



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

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

(d) Access to Shipper Facilities at points listed on Exhibit A to this Agreement open to BNSF shall be direct or through reciprocal switch, or, with UP/SP's prior agreement, through a third party contractor. Access to New Shipper Facilities open to BNSF on the Trackage Rights Lines shall be (i) direct; (ii) with UP/SP's prior agreement, through haulage for the shortest period of time necessary to allow BNSF to establish its own direct operating access after initiating service to a New Shipper Facility, but not to exceed the later to occur of 90 days or the date upon which UP completes the construction of and accepts for service any connections, sidings or other support facilities to be paid for by BNSF that UP is then obligated to construct pursuant to this Agreement or the trackage rights agreements executed pursuant to Section 9(f) of this Agreement; (iii) with UP/SP's prior agreement, reciprocal switching where, at the time BNSF service is to commence, UP/SP already provides reciprocal switching on the portion of the Trackage Rights Line upon which the turnout to the facility is to be located; or (iv) with UP/SP's prior agreement the use of a third party contractor; PROVIDED, HOWEVER, that it shall be

UP/SP's sole decision whether BNSF's service will be provided by either haulage or reciprocal switching; and PROVIDED, FURTHER, that in no case shall UP/SP be required to initiate any new local service or increase its level of service to accommodate the level of service proposed by BNSF. New Shipper Facilities open to BNSF under this Agreement shall be open to both UP/SP and BNSF, subject to the terms of Section 9(c)(v) of this Agreement. The geographic limits within which (x) New Shipper Facilities shall be open to BNSF service at points listed on Exhibit A to this Agreement and (y) BNSF shall have the right to establish and exclusively serve intermodal and auto facilities at points listed in Section 8(i) of and on Exhibit A to this Agreement shall generally correspond to the territory within which, prior to the merger of UP and SP, a new shipper or receiver could have constructed a facility that would have been open to service by both UP and SP either directly or through reciprocal switch. Where switching districts have been established, such districts (as described in Section 9(g)) shall be presumed to establish these geographic limitations.

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

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

(g) UP/SP shall work with BNSF to facilitate access by BNSF to the Ports of Los Angeles and Long Beach, CA. Other than as legally precluded, UP/SP shall (a) extend the term of the present agreement dated November 21, 1981, to continue until completion of Alameda Corridor, (b) amend that agreement to apply to all carload and intermodal traffic, and (c) grant BNSF the right to invoke such agreement to provide loop service utilizing UP's and Santa Fe's



lines to the Ports at BNSF's option to allow for additional operating capacity. UP/SP's commitment is subject to available capacity. Any incremental capacity related projects necessary to accommodate BNSF traffic shall be the sole responsibility of BNSF.

(h) At least forty-five (45) days before initiating service to (i) a Shipper Facility open to BNSF at a point listed or described on Exhibit A to or in Section 8(i) of this Agreement, or (ii) any New Shipper Facility on a Trackage Rights Line, BNSF shall notify UP of its election, subject to Section 3(d) above, of the manner by which it proposes such service be provided and the specifics of its operating plan over UP/SP trackage. Within thirty (30) days of its receipt of BNSF's proposed operating plan, UP shall notify BNSF of its approval or disapproval of BNSF's plan. UP's approval of such plan shall not be unreasonably withheld. In the event UP disapproves of BNSF's proposed plan, UP shall provide an explanation in writing to BNSF of its reasons for disapproval, and UP shall propose an alternative operating plan that would be acceptable to UP and also be no more onerous than the operating plan that UP would establish for service provided by UP. If UP approves BNSF's plan but establishes conditions on that approval, those conditions shall be set forth in writing and shall be no more onerous than UP would establish for service provided by UP. BNSF shall have the right, upon one hundred eighty (180) days' prior written notice to UP/SP, to change its election; PROVIDED, HOWEVER, that BNSF shall not change any such election more often than once every five (5) years. BNSF shall reimburse UP/SP for any costs incurred by UP/SP in connection with any changed election.

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

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

- UP's line between Ajax and San Antonio, TX;



- UP's line between Houston (Algoa) and Brownsville, TX (with parity and equal access to the Mexican border crossing at Brownsville);
- UP's line between Odem and Corpus Christi, TX;
- UP's line between Ajax and Sealy, TX;
- SP's line between San Antonio and Eagle Pass, TX (with parity and equal access to the Mexican border crossing at Eagle Pass);
- UP's line between Craig Junction and SP Junction, TX (Tower 112) via Track No. 2 through Fratt, TX;
- SP's line between SP Junction (Tower 112) and Elmendorf, TX;
- SP's line in San Antonio between SP Tower 105 and SP Junction (Tower 112);
- Overhead Trackage Rights on SP's Port Lavaca Branch, between Placedo and Port Lavaca, TX, for the purpose of reaching a point of build-in/build-out to/from Union Carbide Corporation's ("UCC") facility at North Seadrift, TX. UP/SP shall permit BN/Santa Fe or UCC to construct and connect to the Port Lavaca Branch, at their expense, a build-in/build-out line. BN/Santa Fe or UCC shall have the right to purchase for net liquidation value all or any part of the Port Lavaca Branch that UP/SP may abandon;
- UP's line between Kerr (connection to Georgetown RR) and Taylor, TX;
- Overhead Trackage Rights on UP's line between Round Rock and McNeil, TX for the purpose of interchanging with the Capital Metro Transit Authority, its successors or agent;

- UP's line between Temple and Waco, TX;
- UP's line between Temple and Taylor, TX;
- UP's line between Taylor and Smithville, TX; and
- SP's line between El Paso and Sierra Blanca, TX.

(b) The trackage rights granted under this section shall be bridge rights for the movement of overhead traffic only, except for the local access specified herein. BNSF shall receive access on such lines only to (i) "2-to-1" Shipper Facilities and Existing Transload Facilities at points listed on Exhibit A to this Agreement and City Public Service Board of San Antonio, Texas Elmendorf facilities listed on Exhibit A to this Agreement, (ii) any New Shipper Facility located subsequent to UP's acquisition of control of SP at points listed on Exhibit A to this Agreement, and (iii) any New Shipper Facility located subsequent to UP's acquisition of control of SP on the Trackage Rights Lines. BNSF shall also have the right to establish and exclusively serve intermodal and auto facilities at points listed on Exhibit A to this Agreement and at points identified or described in Section 8(i) of this Agreement. BNSF shall also have the right to interchange with: the Texas Mexican Railway Company at Corpus Christi and Robstown, TX; the Georgetown Railroad at Kerr; Transportacion Ferroviaria Mexicana ("TFM") at Brownsville (Matamoros, Mexico); Ferrocarril Mexicano ("FXE") at Eagle Pass; and the operator of SP's former line between Giddings and Llano at McNeil, TX. BNSF's access and interchange rights at Corpus Christi and Brownsville shall be at least as favorable as SP had on September 25, 1995. BNSF shall have direct access to the Port of Brownsville, the Brownsville and Rio Grande International Railroad, and the TFM. UP will designate a yard in Brownsville for sale to BNSF at such time as BNSF establishes its own trackage rights operations into Brownsville and at such time as the connection between UP and SP as a part of the Brownsville



relocation project is completed. In the event UP/SP determines to cease operations in the SP East Yard at San Antonio, TX, UP/SP will give first consideration to BNSF for taking over operation of the East Yard pursuant to a mutually-agreeable arrangement.

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

auto facilities at points listed in Section 8(i) of and on Exhibit A to this Agreement shall generally correspond to the territory within which, prior to the merger of UP and SP, a new shipper or receiver could have constructed a facility that would have been open to service by both UP and SP either directly or through reciprocal switch. Where switching districts have been established, such districts (as described in Section 9(g)) shall be presumed to establish these geographic limitations.

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



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

(f) In lieu of BNSF's conducting actual trackage rights operations between Houston, Corpus Christi, Harlingen and Brownsville, TX (including TFM interchange), UP/SP agrees, upon request by BNSF, to handle BNSF's business on a haulage basis for the fee called for by Section 8(m) of this Agreement. UP/SP shall accept, handle, switch and deliver traffic moving under haulage without any discrimination in promptness, quality of service, or efficiency in favor of comparable traffic moving in UP/SP's account.

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

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

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

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

- SP's line between Houston and Iowa Junction in Louisiana, which trackage rights have been amended by the Term Sheet Agreement and the TX-LA Line Sale Agreement implementing UP's and BNSF's joint ownership of SP's line between Dawes, TX and Avondale, LA;

- SP's line between Beaumont and Port Arthur, TX;
- SP's line between Dayton and Baytown and East Baytown, TX;
- SP's Channelview Spur which connects to the SP's line between Houston and Iowa Junction near Sheldon, TX for the purpose, inter alia, of reaching a point of build-in/build-out to/from the facilities of Lyondell Petrochemical Company and Arco Chemical Company at Channelview, TX. UP/SP shall permit BN/Santa Fe or one or both shippers to construct and connect to SP's Channelview Spur, at their expense, a build-in/build-out line. BN/Santa Fe or the shippers shall have the right to purchase for net liquidation value all or any part of the Channelview Spur that UP/SP may abandon;
- SP's line between Mallard Junction and Harbor, LA;
- SP's line near Avondale (SP MP 14.94 and West Bridge Junction (SP MP 9.97));
- UP's Main Line No. 1 from UP MP 14.29 to MP 14.11 including crossover to SP's main line and UP's MP 10.38 to MP 10.2; and
- UP's line between West Bridge Junction (UP MP 10.2) and UP's Westwego, LA intermodal facility (approximately UP MP 9.2).

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



and (iii) any New Shipper Facility located subsequent to UP's acquisition of control of SP on the Trackage Rights Lines. BNSF shall also have the right to establish and exclusively serve intermodal and auto facilities at points listed on Exhibit A to this Agreement and at points identified or described in Section 8(i) of this Agreement. BNSF shall also have the right to handle traffic of shippers open to all of UP, SP and KCS at Lake Charles, Rose Bluff and West Lake, LA, and traffic of shippers open to SP and KCS at West Lake Charles. BNSF shall also have the right to interchange with: the Acadiana Railway Company at Crowley, LA; and the Louisiana & Delta Railroad, Inc. at Lafayette, Raceland and Schreiver, LA. BNSF shall also have the right to interchange with and have access over the New Orleans Public Belt Railroad at West Bridge Junction, LA.

(c) Access to Shipper Facilities at points listed on Exhibit A to this Agreement open to BNSF shall be direct or through reciprocal switch, or, with UP/SP's prior agreement, through a third party contractor. Access to New Shipper Facilities open to BNSF on the Trackage Rights Lines shall be (i) direct; (ii) with UP/SP's prior agreement, through haulage for the shortest period of time necessary to allow BNSF to establish its own direct operating access after initiating service to a New Shipper Facility, but not to exceed the later to occur of 90 days or the date upon which UP completes the construction of and accepts for service any connections, sidings or other support facilities to be paid for by BNSF that UP is then obligated to construct pursuant to this Agreement or the trackage rights agreements executed pursuant to Section 9(f) of this Agreement; (iii) with UP/SP's prior agreement reciprocal switching where, at the time BNSF service is to commence, UP/SP already provides reciprocal switching on the portion of the Trackage Rights Line upon which the turnout to the facility is to be located; or (iv) with UP/SP's prior agreement, the use of a third party contractor; PROVIDED, HOWEVER, that it shall be

UP/SP's sole decision whether BNSF's service will be provided by either haulage or reciprocal switching; and PROVIDED, FURTHER, that in no case shall UP/SP be required to initiate any new local service or increase its level of service to accommodate the level of service proposed by BNSF. New Shipper Facilities open to BNSF under this Agreement shall be open to both UP/SP and BNSF, subject to the terms of Section 9(c)(v) of this Agreement. The geographic limits within which (x) New Shipper Facilities shall be open to BNSF service at points listed on Exhibit A to this Agreement and (y) BNSF shall have the right to establish and exclusively serve intermodal and auto facilities at points listed in Section 8(i) of and on Exhibit A to this Agreement shall generally correspond to the territory within which, prior to the merger of UP and SP, a new shipper or receiver could have constructed a facility that would have been open to service by both UP and SP either directly or through reciprocal switch. Where switching districts have been established, such districts (as described in Section 9(g)) shall be presumed to establish these geographic limitations.

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



for service provided by UP. If UP approves BNSF's plan but establishes conditions on that approval, those conditions shall be set forth in writing and shall be no more onerous than UP would establish for service provided by UP. BNSF shall have the right, upon one hundred eighty (180) days' prior written notice to UP/SP, to change its election; PROVIDED, HOWEVER, that BNSF shall not change any such election more often than once every five (5) years. BNSF shall reimburse UP/SP for any costs incurred by UP/SP in connection with any changed election.

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

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

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

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

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

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

- UP's line between Fair Oaks and Bald Knob, AR.

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

(c) BNSF shall have the right to transport unit coal trains (i) over the Trackage Rights Lines to and from a point of build-in/build-out to and from Entergy Services, Inc.'s plant at White Bluff, AR if and when such a build-in/build-out line is constructed by an entity other than UP/SP to connect such plant with an SP line, and (ii) to and from Entergy Services, Inc.'s plant at White Bluff (1) by entering and exiting the Trackage Rights Lines at Jonesboro and Hoxie, AR, respectively, and/or (2) by utilization of BNSF's line via Memphis, TN.

(d) The trackage rights granted under this section shall be bridge rights for the movement of overhead traffic only, except for the local access specified herein. BNSF shall receive access on such lines only to (i) "2-to-1" Shipper Facilities and Existing Transload Facilities at points listed on Exhibit A to this Agreement, (ii) any New Shipper Facility located subsequent to UP's acquisition of control of SP at points listed on Exhibit A to this Agreement, and (iii) any New Shipper Facility located subsequent to UP's acquisition of control of SP on the Trackage Rights Lines. BNSF shall also have the right to establish and exclusively serve intermodal and auto facilities at points listed on Exhibit A to this Agreement and at points identified or described in Section 8(i) of this Agreement. In addition to the other restrictions and limitations set forth herein, as to UP's and SP's lines between Memphis and Valley Junction, IL: (1) BNSF shall not have the right to enter or exit at intermediate points north of Bald Knob and Fair Oaks, AR; and (2) BNSF traffic is limited to traffic that moves through, originates in, or terminates in Texas or Louisiana. These two restrictions do not apply to traffic moving to or



from Shipper Facilities in the Houston-Memphis-St. Louis Corridor to which BNSF has access pursuant to this Section 6(d) or Section 8(i) below. The two restrictions also do not apply to the traffic that BNSF is permitted to handle pursuant to the remaining provisions of this Section 6(d), which remains subject to all other conditions and restrictions. BNSF shall also have the right to handle traffic of shippers open to all of UP, SP and KCS at Texarkana, TX/AR, and Shreveport, LA, to and from the Memphis BEA (BEA 73), but not including proportional, combination or Rule 11 rates via Memphis or other points in the Memphis BEA. In the Houston-Memphis-St. Louis corridor, BNSF shall have the right to move some or all of its traffic via trackage rights over either the UP line or the SP line, at its discretion, for operating convenience. BNSF shall also have the right to interchange: with the Little Rock and Western Railway at Little Rock, AR; the Little Rock Port Authority at Little Rock, AR; KCS at Shreveport, LA and Texarkana, TX/AR, for movements of traffic originated by KCS at or delivered by KCS to shippers or receivers at Lake Charles, West Lake, or West Lake Charles, LA; with KCS (y) at Shreveport, LA for movements of loaded and empty coal trains moving to and from Texas Utilities Electric Company's Martin Lake generating station, and (z) at Texarkana, TX/AR for movements of empty coal trains returning from Texas Utilities Electric Company's Martin Lake generating station; and with the Texas Northeastern Railroad at Texarkana, TX for the sole purpose of moving BNSF traffic to and from Shipper Facilities at Defense, TX.

(e) Access to Shipper Facilities at points listed on Exhibit A to this Agreement open to BNSF shall be direct or through reciprocal switch, or, with UP/SP's prior agreement, through a third party contractor. Access to New Shipper Facilities open to BNSF on the Trackage Rights Lines shall be (i) direct; (ii) with UP/SP's prior agreement, through haulage for the shortest period of time necessary to allow BNSF to establish its own direct operating access after



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

(f) At least forty-five (45) days before initiating service to (i) a Shipper Facility open to BNSF at a point listed or described on Exhibit A to or in Section 8(i) of this Agreement, or (ii)

any New Shipper Facility on a Trackage Rights Line, BNSF shall notify UP of its election, subject to Section 6(e) above, of the manner by which it proposes such service be provided and the specifics of its operating plan over UP/SP trackage. Within thirty (30) days of its receipt of BNSF's proposed operating plan, UP shall notify BNSF of its approval or disapproval of BNSF's plan. UP's approval of such plan shall not be unreasonably withheld. In the event UP disapproves of BNSF's proposed plan, UP shall provide an explanation in writing to BNSF of its reasons for disapproval, and UP shall propose an alternative operating plan that would be acceptable to UP and also be no more onerous than the operating plan that UP would establish for service provided by UP. If UP approves BNSF's plan but establishes conditions on that approval, those conditions shall be set forth in writing and shall be no more onerous than UP would establish for service provided by UP. BNSF shall have the right, upon one hundred eighty (180) days' prior written notice to UP/SP, to change its election; PROVIDED, HOWEVER, that BNSF shall not change any such election more often than once every five (5) years. BNSF shall reimburse UP/SP for any costs incurred by UP/SP in connection with any changed election.

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

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

#### 7. St. Louis Area Coordinations

(a) UP/SP agree to cooperate with BNSF to facilitate efficient access by BNSF to other carriers at and through St. Louis via The Alton & Southern Railway Company ("A&S"). If



BNSF requests, UP/SP agree to construct or cause to be constructed for the use of both BNSF and UP/SP a faster connection between the BN and UP lines at Grand Avenue in St. Louis, MO and a third track from Grand Avenue to near Gratiot Street Tower at the sole cost and expense of BNSF. Upon completion of such construction, UP/SP shall grant to BNSF overhead trackage rights on UP's line between Grand Avenue and Gratiot Street.

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

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

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

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



8. **Additional Rights**

(a) UP/SP shall grant BNSF overhead trackage rights on SP's line between Richmond and Oakland, CA for rail traffic of all kinds, carload and intermodal, for all commodities to enable BNSF to connect via SP's line with the Oakland Terminal Railroad ("OTR") and to access the Oakland Joint Intermodal Terminal ("JIT"), or similar public intermodal facility, at such time as the JIT is built. BNSF shall pay 50% of the cost (up to \$2,000,000 maximum) for upgrading to mainline standards and reverse signaling of SP's No. 1 track between Emeryville (MP 8) and Stege, CA (MP 13.1). Compensation for these trackage rights shall be at the rate of 3.48 mills per ton mile for business moving in the "I-5 Corridor," 3.1 mills per ton mile on all other carload and intermodal business, and 3.0 mills per ton mile for bulk business (as defined in Section 9(a) of this Agreement) escalated in accordance with the provisions of Section 12 of this Agreement. UP/SP shall assess no additional charges against BNSF for access to the JIT and the OTR.

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

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

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

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

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

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

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

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

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



to "2-to-1" Shipper Facilities, Existing Transload Facilities, and New Shipper Facilities at the foregoing points and at other "2-to-1" Points not along a Trackage Rights Line.

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

(k) BNSF shall also have the right to interchange with any short-line railroad that constructs a new line to and establishes an interchange on a Trackage Rights Line subsequent to UP's acquisition of control of SP; PROVIDED, HOWEVER, that the short-line railroad must be a Class II or Class III railroad neither owned nor operated by BNSF or any BNSF affiliate. In addition, the new rail line must be either (i) an extension of an existing Class II or Class III carrier that does not connect with UP or (ii) a new Class II or Class III carrier. BNSF shall not be entitled to interchange traffic with a Class II or Class III carrier at such a new interchange on a Trackage Rights Line if the traffic originates or terminates at a Shipper Facility that is now served solely by UP unless the Shipper Facility qualifies as a New Shipper Facility or unless the new line qualifies as a build-in or build-out under this Agreement.

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



operating inconvenience to UP, consistent with ensuring that BNSF can provide competitive service.

(m) Where this Agreement authorizes BNSF to utilize haulage to provide service, the fee for such haulage shall be \$.50 per car mile plus a handling charge to cover handling at the haulage junction with BNSF and to or from a connecting railroad or third party contract switcher. The handling charge shall be \$50 per loaded or empty car for intermodal and carload and \$25 per loaded or empty car for unit trains with unit train defined as 67 cars or more of one commodity in one car type moving to a single destination and consignee. UP/SP shall bill BNSF the \$50 per car handling charge for all cars and, upon receipt of appropriate documentation from BNSF demonstrating that business assessed the \$50 per car handling fee was a unit train, adjust prior billings by \$25 per car for each car BNSF demonstrates to have been eligible for the \$25 per car handling charge for unit trains. Where UP/SP is providing reciprocal switching services to BNSF at "2-to-1" Shipper Facilities as provided for in Section 9(i) of this Agreement, the per car handling charge shall not be assessed at the point where such reciprocal switch charge is assessed. The haulage fee and handling charge set forth above as of September 25, 1995, shall be adjusted upwards or downwards in accordance with Section 12 of this Agreement.

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

(o) In the event UP determines to terminate or not renew a lease to an Existing Transload Facility to which BNSF gained access as a result of this Agreement or the conditions

imposed on the UP/SP merger and BNSF has previously entered into a contract to provide transportation services to the Existing Transload Facility, UP shall extend the lease for the remaining period of such transportation contract or for a period not to exceed 24 months, whichever period is shorter.

9. **Trackage Rights - General Provisions**

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

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

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

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

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



the right to do so upon payment to the other party of one-half (½) the original cost of constructing such facilities.

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

- (i) UP/SP shall bear the cost of all capacity improvements that are necessary to achieve the benefits of its merger as outlined in the application filed with the ICC for authority for UP to control SP. The operating plan filed by UP/SP in support of the application shall be given presumptive weight in determining what capacity improvements are necessary to achieve these benefits.
- (ii) Any capacity improvements other than those covered by subparagraph (i) above shall be shared by the parties based upon their respective usage of the line in question, except as otherwise provided in subparagraph (iii) below. That respective usage shall be determined by the 12 month period prior to the making of the improvement on a gross ton mile basis.
- (iii) For 18 months following UP's acquisition of control of SP, BNSF shall not be required to share in the cost of any capital improvements under the provision of subparagraph (ii) above.
- (iv) BNSF and UP/SP agree that a capital reserve fund of \$25 million, funded out of the purchase price listed in Section 10 of this Agreement, shall be established. This capital reserve fund shall, with BNSF's prior consent which will not unreasonably be withheld, be drawn down to pay for capital projects on the Trackage Rights Lines that are required to



accommodate the operations of both UP/SP and BNSF on those lines, but in any event shall not be used for expenditures covered by subparagraph (i) above. Any disputes over whether a project is required to accommodate the operation of both parties shall be referred to binding arbitration under Section 15 of this Agreement.

- (v) If both UP/SP and BNSF intend to serve New Shipper Facilities located subsequent to UP's acquisition of control of SP as authorized by Sections 1(b), 3(c), 4(b), 5(b), 6(d), and 8(i) of this Agreement, they shall share equally in any capital investment in such connections and sidings and siding extensions or other support facilities required by both UP and BNSF to provide rail service to such New Shipper Facility. If only one railroad initially provides such service, the other railroad may elect to provide service at a later date, but only after paying to the railroad initially providing such service 50% of any capital investment (including per annum interest thereon) made by the railroad initially providing rail service to the New Shipper Facility. Per annum interest shall be at a rate equal to the average paid on 90-day Treasury Bills of the United States Government as of the date of completion until the date of use by the other railroad commences. Per annum interest shall be adjusted annually on the first day of the twelfth (12th) month following the date of completion and every year thereafter on such date, based on the percentage increase or decrease, in the average yield of 30-year U.S. Treasury Notes for the prior year compared to their average yield in first year of completion of the

access to such industry or industries. Each annual adjustment shall be subject, however, to a "cap" (up or down) of two percentage points more or less than the prior year's interest rate.

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

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

In the event the owning carrier determines to sell or remove from service a Joint Trackage line and/or any associated facilities, the owning carrier shall provide the other carrier with reasonable written notice of such determination. Any such sale to a third party shall be expressly made subject to the terms and conditions of this Agreement, and the owning carrier



shall remain responsible as to the obligations imposed on it herein in the event the third party purchaser does not fulfill those obligations.

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

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



arbitration proceeding to be completed within sixty (60) days of its institution. In the event such agreements are not completed by the date the grants of such trackage rights are to be effective, it is intended that operations under such grants shall be commenced and governed by this Agreement.

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

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

- (i) The party wishing to construct such exclusively owned facilities for its sole use shall submit its plans to the other party for its review and approval, which approval shall not be unreasonably withheld or delayed;
- (ii) In the case of the construction of team tracks and ancillary facilities, including loading facilities and necessary track connections, the parties shall work cooperatively with each other to enable such construction;
- (iii) Such exclusively owned or leased and used facilities shall not (i) impair the other party's use of the Joint Trackage, (ii) prevent or unduly hinder the other party's access to existing or future customers or facilities served from the Joint Trackage, or (iii) impair access to other exclusively owned facilities then in existence; and

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

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

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



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

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

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

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



existing trackage rights) intersect with Trackage Rights Lines or lines it will purchase pursuant to this Agreement. UP/SP shall have the right to connect, for movement in all directions, with its present lines (including existing trackage rights) at points where its present lines (including existing trackage rights) intersect with lines over which it will receive trackage rights pursuant to this Agreement. BNSF shall also have the right, at the option of the City Public Service Board of San Antonio, TX, to connect for movement to and from Elmendorf, TX, where BNSF's trackage rights granted pursuant to this Agreement intersect at SP Junction (Tower 112) with the existing trackage rights SP has granted to City Public Service Board of San Antonio, TX.

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

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

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

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

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

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

- (i) the condition of the lines at closing shall be at least as good as their current conditions as reflected in the current timetable and slow orders (slow orders to be measured by total mileage at each level of speed restrictions).
- (ii) includes track and associated structures together with right-of-way and facilities needed for operations.
- (iii) indemnity for environmental liabilities attributable to UP/SP's prior operations.
- (iv) standard provisions for sales of this nature involving title, liens, encumbrances other than those specifically reserved or provided for by this Agreement.

- (v) assignment of associated operating agreements (road crossings, crossings for wire and pipelines, etc.). Non-operating agreements shall not be assigned.
- (vi) removal by UP/SP, from a conveyance, within 60 days of the closing of any sale, of any non-operating real property without any reduction in the agreed upon purchase price.
- (vii) the purchase will be subject to easements or other agreements involving telecommunications, fiber optics or pipeline rights or operations in effect at the time of sale.

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

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



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

11. **Term**

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

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

12. **Adjustment of Charges**

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

The rates for reciprocal switching services established in Section 9(i) and for haulage service established in Section 8(m) shall be adjusted upward or downward each July 1 of each year to reflect fifty percent (50%) of increases or decreases in Rail Cost Adjustment Factor, not adjusted for changes in productivity ("RCAF-U") published by the Surface Transportation Board or successor agency or other organizations. In the event the RCAF-U is no longer maintained, the parties shall select a substantially similar index and, failing to agree on such an index, the matter shall be referred to binding arbitration under Section 15 of this Agreement.

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



Upon every fifth anniversary of the effective date of this Agreement, either party may request on ninety (90) days notice that the parties jointly review the operation of the adjustment mechanism and renegotiate its application. If the parties do not agree on the need for or extent of adjustment to be made upon such renegotiation, either party may request binding arbitration under Section 15 of this Agreement. It is the intention of the parties that rates and charges for trackage rights and services under this Agreement reflect the same basic relationship to operating costs as upon execution of this Agreement (September 25, 1995).

13. **Assignability**

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

14. **Government Approvals**

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



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

15. **Arbitration**

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

16. **Further Assurances**

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

17. **No Third Party Beneficiaries**

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

UNION PACIFIC RAILROAD COMPANY

By: \_\_\_\_\_  
Title: \_\_\_\_\_

THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY

By: \_\_\_\_\_  
Title: \_\_\_\_\_

**Exhibits to Restated and Amended BNSF Settlement Agreement**

Exhibit A -- List of "2-to-1" Points

Exhibit B -- Term Sheet for UP/SP-BNSF Proportional Rate Agreement Covering I-5 Corridor

Exhibit C -- Schematic drawing of UP's Main Line No. 1 between MP 14.11 and 10.38, UP's Westwego intermodal terminal, and SP's old Avondale Yard (together with the fueling and mechanical facilities located thereon)

Exhibit D -- Dispatching Protocols

Exhibit E -- "2-to-1 Point Identification Protocol"

Exhibit F -- Overhead Trackage Rights Lines



**EXHIBIT A**

**EXHIBIT A**  
**LIST OF "2-TO-1" POINTS**

Points Referred to in Section 1(b)

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

Points Referred to in Section 3(a)

Ontario CA  
La Habra CA  
Fullerton CA

Points Referred to in Section 4(b)

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

Points Referred to in Section 5(b)

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

Points Referred to in Section 6(d)

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



**EXHIBIT B**

## **EXHIBIT B**

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

#### **Concept**

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

#### **Covered Territory**

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

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

and points in

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

#### **Traffic Covered**

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



### **Proportional Rates**

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

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

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

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

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

### **Application**

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



### **Service**

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

### **Third Party Consultant**

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

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

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

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

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

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

**B. Compute BNSF Division on a Specific Move**

$$\begin{aligned} & (A) \times (5) \times (3) \\ & \$0.06 \times 300 \times 100 = \$1800 \\ & \$0.06 \times 200 \times 50 = \$ 600 \end{aligned}$$

**EXHIBIT C**



660-3582  
342-2580

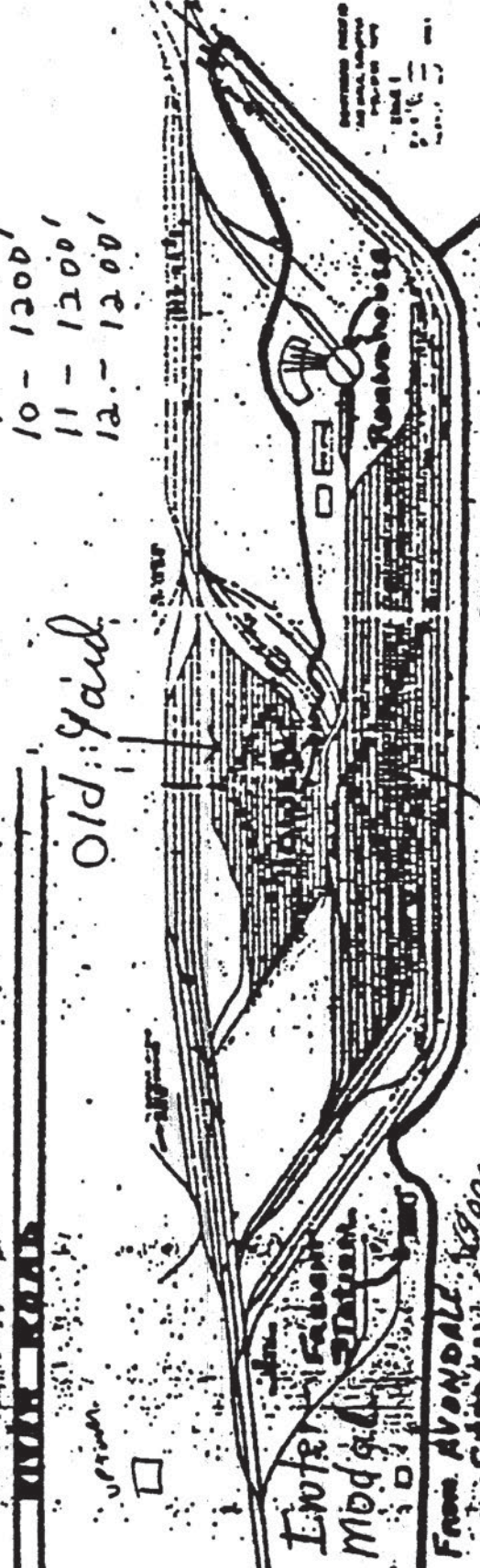
# S.P. Avondale Yard

350-7150  
Crandall  
5/12/76  
== TOTAL PAGE. 881 ==  
== TOTAL PAGE. 881 ==

P. 81/81  
PAGE. 881

SEP 24 '95 11:21 FR UP SPRING 713-3587593 13 358 7593 TO 82715955  
SEP 24 '95 9:22 FROM UNION PACIFIC AVONDAL

Old Yard



Old Yard Capacity  
needs Rehab

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

New Yard

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

Old Yard

- 13-1800'
- 14-1400'
- 15-1800'
- 16-1700'
- 17-1600'
- 18-1500'
- 19-1400'
- 20-1300'
- 21-1200'
- 22-1100'

Not to scale  
not entirely  
accurate

**EXHIBIT D**



April 24, 1996

## BNSF - UP/SP DISPATCHING PROTOCOLS

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

1. **Scope:** These protocols apply on all rail line segments where Burlington Northern Railroad Company or The Atchison, Topcka & Santa Fe Railway Company (which will be referred to jointly or individually as "BNSF") has trackage rights over tracks of the entity or entities resulting from the merger of the rail affiliates of Union Pacific Corporation and Southern Pacific Rail Corporation (which will be referred to jointly or individually as "UP/SP") and on all rail line segments where UP/SP has trackage rights over tracks of BNSF. All such rail lines will be referred to as "joint trackage and will include all current joint line trackage rights."
2. **Purpose:** To ensure that BNSF and UP/SP trains operating on joint trackage are given equal dispatch without any discrimination in promptness, quality of service or efficiency and that the competitiveness of tenant operations on joint trackage is not adversely affected by the fact that the other railroad owns the track.
3. **General Instructions:** BNSF and UP/SP will issue written instructions to all personnel (including supervisors) responsible for train dispatching on joint trackage that trains of the tenant are to be dispatched exactly as if they were trains of the same class of the owner and given equal treatment with trains of the owner. These instructions will be issued at agreed intervals or at the request of either party.
4. **Monitoring Systems:** At the request and expense of the tenant, the owner will make available computer terminals, facilities or capabilities comparable to those available to its own dispatchers showing joint trackage it dispatches so that the tenant can monitor the handling of its trains by the owner.
5. **Train Information:** The tenant will provide to the owner, and regularly update, information about its expected train operations and schedules (including priorities, time commitments, horsepower per trailing ton, etc.) over joint trackage, preferably using electronic data interchange. Parties will establish run time standards by train category based on expected train volumes for each line segment. If train volumes are different than expected then adjustments to run time standards will be made by mutual agreement. The tenant will provide reliable and current information about trains approaching joint trackage, including train arrival time and train characteristics, preferably by providing at its expense computer terminals, facilities or capabilities showing trains approaching joint trackage, sufficiently in advance to allow dispatchers to plan for them. The owner will provide to the tenant advance notice of planned maintenance-of-way projects, line closures and train or equipment restrictions. BNSF and UP/SP will cooperate to develop a process for discussing maintenance windows in advance and agree upon so as not to adversely affect schedules of one carrier more than the other.



6. **Specific Instructions:** The owner will permit the tenant to transmit instructions regarding the requirements of specific trains and shipments to designated dispatching center employees responsible for handling those trains.
7. **Train Priorities/Run Time Standards:** BNSF and UP/SP will at all times provide to each other current procedures for assigning dispatching priorities or rankings to their trains and information sufficient to show how those procedures are applied to their own trains. The tenant will assign priorities or rankings to its trains operating on joint trackage using the owner's procedures, and the owner will dispatch tenant trains in accordance with those priorities or rankings. It is understood that technological advances in computer aided dispatching might result in changes to priority assignment methodologies. The parties agree to discuss technological changes which might affect priority assignment methodologies prior to implementation. The Joint Service Committee will be responsible for reviewing these assignments to ensure that they are applied equitably by both railroads. It is agreed that a three member panel from each carrier will make up the Joint Service Committee. Suggestions for three member panel are representatives from Joint Facilities, VP Transportation, and Joint Trackage Rights Operations.
8. **Entry to Joint Trackage:** At points where tenant trains enter joint trackage, entry will be provided by the owner on a first-come, first-served basis, taking into consideration the relative priorities of affected trains and the specific needs and operating characteristics of individual trains of both railroads. [If operating circumstances make strict application of this principle difficult or uncertain, BNSF and UP/SP may jointly establish standards for determining sequence of entry to joint trackage.] Parties will communicate daily on any conflicts concerning entry to joint trackage to gain resolution.
9. **Communications:** BNSF and UP/SP will provide to each other, and keep current, lists of dispatching personnel responsible for dispatching each segment of joint trackage and contact numbers. For each segment, BNSF and UP/SP will designate supervisory employees to serve as the day-to-day contacts for communications about operating changes, service requests and concerns. Where feasible and economical, dedicated phone lines or computer links will be established for these communications.
10. **Access to Dispatching Centers:** Appropriate officials of either railroad will be admitted at any time to dispatching facilities and personnel responsible for dispatching joint trackage to review the handling of trains on joint trackage and will be provided an office in the other railroad's dispatching center (although both railroads will take reasonable steps to prevent disclosure of proprietary information not relevant to that review). In order to support BNSF operations over UP/SP trackage rights granted in connection with the UP/SP merger, UP/SP will pay BNSF an amount equal to the reasonable and conventional salary of one supervisory employee to be placed by BNSF at UP/SP's Harriman dispatching center. It is understood that management and supervision of dispatching operations is the responsibility of the owning carrier.



- 3 -

11. **Performance Measurement:** BNSF and UP/SP will cooperate to develop train performance evaluation methods under which train performance of tenant trains on joint trackage segments can be compared to train performance of the owner's trains on the same segments for the same train category and priority.
12. **Personnel Incentives and Evaluation:** In evaluating the performance of employees and supervisors responsible for dispatching joint trackage, both BNSF and UP/SP will consider train performance of tenant trains and effectiveness in cooperating with tenant personnel and meeting tenant service requirements in the same manner as such factors are considered with respect to the owner's trains, personnel and requirements. If bonuses, raises or salaries of those persons are affected by performance of the owner's trains, performance of the tenant's trains shall be considered on the same basis to the extent feasible.
13. **Disagreements:** The designated contact supervisors are expected to raise questions, disagreements, concerns or disputes about compliance with these protocols promptly as and when any such matters arise and to use their best efforts to resolve them. If a matter is not resolved to the satisfaction of both parties, it will be presented to the Joint Service Committee. If a satisfactory resolution cannot be achieved by the Joint Service Committee, the matter will be submitted to binding summary arbitration before a neutral experienced railroad operating official within fourteen days. The parties will agree in advance on the sanctions available to the arbitrator to address failures to comply with these protocols.
14. **Modifications:** As the ultimate objective of these protocols is the equal, flexible and efficient handling of all trains of both railroads on joint trackage, these protocols may be modified at any time by mutual agreement, consistent with that objective.

**EXHIBIT E**



## 2-To-1 Point Identification Protocol

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

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

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

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

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



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

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

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

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



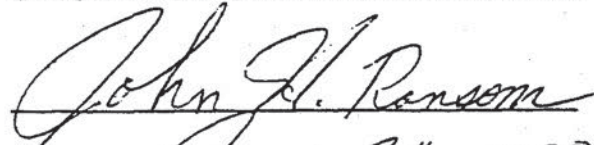
receives its longest haul and UP receives \$3 per car mile beyond that junction. If no joint through rate exists, BNSF receives its longest haul via junctions in existence between UP and BNSF, prior to the date of UP control over SP, September 11, 1996, and UP receives \$3 per car mile beyond. UP must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

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

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

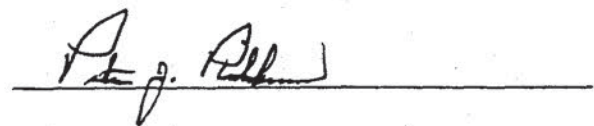
AGREED TO AND ACCEPTED BY:

UNION PACIFIC RAILROAD COMPANY



Date: June 24, 1998

THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY



Date: June 26, 1998

**EXHIBIT F**

## EXHIBIT F

### LIST OF OVERHEAD TRACKAGE RIGHTS

1. Western Trackage Rights

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

2. South Texas Trackage Rights

- A. UP/SP shall grant BNSF Overhead Trackage Rights on the following lines:
- a) SP's Port Lavaca Branch, between Placedo, TX in the vicinity of MP 14.2, and a point of build-in along said branch in the vicinity of MP 6.93 at Kamey, TX; and
  - b) UP's line between Round Rock, TX, in the vicinity of UP's Austin Subdivision Milepost 161.79, and McNeil, TX, in the vicinity of UP's Austin Subdivision Milepost 166.1.

3. Eastern Texas – Louisiana Trackage Rights

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

4. Additional Rights

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

5. Rights to Omnibus Points

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



**[Redacted from Public Version]**

INTERIM TRACKAGE RIGHTS AGREEMENT

The Atchison, Topeka and Santa Fe Railway Company (hereinafter referred to as "Santa Fe") grants The Denver and Rio Grande Western Railroad Company (hereinafter referred to as "DRGW") bridge rights on approximately 12 miles of Santa Fe tracks and appurtenances, including but not limited to underlying Right-of-Way, Interlockers, Bridges, etc., between Pueblo and Nyberg, Colorado (hereinafter referred to as "Joint Line"). This grant of trackage rights is understood to be interim in nature and without prejudice to Santa Fe's appeals concerning the validity of Interstate Commerce Commission (ICC) orders imposing DRGW use of the Joint Line as a condition to the consolidation of Union Pacific, Missouri Pacific and Western Pacific in ICC Finance Docket No. 30,000 or to Santa Fe's appeals concerning the validity of the ICC orders approving that consolidation. DRGW acknowledges that the grant of these interim trackage rights and the terms and conditions therefor in no way constitute an admission by Santa Fe that DRGW is lawfully entitled to operate over the Joint Line and that the interim terms and conditions set forth herein in no way constitute an admission of either party as to appropriate terms and conditions required under the standards set forth in 49 U.S.C. §11103.

1. Subject to the foregoing and the terms of this interim agreement, DRGW is hereby granted the right to use the

Joint Line solely for the operation of its freight business. DRGW with its own employees or MP employees and at its sole cost and expense may operate its trains, engines and cars on and along the Joint Line, provided, however, that DRGW shall not permit any of its employees to operate trains thereover until they are qualified on Santa Fe's operating rules and regulations to the satisfaction of Santa Fe.

2. Santa Fe shall have sole control of all operations over and maintenance of the Joint Line and reserves the right to give priority to its own trains in the event of congestion.

3. Santa Fe shall, at the sole cost of DRGW, construct, own, operate, maintain, repair and renew any connecting or other tracks, signalling, dispatcher telephones or other communication facilities on Santa Fe right-of-way as in the judgment of Santa Fe and DRGW are necessary to control DRGW trains entering and leaving the Joint Line.

4. DRGW shall use the Joint Line only for the bridging of its trains, and it is understood and agreed that DRGW is not granted the right to use any other Santa Fe tracks or to perform any local services along the Joint Line.

5. DRGW shall compensate Santa Fe for its use of the Joint Line in accordance with terms to be agreed upon between the parties or as determined by the ICC pursuant to the provisions of 49 U.S.C. §11103. Such compensation shall be retroactive to the date of DRGW's first use of the Joint



Line with interest. The rate of interest shall be as agreed by the parties or established by the ICC. For purposes of assessing compensation, DRGW shall keep records of the movements of cars loaded or empty and locomotives over the Joint Line.

6. In the event any accident, derailment or wreck shall occur on the Joint Line, Santa Fe will clear it. The total cost of clearing and/or repairing the Joint Line or any other property damaged thereby will be borne by the party or parties liable therefor pursuant to the Liability and Maintenance provisions of this agreement (Item 7).

7. Any locomotive, car or train used or operated by either party or its tenants on the Joint Line shall be deemed within the meaning of this agreement to be the locomotive, car or train of such party whether owned by it or not, provided, however, that cars moving on DRGW waybills shall be considered DRGW.

18. The term "loss or damage" as used in this Paragraph relates to loss or damage arising upon or adjacent to the Joint Line and embraces all losses and damages growing out of the death of or injury to persons and all losses and damages growing out of loss of or damage to property, including property belonging to either or both of the parties hereto and also embraces all costs and expenses incident to any such losses or damages.

The term "joint employes" as used in this Article includes any officer or other employe while actually engaged in the management, maintenance or operation of any part of the Joint Line, but it shall not include any such officer or cars whether operated in DRGW trains or otherwise.

or employe during such time as he is performing any service for or on behalf of or in respect to the use of the Joint Line solely for one of the parties; when so employed, such officer or employe shall be deemed for the time being the sole employe of the party for whom or in whose behalf or in respect to whose use of the Joint Line such service is being performed.

Loss or damage due

- (a) to the negligence or wrongful act or omission of the sole employe or employes of one of the parties, or
- (b) to the concurring negligence or wrongful act or omission of a joint employe and of the sole employe or employes if one of the parties, or
- (c) to the failure or defect of the exclusive equipment or applicane of one of the parties,

shall be borne by the party whose sole employe or employes or whose exclusive equipment or appliance so caused or contributed to such loss or damage.

Loss or damage due

- (d) to the concurring negligence or wrongful act or omission of the sole employe or employes of one party and of the sole employe or employes of the other party, or
- (e) to the concurring negligence or wrongful act or omission of a joint employe and of the sole employe or employes of one party and of the sole employe or employes of the other party.

shall be borne equally by the parties, except that each party shall bear all such loss or damage in respect to its own exclusive property or property in its custody or control and

as to its sole employes, passengers or persons upon its locomotives, cars or trains.

Loss or damage due

- (f) to the negligence or wrongful act or omission of a joint employe, or
- (g) to the acts of third persons not in the employ or under the control of either party, or
- (h) to the failure or defective condition of the Joint Line, or
- (i) to unknown causes,

shall be borne by each party hereto as to its own exclusive property or property in its custody or control and as to its own employes, passengers or persons upon its locomotives, trains or cars, or in or about the Joint Line in the transaction of business with it; while as to other persons and their property, joint employes and their property, such loss or damage shall be borne by the parties hereto in proportion to the ratio which each party's car mileage for the month in which such loss or damage occurred bears to the total car mileage of both parties for said month.

Anything herein to the contrary notwithstanding, neither party shall have any claim against the other for loss or damage of any kind caused by or resulting from interruption or delay to its business.

Each party who may be liable for or be required hereunder to bear any loss or damage shall and will indemnify and save harmless the other party from such loss or damage and against the payment of any liability for such loss or damage.



If any suit shall be brought against either party and any judgment shall be recovered which such party shall be compelled to pay and the other party shall, under the provisions of this agreement, be solely liable therefor, then such other party shall on demand promptly repay to the party paying the same, any moneys which it (the party paying the same) may have paid or been required to pay whether in the way of damages, costs, fees, or other expense; and if the liability in any such case or cases is joint as between the parties, the party defendant therein shall be reimbursed to the extent and in the proportion that the other party hereto may be required to bear or to participate in such liability as hereinabove provided.

Neither party shall be concluded by any judgment at law or in equity against the other unless it has had reasonable notice from such other requiring it to appear in an action or suit and make defense thereto for its own account or jointly with the other party. If such notice shall have been given by either party to the other and the party receiving the same shall have failed to appear and make defense, it shall be concluded by the judgment or decree in said suit.

Either party may make settlement of all claims for loss or damage for which the parties hereto shall be jointly liable; however, neither party shall pay more than Five Hundred Dollars (\$500.00) in making any such settlement or compromise unless and until it shall have procured the written

consent thereto of the claim agent of the other party; provided, however, that should either party withhold its consent to any such proposed settlement such party shall within ten (10) days after the receipt of notification of the proposed voluntary settlement take over and assume settlement of the claim, or, at its option the defense thereof, and in the event that such party shall thereafter pay or expend in connection with the compromise or defense of such claim an amount greater than that for which the party proposing settlement could have settled such claim then such party shall bill the other party in connection therewith for its proportion of the amount for which the proposing party could have made voluntary settlement and in making such voluntary or other settlement as aforesaid either party, as the case may be, shall procure from each claimant a release for both parties from liability in the premises.

8. It is understood and agreed that the terms of compensation, as opposed to liability, set forth herein are on an interim basis only and that, in the event DRGW's use is ultimately upheld as lawful, a formal trackage rights agreement will be negotiated by Santa Fe and DRGW, or established by the ICC, under the condemnation standards set forth in 49 U.S.C. §11103. It is further understood and agreed that such ultimate terms for compensation, if any, shall be retroactive to the date DRGW may commence operations over the Joint Line pursuant to this interim agreement but

liability provisions as set forth in Item 7 hereof shall govern during the term of interim operations.

9. This agreement shall commence at the time DRGW, in compliance with Item 1 hereof, shall have executed this interim agreement and shall commence operations over the Joint Line. This agreement shall terminate no later than December 31, 1983, provided, however, that in the event it is determined prior to that date either on judicial review or by the ICC that DRGW's grant of trackage rights over the Joint Line is invalid, or that the Union Pacific, Missouri Pacific or Western Pacific consolidations are invalid, this interim trackagerights agreement shall terminate and DRGW will immediately cease operations over the Joint Line.

If you are agreeable to the foregoing, will you please so indicate by signing and returning the duplicate copy of this letter.

THE ATCHISON, TOPEKA AND  
SANTA FE RAILWAY COMPANY

By *[Signature]*  
Its President and Chief Executive  
Officer

AGREED AND ACCEPTED:

THE DENVER AND RIO GRANDE  
WESTERN RAILROAD COMPANY

By W. J. Holtzman  
Its President and Chief Executive Officer



SUPPLEMENT TO  
INTERIM TRACKAGE RIGHTS AGREEMENT

THIS SUPPLEMENTAL AGREEMENT is entered into this 25<sup>th</sup> day of May, 1989, by and between THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY (hereinafter referred to as "Santa Fe") and THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY (hereinafter referred to as "DRGW");

RECITALS:

By agreement effective December, 1982 (hereinafter referred to as "Interim Trackage Rights Agreement"), the parties set forth their understanding with respect to the interim grant of trackage rights by Santa Fe to DRGW over Santa Fe's tracks and appurtenances between Pueblo and Nyberg, Colorado. The parties now desire to amend the Interim Trackage Rights Agreement by extending the term thereof and to provide for partial payment of Compensation for use of tracks pending determination of final terms, as set forth below.

AGREEMENT:

1. The following provision is hereby added to and made a part of Item 5 of the Interim Trackage Rights Agreement:

"DRGW shall pay to Santa Fe from the date it commenced using the Joint Line, and monthly thereafter, upon rendition of bills therefor, for use of the Joint Line in the operation of its trains thereover where a specific payment is not otherwise provided, a sum determined at the rate of seventy-five (75) percent of the Standard Detour Rate of \$9.00 per train mile for each train moved over the Joint Line during the month to which such bill is applicable. For the purpose hereof, the term "train mile" means movement of one train (an engine or more than one engine with or without cars attached, exclusive of motor cars and hi-rail motor cars) a distance of one mile. In computing train miles, the distance run by trains over the Joint Line shall be the distance such trains run in a through movement over the Joint Line measured along said main track. The mileage for a through movement over the Joint Line is 12.50 miles.

"Upon completion of negotiations specifying terms of compensation for use of the Joint Line by DRGW, Santa Fe shall allow DRGW credit for payments made hereunder in computing the actual amount due Santa Fe under the specific terms of compensation from the date DRGW commenced using the Joint Line.

"The payment by DRGW of said rate of seventy-five (75) percent of the Standard Detour Rate of \$9.00 per train mile shall not be construed as establishing any precedent in determining the specific terms of compensation for use of the Joint Line as hereinabove provided."

2. The second sentence of Item 9 of the Interim Trackage Rights Agreement is amended to read as follows:

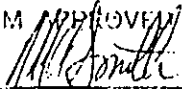
"This agreement shall terminate no later than June 30, 1990, provided, however, that in the event it is determined prior to that date either on judicial review or by the ICC that DRGW's grant of trackage rights over the Joint Line is invalid, or that the Union Pacific, Missouri Pacific or Western Pacific consolidations are invalid, this interim trackage rights agreement shall terminate and DRGW will immediately cease operations over the Joint Line."

3. This Supplemental Agreement shall become effective as of the date it is entered into. Except as otherwise provided herein, all the terms, covenants and conditions of the Interim Trackage Rights Agreement shall remain in full force and effect.

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

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

FORM APPROVED



General Attorney

By



Its

President

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

By

Its

SUPPLEMENT TO  
INTERIM TRACKAGE RIGHTS AGREEMENT

THIS SUPPLEMENTAL AGREEMENT is entered into this 28th day of June, 1989, by and between THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY (hereinafter referred to as "Santa Fe") and THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY (hereinafter referred to as "DRGW"):

RECITALS:

By agreement effective December, 1982 (hereinafter referred to as "Interim Trackage Rights Agreement"), the parties set forth their understanding with respect to the interim grant of trackage rights by Santa Fe to DRGW over Santa Fe's tracks and appurtenances between Pueblo and Nyberg, Colorado. The parties now desire to amend the Interim Trackage Rights Agreement by extending the term thereof as set forth below.

AGREEMENT:

1. The second sentence of Item 9 of the Interim Trackage Rights Agreement is amended to read as follows:

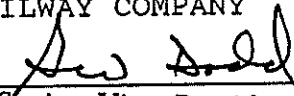
This agreement shall terminate no later than June 30, 1990, provided, however, that in the event it is determined prior to that date either on judicial review or by the ICC that DRGW's grant of trackage rights over the Joint Line is invalid, or that the Union Pacific, Missouri Pacific or Western Pacific consolidations are invalid, this interim trackage rights agreement shall terminate and DRGW will immediately cease operations over the Joint Line.

2. This Supplemental Agreement shall become effective as of the date it is entered into. Except as otherwise provided herein, all the terms, covenants and conditions of the Interim Trackage Rights Agreement shall remain in full force and effect.



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

THE ATCHISON, TOPEKA AND SANTA FE  
RAILWAY COMPANY

By   
Its Senior Vice President-Finance  
and Chief Financial Officer

ATTEST:

  
Asst Secretary

THE DENVER AND RIO GRANDE WESTERN  
RAILROAD COMPANY

By   
Its GENERAL MANAGER

SUPPLEMENT TO

INTERIM TRACKAGE RIGHTS AGREEMENT

THIS SUPPLEMENTAL AGREEMENT is entered into this 10th day of May 1990, by and between THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY (hereinafter referred to as "Santa Fe") and THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY (hereinafter referred to as "DRGW");

RECITALS:

By agreement effective December 1982, (hereinafter, as amended June 28, 198 referred to as "Interim Trackage Rights Agreement"), the parties set forth their understanding with respect to the interim grant of trackage rights by Santa Fe to DRGW over Santa Fe's tracks and appurtenances between Pueblo and Nyberg, Colorado. The parties now desire to amend the Interim Trackage Rights Agreement by extending the term thereof as set forth below.

AGREEMENT:

1. The second sentence of Item 9 of the Interim Trackage Rights Agreement is amended to read as follows:

This agreement shall terminate no later than June 30, 1991, provided, however, that in the event it is determined prior to that date either on judicial review or by the ICC that DRGW's grant of trackage rights over the Joint Line is invalid, or that the Union Pacific, Missouri Pacific or Western Pacific consolidations are invalid, this interim trackage rights agreement shall terminate and DRGW will immediately cease operations over the Joint Line."

2. This Supplemental Agreement shall become effective as of the date it is entered into. Except as otherwise provided herein, all the terms, covenants and conditions of the Interim Trackage Rights Agreement shall remain in full force and effect.

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

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

By *M.R. Nix*

Its PRESIDENT AND CHIEF OPERATING OFFICER

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

By *W.M. J. Holtman*

Its Chairman of the Board, President and  
Chief Executive Officer

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INTERIM TRACKAGE RIGHTS AGREEMENT

THIS SUPPLEMENTAL AGREEMENT is entered into this \_\_\_\_\_ day of \_\_\_\_\_, 1991, by and between THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY (hereinafter referred to as "Santa Fe") and THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY (hereinafter referred to as "DRGW");

RECITALS:

By agreement effective December 1982, (hereinafter, as amended June 28, 1989, and May 10, 1990, referred to as "Interim Trackage Rights Agreement"), the parties set forth their understanding with respect to the interim grant of trackage rights by Santa Fe to DRGW over Santa Fe's tracks and appurtenances between Pueblo and Nyberg, Colorado. The parties now desire to amend the Interim Trackage Rights Agreement by extending the term thereof as set forth below.

AGREEMENT:

1. The second sentence of Item 9 of the Interim Trackage Rights Agreement is amended to read as follows:

This agreement shall terminate no later than June 30, 1992, provided, however, that in the event it is determined prior to that date either on judicial review or by the ICC that DRGW's grant of trackage rights over the Joint Line is invalid, or that the Union Pacific, Missouri Pacific or Western Pacific consolidations are invalid, this interim trackage rights agreement shall terminate and DRGW will immediately cease operations over the Joint Line.

2. This Supplemental Agreement shall become effective as of July 1, 1991. Except as otherwise provided herein, all the terms, covenants and conditions of the Interim Trackage Rights Agreement shall remain in full force and effect.

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

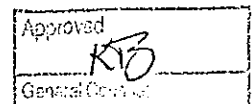
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

By: \_\_\_\_\_  
Its: Vice President-Transportation

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

By: W. J. Holtzman  
Its: Chairman of the Board, President and Chief Executive Officer

A:\062991





**REDACTED – TO BE PLACED ON PUBLIC FILE**

**UP/SP-411**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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Finance Docket No. 32760 (Sub-No. 46)

**BNSF RAILWAY COMPANY  
—TERMINAL TRACKAGE RIGHTS—  
KANSAS CITY SOUTHERN RAILWAY COMPANY AND  
UNION PACIFIC RAILROAD COMPANY**

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**UNION PACIFIC'S REPLY  
TO BNSF'S OPENING STATEMENT AND EVIDENCE**

**VOLUME I of II: REPLY STATEMENT AND EVIDENCE**

GAYLA L. THAL  
LOUISE A. RINN  
THOMAS A. ANDREOLI  
ELISA B. DAVIES  
JEREMY M. BERMAN  
Union Pacific Railroad Company  
1400 Douglas Street  
Omaha, Nebraska 68179  
(402) 544-3309

MICHAEL L. ROSENTHAL  
CAROLYN F. CORWIN  
Covington & Burling LLP  
One CityCenter  
850 Tenth Street, NW  
Washington, D.C. 20001  
(202) 662-6000

*Attorneys for Union Pacific Railroad Company*

August 24, 2015

Settlement Agreement, and different from those the Board required Union Pacific to provide BNSF when the UP/SP merger was approved.

**A. BNSF agreed to alternative access where Union Pacific lacks authority to grant certain trackage rights.**

BNSF is wrong in asserting that the BNSF Settlement Agreement gives it an unconditional right to access CITGO and other shippers using trackage rights over the Rose Bluff Industrial Lead. Under the terms of the joint facility agreement governing the Rose Bluff Industrial Lead, Union Pacific cannot grant trackage rights over KCS's objection, and KCS has objected to BNSF operating over the Lead. Union Pacific and BNSF expressly agreed in Section 8(n) of the BNSF Settlement Agreement that if Union Pacific lacks sufficient legal authority to grant certain trackage rights, we would provide BNSF with an alternative means of access of commercially equivalent utility—which we have done.<sup>16</sup>

BNSF gained rights to serve Lake Charles area shippers as a result of the CMA Agreement. The CMA Agreement made this new access subject to the general terms of the BNSF Settlement Agreement. The parties to the CMA Agreement expressly agreed that “[t]he [BNSF] Settlement Agreement shall be amended to give [BNSF] the right to handle traffic of shippers open to all of UP, SP and KCS at Lake Charles and West Lake, Louisiana.” Counsel’s Exhibit 3 (CMA Agreement § 8). The CMA Agreement further provided that BNSF “access to the covered shippers at Lake Charles and West Lake shall be *on the same basis as is provided for in the [BNSF] Settlement Agreement for ‘2-to-1’ points.*” *Id.* (emphasis added).

When Union Pacific advised the Board of the parties’ subsequent agreement to extend the CMA Agreement’s coverage to shippers in West Lake Charles, Union Pacific said we would do

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<sup>16</sup> If BNSF does not believe its current access to CITGO is consistent with Section 8(n), it can invoke the agreement’s dispute resolution mechanism. See Counsel’s Exhibit 2 (RSA § 15).

so by amending the BNSF Settlement Agreement. *See* Counsel’s Exhibit 4 (Applicants’ Brief at 23 n.9) (“Applicants recently agreed with CMA to extend the coverage of Section 8 of the CMA settlement to shippers at West Lake Charles served by SP and KCS, and the [BNSF] Settlement Agreement will be amended accordingly.”).

Union Pacific and BNSF subsequently incorporated the CMA Agreement’s Lake Charles area access provisions into Section 5(b) of the BNSF Settlement Agreement through the Second Supplemental Agreement. *See* Counsel’s Exhibit 5 (Second Supplemental Agreement § 4(b)). Nothing in the Second Supplemental Agreement in any way affected the substance of Section 8(n) of the BNSF Settlement Agreement. *See id.* (Second Supplemental Agreement § 6(b)). Accordingly, the new provision granting BNSF access to shippers in the Lake Charles area was subject to Section 8(n).

**B. The Board did not condition its approval of the UP/SP merger on BNSF’s use of trackage rights to access shippers in the Lake Charles area.**

BNSF also is wrong in asserting that the Board “specifically” required Union Pacific to provide BNSF with trackage rights over “nine miles of track in West Lake Charles, LA jointly owned by UP and KCS, known as the Rosebluff Industrial Lead.” BNSF Op. at 2-3. The Board’s decision approving the UP/SP merger makes no mention whatsoever of the nine miles of track in West Lake Charles, the Rose Bluff Industrial Lead, or any Lake Charles area track jointly owned by Union Pacific and KCS. Nor does this requirement appear in the BNSF Settlement Agreement or the CMA Agreement.

BNSF claims the Board determined in Decision No. 44 that “direct BNSF service” to shippers in the Lake Charles area using trackage rights is “a vital and necessary component in resolving the loss of competitive options to Lake Charles area shippers.” BNSF Op. at 15. However, BNSF is playing semantic games. In Decision No. 44, the Board required Union



BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

Finance Docket No. 32760 (Sub-No. 46)

BNSF RAILWAY COMPANY  
—TERMINAL TRACKAGE RIGHTS—  
KANSAS CITY SOUTHERN RAILWAY COMPANY AND  
UNION PACIFIC RAILROAD COMPANY

---

**REPLY VERIFIED STATEMENT**

**OF**

**JOHN H. REBENS DORF**

**REPLY VERIFIED STATEMENT**

**OF**

**JOHN H. REBENS DORF**

**I. Background**

My name is John H. Rebensdorf. Until I retired in 2012, I was Union Pacific Railroad Company's Vice President – Network Planning and Operations. I hold a Bachelor's Degree in Civil Engineering from the University of Nebraska and a Master's Degree in Business Administration from Harvard University. Before I joined Union Pacific, I worked in the Mechanical Department of the Chicago, Burlington & Quincy Railroad and in the Operating and Engineering Department of the Chicago, Rock Island and Pacific Railroad. At Union Pacific, I held a variety of positions in the Finance, Executive, and Operating departments before I was promoted to Vice President –Network Planning and Operations in 2003.

I was Union Pacific's lead negotiator for the settlement agreement between Union Pacific and BNSF in connection with the UP/SP merger ("BNSF Settlement Agreement"). I was also involved in amending that agreement to address the conditions imposed on the merger by the Board, including the terms of a settlement agreement among Union Pacific, BNSF, and the Chemical Manufacturers Association ("CMA Agreement").

I am making this statement to correct errors in BNSF's Opening Statement and Evidence and the Verified Statement of Richard E. Weicher about the rights BNSF obtained in the UP/SP merger to serve shippers in and around Lake Charles, Louisiana. Union Pacific took seriously the need to address concerns that shippers expressed about the merger, and in response we made numerous concessions to accommodate service by BNSF that would preserve competition and otherwise address shipper concerns. As I explain below, Union Pacific and BNSF both

recognized that Union Pacific in some circumstances might lack sufficient legal authority to grant BNSF access to shippers using trackage rights, so we expressly provided for alternative access in such situations. As I also explain below, BNSF planned at the time of the merger to access shippers in the Lake Charles area using reciprocal switching, not trackage rights. I further explain why BNSF is simply wrong when it claims that it has a unilateral right to change its method of service from reciprocal switching to trackage rights.

**II. BNSF agreed in Section 8(n) of the BNSF Settlement Agreement to use an alternative means of access where Union Pacific lacks sufficient authority to grant trackage rights.**

In applying for terminal trackage rights over the Rose Bluff Industrial Lead, BNSF is asking the Board to grant entirely different rights than BNSF agreed to accept in the BNSF Settlement Agreement. BNSF now takes the position that it should receive trackage rights regardless of any legal rights KCS may possess under the joint facility agreements governing the trackage in question. However, Union Pacific and BNSF expressly agreed in Section 8(n) of the BNSF Settlement Agreement that if Union Pacific for any reason lacked sufficient legal authority to grant certain trackage rights, Union Pacific as a remedy would provide an alternative means of access of commercially equivalent utility.

The BNSF Settlement Agreement states in Section 8(n):

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

Union Pacific and BNSF expressly included this provision in the Initial BNSF Settlement Agreement. *See Counsel's Exhibit 1 (Initial BNSF Settlement Agreement § 8(j))*. And the provision remains in place and unchanged, except for re-numbering, in the Restated and



Amended Agreement (“RASA”), which Union Pacific and BNSF submitted to the Board on March 1, 2002, to reflect the conditions imposed by the Board on the merger and subsequent decisions interpreting and clarifying those conditions. *See* Counsel’s Exhibit 2 (RASA § 8(n)).

Section 8(n) was important to both Union Pacific and BNSF. Union Pacific was granting BNSF trackage rights over several thousand miles of lines. In negotiating these trackage rights, Union Pacific and BNSF recognized that some lines might be subject to pre-existing agreements that would restrict Union Pacific’s ability to grant access to BNSF. Section 8(n) addresses this possible restriction. Union Pacific was careful not to make commitments that we could not keep, and BNSF obtained the assurance that it would receive the value of the rights that it had negotiated.

Section 8(n) directly contradicts BNSF’s incorrect claim that Union Pacific has a “responsibility” for “ensuring that [it] has (or acquires) any underlying contractual or other authority needed” to grant BNSF the trackage rights described in the BNSF Settlement Agreement. BNSF Op. at 12 & Weicher VS at 8. The BNSF Settlement Agreement imposes no such responsibility. Instead, on its face, Section 8(n) obligates Union Pacific to provide an alternative form of access of “commercially equivalent utility” when Union Pacific lacks sufficient legal authority to grant trackage rights. The present situation represents the very contingency that the parties contemplated when they negotiated Section 8(n).

As background, the BNSF Settlement Agreement initially covered only those shippers who, immediately prior to the UP/SP merger, were served by both Union Pacific and Southern Pacific and no other railroad (“2-to-1” shippers). Prior to the UP/SP merger, CITGO and other Lake Charles area shippers were not “2-to-1” shippers. CITGO and other shippers in West Lake Charles had access to both KCS and Southern Pacific—they did not have access to Union

Pacific. Shippers in Lake Charles and Westlake had access to three railroads: Union Pacific, Southern Pacific, and KCS, and therefore were “3-to-2” shippers.

In the merger proceeding, CMA and certain shippers argued that the merger would reduce competition in the Lake Charles area even though there were no 2-to-1 shippers in that area. To secure CMA’s support for the merger, Union Pacific entered into the CMA Agreement, in which it agreed to give BNSF access to Lake Charles area shippers by amending the BNSF Settlement Agreement to cover those shippers. *See Counsel’s Exhibit 3 (CMA Agreement § 8)*. The amendment did not affect Section 8(n) of the BNSF Settlement Agreement. *See Counsel’s Exhibit 5 (Second Supplemental Agreement § 6(b))*.<sup>1</sup>

In approving the UP/SP merger, the Board required Union Pacific to change the BNSF Settlement Agreement in one way that might affect traffic moving to CITGO—it required Union Pacific to remove a geographic restriction on BNSF service to shippers in the Lake Charles area. However, the change did not affect the application of Section 8(n). On the contrary, the Board imposed as a condition on the UP/SP merger all the terms of the BNSF Settlement Agreement, including Section 8(n). *See Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233, 419 (1996).

### **III. BNSF planned at the time of the UP/SP merger to access Lake Charles area shippers using reciprocal switching, not trackage rights.**

In his statement, Weicher implies that the Board’s merger conditions require that BNSF must be allowed to serve Lake Charles area shippers using trackage rights. The Board never imposed such a requirement. What Weicher characterizes as “trackage rights conditions,” Weicher VS at 3, are more accurately described as access conditions. The Board left Union

<sup>1</sup> In the Second Supplement Agreement, Section 8(j) of the Initial BNSF Settlement Agreement was re-numbered as Section 8(k), after the parties added a new Section 8(j). In the RASA, the provision was re-numbered as Section 8(n) after the parties added new Sections 8(j), (k), and (l).

Pacific and BNSF to determine the specific method of access pursuant to the terms of the BNSF Settlement Agreement (including Section 8(n)).

Indeed, at the time of the merger, BNSF was not even planning to serve Lake Charles area shippers using trackage rights, and the Board was aware of this fact. After BNSF obtained access to the Lake Charles area in the CMA Agreement, Union Pacific agreed that BNSF could serve Lake Charles area shippers using a combination of haulage and reciprocal switching. The parties then entered into a haulage agreement, which Union Pacific submitted to the Board several months before the Board approved the UP/SP merger. *See Counsel's Exhibit 21 (Lake Charles Haulage Agreement).*

The BNSF Settlement Agreement also does not require that BNSF serve Lake Charles area shippers using trackage rights; instead, the agreement uses the broader term "handle":

BNSF shall also have the right to *handle* traffic of shippers open to all of UP, SP and KCS at Lake Charles, Rose Bluff and West Lake, LA, and traffic of shippers open to SP and KCS at West Lake Charles.

Counsel's Exhibit 2 (RASA § 5(b)) (emphasis added). The parties agreed that BNSF access to industries at points open to BNSF could be "direct or through reciprocal switch, or, with UP/SP's prior agreement, through a third party contractor." *Id.* (RASA § 5(c)). Neither Union Pacific nor BNSF ever represented to the Board that BNSF would access any shipper facility using trackage rights, as opposed to relying on reciprocal switching provided by Union Pacific. The parties recognized that different methods of access might be appropriate in different operating and commercial environments.

BNSF has served Lake Charles area shippers using reciprocal switching since 1997. When I retired from Union Pacific in 2012, fifteen years after the UP/SP merger, BNSF was still serving many "2-to-1" locations using reciprocal switching. I am not aware of any time, at least

until now, that BNSF or a shipper has claimed that BNSF access using reciprocal switching violates the Board's condition for Lake Charles area access.

**IV. BNSF does not have an absolute right to elect between access using trackage rights and access using reciprocal switching.**

As a final point, BNSF is incorrect when it claims that it has “the unilateral right to use any identified service alternative.” Weicher VS at 3. That statement is incorrect for two reasons: *First*, as discussed above, Section 8(n) of the BNSF Settlement Agreement recognizes that BNSF does not have the right to serve a particular shipper using trackage rights where Union Pacific lacks sufficient legal authority to grant the necessary trackage rights. *Second*, even where there are no legal barriers to BNSF service using trackage rights, BNSF's election is contingent on the development of a mutually acceptable operating plan, as BNSF acknowledges in its Opening Statement and Evidence. *See* BNSF Op. at 19 (“[T]he BNSF Settlement Agreement sets forth a process by which the railroads can agree on an operating plan.”).

The process that Union Pacific and BNSF agreed to follow when BNSF proposes to initiate service to a covered shipper or change its method of service requires BNSF to obtain Union Pacific's approval of an operating plan. Specifically:

1. Before initiating service or changing its election BNSF must provide Union Pacific “with the specifics of its operating plan over UP/SP trackage.” Counsel's Exhibit 2 (RASA § 5(d)).
2. Within 30 days of its receipt of BNSF's proposed operating plan, Union Pacific must “notify BNSF of its approval or disapproval of BNSF's plan.” *Id.*
3. If Union Pacific disapproves of BNSF's proposed plan, Union Pacific must “provide an explanation in writing to BNSF of its reasons for disapproval” and “propose an alternative operating plan that would be acceptable to UP and also be no more onerous than the operating plan that UP would establish for service provided by UP.” *Id.*
4. If Union Pacific approves BNSF's plan but establishes conditions on that approval—for example, a requirement that BNSF make capital investments to permit the



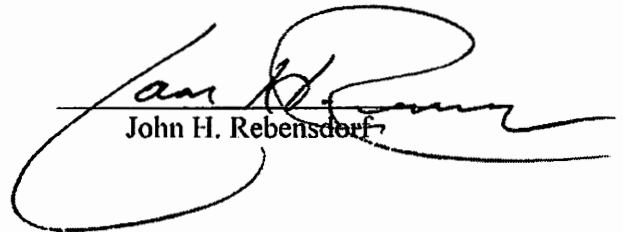
operations to occur—“those conditions shall be set forth in writing and shall be no more onerous than UP would establish for service provided by UP.” *Id.*

This process was designed to promote informed discussion with the objective of providing both railroads the ability to serve their customers. My recollection from my time at Union Pacific is that we were able to reach agreement with BNSF in every case, except a few where the parties disagreed about whether a shipper was actually covered by the BNSF Settlement Agreement. I do not recall that the parties ever reached the point where they arbitrated a dispute over Union Pacific’s disapproval of, or establishment of conditions on approval of, an operating plan proposed by BNSF, but arbitration is available if needed. Such disputes would be covered by the arbitration provision in Section 15 of the BNSF Settlement Agreement. *See Counsel’s Exhibit 2 (RASA § 15)).*

**VERIFICATION**

I, John H. Rebensdorf, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on 02/20, 2015.

  
John H. Rebensdorf

HIGHLY CONFIDENTIAL VERSION

KCS-65

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 32760

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

-- CONTROL AND MERGER --

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

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PETITION OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY TO  
REOPEN/RECONSIDER

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 32760

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PETITION OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY TO  
REOPEN/RECONSIDER

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**PREFACE AND SUMMARY OF ARGUMENT**

The Kansas City Southern Railway Company ("KCS"), pursuant to 49 U.S.C. § 10327(g)(1) and Section 1115.3 of the Commission's Rules of Practice, 49 C.F.R. § 1115.3(b)(1) and (3), respectfully petitions the Surface Transportation Board ("Board") to reopen the above captioned proceeding and to reconsider portions of Decision No. 44 dated August 6, 1996,<sup>1</sup> for the reason that the Commission's decision has been affected materially by new evidence and contains material error.<sup>2</sup>

The BNSF and CMA agreements granted BNSF access to shipper facilities in Louisiana at Lake Charles, Westlake, and West Lake Charles (collectively, the "Lake Charles area").<sup>3</sup> Decision No. 44, however, lifted certain route and rate restrictions that were imposed on BNSF's access in the Lake Charles area in the CMA agreement, which

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<sup>1</sup> Decision No. 44 was served on August 12, 1996, and this petition is therefore timely. 49 CFR § 1115.3(e).

<sup>2</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, took effect on January 1, 1996 (the "Act"). The Act abolished the ICC and transferred certain functions and proceedings, including this proceeding, to the Surface Transportation Board ("STB"). Except as otherwise noted, all citations contained in these comments are to the former section of the Interstate Commerce Act. It is also assumed for purposes of the filing, that all references to the "Commission" or "Interstate Commerce Commission" or the "ICC" are interchangeable with references to the "Board" or the "STB."

<sup>3</sup> See CMA Agreement at ¶ 8, amended at UP/SP-260 at 23, n. 9; and as further implemented by the second supplemental agreement to the BNSF agreement dated June 27, 1996 (UP/SP-266, Exhibit A, amending the BNSF agreement ¶ 5b).



thereby expanded BNSF's access to the Lake Charles area shipper facilities. *See* Decision No. 44 at 152-154; and 188-189.<sup>4</sup>

While the Board, in expanding on BNSF's access, was attempting to deal with certain arguments raised by KCS, Montell, and The Society of Plastics Institute (SPI), based upon the new evidence submitted herein, it appears that the Board has inadvertently violated Commission precedent. Furthermore, unbeknownst to the Board, UP/SP did not have the authority to provide BNSF, in the CMA agreement, access to the Lake Charles facilities without KCS's consent or without requiring BNSF to file a terminal trackage rights application under 49 U.S.C. § 11102 (formerly § 11103). Accordingly, the Board should not have granted BNSF access to the Lake Charles area as a condition to the merger, and at a very minimum, should not have expanded upon that access. Instead, the Board should substitute the conditions proposed herein. These proposed conditions would preserve, but not enhance, the competitive options available to Lake Charles area shippers.

### **ARGUMENT**

#### **A. DESCRIPTION OF RAILROAD OPERATIONS IN THE LAKE CHARLES AREA**

The Lake Charles area consists of three distinct railroad stations, Lake Charles, Westlake, and West Lake Charles. A description of the physical location of these 3 stations, including a map, is contained in the Verified Statement of Kenneth D. Clark, Jr., KCS's Vice President-Marketing, Chemical and Petroleum business units, attached as Exhibit "A" (V.S. Clark).

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<sup>4</sup> Despite KCS's request, KCS was not allowed to submit argument and evidence on the CMA agreement. Decisions Nos. 35 and 38. Furthermore, UP/SP modified the CMA and BNSF agreements in their brief and June 28th filing, far after the time available to KCS to submit evidence and argument. *See* UP/SP-260 at 23, n. 9 and UP/SP-266. As noted, the Board further modified these provisions in their decision. Accordingly, this is the first opportunity that KCS has to submit argument and evidence on these issues.

did not provide enough storage capacity (a highly unlikely event in that Lake Charles area shippers have not complained about KCS's or SP's current plastics storage capabilities and provided no such argument in this proceeding), such shippers would have the option of a KCS-BNSF interchange at Beaumont, Lake Charles, and Texarkana. Besides its own storage capability, BNSF could then take advantage of its access to all SP Gulf Coast SIT facilities, which access would not be impacted in any way by removing direct access for BNSF in the Lake Charles area. Thus, KCS-BNSF joint line service would more than sufficient for Lake Charles area plastics shippers, and further, due to the numerous KCS/BNSF interchanges, also allow such shippers to avoid the UP/SP monopoly bottleneck problem.

C. UP/SP DID NOT HAVE AUTHORITY TO PROVIDE BNSF ACCESS TO LAKE CHARLES SHIPPERS WITHOUT KCS'S CONSENT, AND BNSF THEREFORE MUST OBTAIN TERMINAL TRACKAGE RIGHTS AUTHORITY UNDER 49 U.S.C. §11102 BEFORE BNSF CAN ACCESS LAKE CHARLES SHIPPERS

The railroad operations of KCS, UP and SP in the Lake Charles area are governed by a multitude of trackage, haulage, switching, and other operating agreements among those parties. Applicants acquired access over KCS main line trackage in the area primarily pursuant to four agreements dating back to the first half of this century.<sup>18</sup> As shown below, Applicants did not have the authority under these agreements to grant BNSF access over KCS trackage in the Lake Charles area, as ¶ 8 of the CMA agreement purports to do.

On September 19, 1934, KCS and The Texas and New Orleans Railroad Company ("T&NO," predecessor to SP) entered into a joint facility agreement (HC 0001455 K through HC 0001467 K) whereby, among other provisions, KCS granted T&NO trackage rights over a portion of the main line of KCS's Lake Charles Branch for it to serve Mathieson Alkali

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<sup>18</sup> These agreements are marked Highly Confidential and are attached to the Verified Statement from Tom J. Nelson, Exhibit C, as document numbers HC 0001455 K through HC 0001517 K.

Works, Inc. (predecessor to Olin Corporation). Under a similar contract dated August 30, 1940 (HC 0001468 K through HC 0001487 K), KCS granted trackage rights to T&NO over another portion of KCS's Lake Charles Branch main line in order to serve the Continental Oil Company (predecessor to Conoco Oil Company).<sup>19</sup> The trackage segments described in the 1934 and 1940 agreements are part of the access grant to BNSF purportedly conveyed under ¶ 8 of CMA agreement. However, under the 1934 and 1940 agreements, Applicants did not have the authority to admit another carrier onto the trackage. The 1940 agreement merely allows T&NO, and its successors and assigns, to use track "jointly with the Kansas City Company and such other carriers as may be admitted by the Kansas City Company to the use of same." A similar provision exists in the 1934 agreement. Under these joint facility agreements, KCS remains the sole owner of the trackage, and only KCS has the right to grant another carrier access over the track.<sup>20</sup>

On May 21, 1947, the United States and the Reconstruction Finance Corporation deeded to KCS and T&NO, as joint owners, approximately 4.788 miles of industrial lead track and 1.635 miles of other track in the Westlake area. Although the 1947 deed conveyed to T&NO a joint ownership interest in the trackage, the operations over the trackage are governed by an agreement between KCS and T&NO dated March 29, 1948 (HC 0001488 K through HC 0001492 K). In that agreement, KCS and T&NO defined the rights of the parties in connection with the operations over the jointly owned track. The trackage segments governed by the 1948 agreement also are part of the access rights purportedly

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<sup>19</sup> This August 30, 1940 joint facility agreement was supplemented by an agreement dated May 5, 1951 to include new construction by T&NO and another segment of KCS main line track.

<sup>20</sup> These agreements generally cover the West Lake Charles and Rose Bluff Yard facilities.

granted to BNSF by Applicants under the CMA agreement. However, the 1948 operating agreement expressly provides that neither KCS nor T&NO, nor their successors and assigns, may "sell, lease or transfer its interest in the jointly owned tracks, or any part thereof, without advance written approval by the other party."<sup>21</sup>

Similarly, in an agreement dated July 26, 1954 (HC 0001493 K through HC 0001502 K), KCS and T&NO defined the various obligations with respect to the ownership and operation of jointly owned trackage serving the Lake Charles Harbor and Terminal District. The trackage segments governed by this agreement are also part of the access rights purportedly granted to BNSF by Applicants under the CMA agreement. Among the obligations defined in the 1954 agreement is an express provision that "neither [party] shall sell, lease or transfer its interest in the jointly owned tracks, or any part thereof, without advance written approval by the other party." Indeed, KCS is the sole owner of the "Continental Oil Company" trackage, and thus only KCS can grant additional access.

The contractual provisions found in these four governing joint facility agreements clearly prohibit Applicants from granting access to BNSF without KCS's consent.<sup>22</sup> Prior to entering into the CMA agreement, Applicants did not seek KCS's consent to allow BNSF to operate over KCS's trackage, nor did KCS provide its consent. Therefore, Applicants do not have authority to grant BNSF operating rights over KCS trackage. As such, any

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<sup>21</sup> These agreements generally cover the Westlake facilities.

<sup>22</sup> The intent of the joint facility agreements described above is further supported by an agreement dated September 2, 1981 (HC 0001503 K through HC 0001517 K), whereby the parties sought to change the operating procedures in the Lake Charles area in order to provide more efficient service. That agreement, which incorporates all four of the joint facility agreements, provides that "each and every provision [of the agreement] is for the exclusive benefit of the parties hereto and not for the benefit of any third party."



purported grant of operating rights to BNSF in the CMA agreement is illegal, unenforceable, and void.

It is long standing precedent that a railroad that desires access over another railroad's facilities, including jointly operated facilities, must file a terminal trackage rights application under 49 U.S.C. § 11103 (now, § 11102), even in the context of a merger or line acquisition proceeding.<sup>23</sup> Indeed, the terms of the statute itself provide that it is only the Board that "may require terminal facilities . . . owned by a rail carrier . . . to be used by another carrier" and then only if certain conditions are met. If a joint facility rail partner, even in the context of a merger proceeding, could simply allow another carrier over the joint facilities, over the objections of the other partner and in the face of contractual provisions to the contrary, the statute, and private contracts, would become meaningless. Applicants and BNSF must first file a section 11103 terminal trackage rights application in order for BNSF to receive the access over KCS facilities that was purportedly conveyed under the CMA agreement.

Additionally, even if ¶ 8 of the CMA agreement should be imposed by the Board as a condition to the merger, which it should not,<sup>24</sup> the Applicants cannot simply invoke the

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<sup>23</sup> See *CSX Corp. -- Control -- Chessie and Seaboard C.L.I.*, Finance Docket No. 28905 (Sub-No. 1), 363 I.C.C. 584 (ICC Decided September 23, 1980; *UP/MP/WP*, 366 I.C.C. at 574-576; *Rio Grande Indus., et al. -- Purchase and Related Trackage Rights -- Soo Line Railroad Company Line Between Kansas City and Chicago, IL*, Finance Docket No. 31505, Decision No. 6 (ICC Served November 15, 1989); and *Rio Grande Indus., Inc. et al -- Purchase and Trackage Rights -- Chicago, Missouri & Western Railway Company Line between St. Louis, MO and Chicago, IL*, Finance Docket No. 31522, 5 I.C.C.2d 952 (1989).

<sup>24</sup> By adopting ¶ 8 and imposing it as a condition, the Board actually increased the number of carriers at West Lake Charles from two (KCS and SP) to three (KCS, UP/SP, and BNSF) and maintained three carrier competition at Westlake and Lake Charles. The imposition of ¶ 8 as a condition, granting BNSF direct access to the Lake Charles area, was thus itself contrary to Commission precedent.

immunity provision of 49 U.S.C. § 11341(a) (now, § 11321(a)) to override the contractual provisions found in the joint facility agreements in the absence a terminal trackage rights application under § 11103. Although § 11341 provides that a person participating in an approved railroad merger is "exempt from antitrust laws and from all other law . . . as necessary to let that person carry out the transaction," this section cannot be interpreted to deprive another carrier of the use of its property without adequate due process of law, adequate compensation, and without an opportunity to resolve operational problems.

Under the rules of statutory construction, section 11341(a) cannot be read to exempt applicants from the requirements of § 11103, just as § 11341(a) could not be read to exempt the merger from any other provision of the Interstate Commerce Act, such as labor protection. In reading Section 11341 and Section 11103, the Board must interpret the statutes as being consistent with one another when possible. *Local 478 Trucking and Allied Industries Pension Fund v. Jayne*, 778 F. Supp. 1289 (D.N.J. 1991). In resolving the apparent conflict between § 11341 and § 11103, the Board must regard each statute as effective wherever possible, absent clearly expressed congressional intent to the contrary. *Muller v. Lujan*, 928 F.2d 207 (6th Cir. 1991); *U.S. v. Norquay*, 905 F.2d 1157 (8th Cir. 1990). The Board's discussion of the section 11341(a) issue in the context of that terminal trackage rights application makes it clear that § 11103 and § 11341 may be harmoniously applied in the context of a merger.

If Applicants wish to gain trackage rights in the face of contractual provisions to the contrary, even in the context of a merger proceeding, they must file an application for terminal trackage rights under § 11103. If Congress did not intend Section 11103 to apply in the context of a merger proceeding, it would have expressed that intent in the language of the

statute.<sup>25</sup> Therefore, a terminal trackage rights application is a necessary prerequisite for Applicants to use the immunity provision of § 11341 to override the contractual obligations governing the Lake Charles area trackage.

Applicants themselves recognized that a § 11103 terminal trackage rights application is necessary in order to override contractual provisions protecting a carrier's ownership interest in a terminal facility.<sup>26</sup> In Sub-No. 9, Applicants and BNSF sought terminal trackage rights for BNSF over three segments of KCS trackage (joint facility segments in Beaumont and Shreveport) despite contractual provisions limiting access to carriers approved by KCS. Instead of relying solely upon § 11341 to override the consent provisions in the governing contracts, Applicants acknowledged the necessity for a § 11103 terminal trackage rights application requesting BNSF access over the KCS trackage. In granting the relief, the Board likewise did not invoke § 11341 immunity to override the contractual consent provisions. Instead, the Board recognized that there was no need to invoke the immunity provision as long as § 11103 remained available.<sup>27</sup>

Accordingly, a § 11103 terminal trackage rights application is necessary to ensure that an owner of the facilities is afforded constitutional due process before its property is taken for another's use. The application procedure provides the owner with an opportunity to

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<sup>25</sup> In that Congress only recently rewrote the Interstate Commerce Act, after Applicants had filed their merger application, Congress had the full opportunity to change the terminal trackage rights statute, but Congress did not modify, repeal, or otherwise substantively change former § 11103. *See* ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, enacted December 29, 1995, effective January 1, 1996, section 11102.

<sup>26</sup> Similarly, Tex Mex, instead of relying upon § 11341(a)'s preemptive authority, also filed a terminal trackage rights application seeking access to the Houston Belt Terminal railroad.

<sup>27</sup> "We think that an override of the restrictions in KCS' trackage rights agreements would be necessary to carry out the merger here if section 11103 were unavailable." Decision No. 44 at 170 (emphasis added)(footnote omitted).

demonstrate that the proposed usage is not practicable and not in the public interest; it allows the owner to show that the proposed usage would substantially impair its ability to handle its own business over the trackage and that the relief is not operationally feasible; and it allows the owner to prove that such access is not in the "public interest." A § 11103 proceeding also allows the owner a forum in which to pursue appropriate conditions and compensation for the use of its facilities.

Therefore, in the present case, if the Board continues to believe that BNSF should be granted direct access to the Lake Charles area, which it should not be, the Board, at a minimum, must require BNSF and Applicants to file a § 11103 terminal trackage rights application before that access can be implemented, and KCS must be afforded the opportunity to respond to that application. If the Board revokes its imposition of ¶ 8 of the CMA agreement (and its later modification to that section) and instead, substitutes the conditions proposed herein by KCS, the filing of a terminal trackage rights application would not be necessary.

### CONCLUSION

By imposing ¶ 8 of the CMA agreement as a condition to approval of the proposed merger and then by further expanding upon BNSF's access granted in ¶ 8, the Board has violated long standing precedent regarding the criteria for the imposition of conditions in merger proceedings. By substituting the conditions proposed herein, (1) removing BNSF's direct access to the Lake Charles area, or at a minimum, eliminating the Board's expansion of that access and requiring BNSF to file a terminal trackage rights application; and (2) establishing new KCS/BNSF interchanges at Texarkana, Beaumont, and Lake Charles, the



Board can resolve both the monopoly bottleneck problem and the concern over plastics storage capacity in the least intrusive way and without violating Commission precedent.

This 3rd day of September, 1996.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing "THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S PETITION TO REOPEN/RECONSIDER" was served this 3rd day of September, 1996, by hand delivery to attorneys for Applicants and by depositing a copy in the United States mail in a properly addressed envelope with adequate postage thereon addressed to each other party on the restricted service list.

  
Attorney for The Kansas City Southern  
Railway Company