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ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY
—OPERATING RIGHTS—
SOUTHERN PACIFIC TRANSPORTATION CO.

UNION PACIFIC RAILROAD COMPANY'S FINAL BRIEF

CHRISTINA B. CONLIN
JAMES B. BOLES
TONYA W. CONLEY
TANYA L. SPRATT
Union Pacific Railroad Company
1400 Douglas Street
Omaha, NE 68179

MICHAEL L. ROSENTHAL
Covington & Burling LLP
One CityCenter
850 Tenth Street, N.W.
Washington, DC 20001
(202) 662-6000

Attorneys for Union Pacific Railroad Company

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Crouch VS	Verified Statement of Harvey A. Crouch, PE (May 3, 2024)
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Mathur RVS	Reply Verified Statement of Dr Divya Mathur (Mar. 14, 2025)
Mathur VS	Verified Statement of Dr Divya Mathur (May 3, 2024)
UP Opening	Union Pacific Railroad Company's Opening Statement and Evidence (May 3, 2024)
UP Reply	Union Pacific Railroad Company's Reply Statement and Evidence (Mar. 14, 2025)

In Union Pacific's Final Brief, Highly Confidential information is enclosed in double braces, and Confidential Information is enclosed in single braces. Highly Confidential and Confidential information is redacted from the public version of documents filed at the Board.

UNION PACIFIC RAILROAD COMPANY'S FINAL BRIEF

I. Introduction and Summary

This proceeding involves the interest rental BNSF Railway Company pays for trackage rights over Union Pacific Railroad Company's 67.8-mile line between Kern Junction and Mojave, California (the Tehachapis Line or Line). When line owners and tenants cannot agree on appropriate compensation for trackage rights and the issue cannot be left to bargaining, the Surface Transportation Board resolves the dispute using principles established in *SSW Compensation*.¹ This is such a dispute, because it involves modifying compensation terms the Interstate Commerce Commission prescribed in *Atchison, Topeka & Santa Fe Ry.—Operating Agreement—S. Pac. Company*, 331 I.C.C. 367 (1967), *modified*, 333 I.C.C. 342 (1968) (*1967 Order*).

The two rounds of evidence filed in this proceeding show Union Pacific and BNSF agree the Board should calculate the interest rental payment using *SSW Compensation*'s capitalized earnings (CE) method and largely agree on the interest rental that would be established by a straightforward application of CE. However, BNSF does not like the bottom-line result, so rather than accept an outcome that eliminates its current competitive advantage over Union Pacific, it repackages arguments this agency has previously rejected in an attempt to justify significant departures from *SSW Compensation*.

BNSF's primary claim is that setting interest rental based on *SSW Compensation* would cause a competitive imbalance.² That claim is false and flouts the economic

¹ See *New England Cent. R.R.—Trackage Rights Order—Pan Am S. LLC*, FD 35842, slip op. at 8–9 (STB served Oct. 31, 2017); *Atchison, Topeka & Santa Fe Ry.—Operating Agreement—S. Pac. Transp. Co. (1992 Order)*, 8 I.C.C.2d 297, 303 (1992); *Arkansas & Missouri R. Co. v. Missouri Pacific R. Co. (A&M)*, 6 I.C.C.2d 619, 621–22 (1990).

² See BNSF Reply at 2, 21–24.

principles underlying *SSW Compensation*. By design, *SSW Compensation* sets terms that “plac[e] the renter in the same position as the owner,” thus “assuring a competitive relationship between the two systems.”³ Adopting BNSF’s departures from *SSW Compensation* would exacerbate an existing competitive imbalance that favors BNSF. BNSF’s proposed { } rental is below the \$5.5 million rental accepted in a settlement more than thirty years ago by a financially weak Southern Pacific.⁴ Union Pacific’s proposed rental may appear large in relation to the current, very low rental, but BNSF’s 2022 operating expenses for traffic using the Line would increase by only {{ }} if it paid the proposed rent.⁵ The new rental would not reduce BNSF’s or Union Pacific’s incentive or ability to compete vigorously for traffic moving over the Line—it would enhance competition by leveling the playing field.

BNSF also claims setting interest rental based on *SSW Competition* would disrupt commercial bargaining for trackage rights.⁶ BNSF is fundamentally misguided; it would have the opposite effect on trackage rights negotiations. Since the 1990s, railroads negotiating to extend trackage rights arrangements have known *SSW Compensation* would apply if they could not agree on new terms. The stability of the regulatory environment

³ *St. Louis Southwestern Ry.—Trackage Rights Over Missouri Pacific R.R.—Kansas City to St. Louis (SSW II)*, 4 I.C.C.2d 668, 682, 688 (1987).

⁴ In 1992, the Board reopened this proceeding at Southern Pacific’s request, and the parties ultimately entered into a settlement called the “Joint Stipulation and Agreement.” See *Atchison, Topeka & Santa Fe Ry.—Operating Agreement—S. Pac. Transp. Co. (July 1993 Order)*, FD 22218 et al. (ICC served July 8, 1993).

⁵ Dr. Mathur calculated BNSF’s operating expenses for movements traversing the Line in 2022—which does not include BNSF’s interest rental payment to Union Pacific—as {{ }} See Mathur VS, Ex. 21. She also calculated the appropriate interest rental payment in 2023 would be { } See Mathur RVS at 4. {{ }}

⁶ See BNSF Reply at 25.

has limited the number of disputes requiring resolution by this agency. Accepting BNSF's invitation to depart from *SSW Compensation* would disrupt this stable environment, create significant uncertainty regarding interest rental payments that would be found appropriate, and thus increase the likelihood parties would not resolve their disagreements without regulatory intervention.

The remainder of this brief primarily addresses BNSF's departures from *SSW Compensation*, including new justifications BNSF offers for the first time on reply. The brief also addresses other disputes regarding more technical aspects of *SSW Compensation*'s application. As Union Pacific's evidence shows, the Board should order BNSF to pay increased interest rental retroactive to January 3, 2023.

II. BNSF must pay a usage-based share of interest rental calculated using a rate of return equal to the current pre-tax nominal cost of capital.

Under *SSW Compensation*, the interest rental component of trackage rights compensation is determined “by multiplying (i) the value of the assets that comprise the trackage rights line by (ii) a rate of return equal to the current pre-tax nominal cost of capital.”⁷ The tenant's share of the interest rental is based on its “percentage usage.”⁸

Union Pacific's reply refuted BNSF's arguments that terms under which Southern Pacific agreed to Atchison, Topeka & Santa Fe's use of the Tehachapis Line in 1912 should dictate the rate of return and sharing arrangement that apply more than 110 years

⁷ *New England Cent. R.R.*, slip op. at 3; accord *CSX Corp.—Control & Operating Leases/Agreements—Conrail Inc.*, 4 S.T.B. 75, 78–79 (1999).

⁸ *St. Louis Southwestern Ry.—Trackage Rights Over Missouri Pacific R.R.—Kansas City to St. Louis (SSW III)*, 5 I.C.C.2d 525, 530 (1989).

later, and more than 60 years after expiration of the parties' voluntary agreement, rather than terms established under *SSW Compensation*.⁹

BNSF erroneously claims the ICC's 1967 Order rejected setting the rate of return equal to the cost of capital in recognition of (i) ATSF's decision not to build its own parallel line, and (ii) ATSF's contribution of funds to updating and improving the Line.¹⁰ The 1967 Order merely adopted the Hearing Examiner's recommended rate of return as "realistic, fair and in line with rates approved in other proceedings."¹¹ And the Hearing Examiner did not reject using the cost of capital as matter of principle but instead found Southern Pacific's cost-of-capital study produced results inconsistent with rate-of-return evidence in ICC reports.¹² Twenty years later, in *SSW II*, the ICC concluded the pre-tax cost of capital establishes the appropriate rate of return. The ICC recognized railroads were entitled to "a reasonable economic profit or return (or both) on capital employed in the business," and the pre-tax cost of capital establishes a reasonable return because it "represents the average cost to any of the railroads for obtaining capital."¹³ The ICC further recognized using the cost of capital "favors no carrier over another," "places both the incumbent and tenant railroads on an identical footing regarding a required rate of

⁹ See UP Reply at 9–16; Mathur RVS at 13–22. Union Pacific also showed (i) BNSF failed to support its claim that Southern Pacific and ATSF ever agreed to base the rate of return on prevailing interest rates, and (ii) Southern Pacific's and ATSF's subsequent behavior showed they never agreed to any benchmark. See UP Reply at 13–14; Hughes RVS at 16–17.

¹⁰ See BNSF Reply at 12.

¹¹ 1967 Order, 331 I.C.C. at 370.

¹² See Hughes Reply Workpaper "Hearing Examiner Report.pdf" at 22–23.

¹³ *SSW II*, 4 I.C.C.2d at 682 (quoting 49 U.S.C. § 10704(a)(2)); see also *SSW III*, 5 I.C.C.2d at 535 ("A return on investment consistently lower than the cost of capital presages corporate contraction since both debt and equity investment alternatives are comparatively more attractive.").

return,” and “ensures that the renting carrier is not subsidized by the owning road.”¹⁴ This agency has used the pre-tax cost of capital as the rate for return in every subsequent case.¹⁵

BNSF’s substantive arguments for binding Union Pacific to the terms of an ancient, expired, voluntary agreement are also flawed. As the ICC recognized in its *March 1993 Order*, ATSF’s long-ago decision to become Southern Pacific’s tenant does not mean Union Pacific must subsidize BNSF’s use of the Line by accepting a below-market return on its investment after the original agreement expired.¹⁶ The cost of capital is the appropriate rate of return for both new and continuing tenants because it provides “a reasonable . . . return” on Union Pacific’s “capital employed in the business,”¹⁷ and this agency has consistently used the pre-tax cost of capital in cases involving continuing tenants.¹⁸

ATSF’s past contribution of funds also has no bearing on the appropriate rate of return. As the ICC explained in its *March 1993 Order*, ATSF’s contribution to past

¹⁴ *SSW II*, 4 I.C.C. at 682. The ICC also recognized its approach likely gives the tenant a “special benefit,” namely, access at a lower cost than “the capital investment cost of constructing a comparable line.” *SSW III*, 5 I.C.C.2d at 536.

¹⁵ In 1993, the ICC offered ATSF the opportunity to argue for using the real cost of capital, rather than the nominal cost of capital. *See Atchison, Topeka & Santa Fe Ry.—Operating Agreement—S. Pac. Transp. Co. (March 1993 Order)*, FD 22218 et al., slip op. at 10 (ICC served Mar. 26, 1993). BNSF did not take up that offer in this proceeding.

¹⁶ *See March 1993 Order*, slip op. at 9 (“Had ATSF built its own line, it would seek to earn the cost of capital rate for movements on that line. That it did not build such a line years ago should not affect SP’s rental now and in subsequent years.”); *see generally* Thomas W. Merrill, *The Economic of Leasing*, 12 J. of Legal Analysis 221 (2020) (discussing the benefits of leasing rather than ownership). ATSF knew its 1912 agreement would expire in 60 years and it would have to enter into a new agreement acceptable to the Line’s owner, construct its own line, or lose business dependent on the Line.

¹⁷ 49 U.S.C. § 10704(a)(2).

¹⁸ *See New England Cent. R.R.*, slip op. at 12; *Toledo, Peoria & W. Ry.—Trackage Rights Compensation—Peoria & Pekin Union Ry.*, FD 26476 (Sub-No. 1), slip op. at 2 (ICC served Sept. 20, 1994); *March 1993 Order*, slip op. at 10; *A&M*, 6 I.C.C.2d at 628.

replacements “served to preserve the productive capacity and value of the Tehachapis [L]ine,” and “the recovery of past cost (through replacements) is not relevant to establish a fair rental charge for present and future use of the line.”¹⁹ Regarding the claim that ATSF contributed to improvements, not just replacements, the ICC agreed that “the costs of improvements made by ATSF should be excluded from a RCNLD valuation of the subject line” and offered ATSF the opportunity to “show in detail what those investments were and segregate these amounts clearly.”²⁰ However, BNSF did not submit detailed evidence showing BNSF or ATSF paid for improvements.²¹ In fact, BNSF says it favors CE over RCNLD because “CE moves away from the question of how to develop a valuation based on an asset inventory that fully accounts for BNSF/ATSF’s capital contribution and focuses instead on the relevant earnings of the joint users generated by the Line.”²² Dr. Mathur agreed.²³ CE establishes the Line’s value based on its earning potential, not its construction costs, so even if BNSF/ATSF contributed to investment, no adjustment to the Line’s valuation would be appropriate under CE.

BNSF’s suggestion that CE should account for the value of BNSF/ATSF investments does not have any merit. BNSF not only fails to establish the value of its

¹⁹ *March 1993 Order*, slip op. at 8. For essentially the same reason, there is no merit to BNSF’s claim that its rental should be based on a lower rate of return because it “will continue to provide much of the capital funding for the Line” through maintenance payments. BNSF Reply at 11. BNSF’s shared responsibility for maintaining the Line is distinct from its obligation to pay interest rental.

²⁰ *March 1993 Order*, slip op. at 8.

²¹ By contrast, *Union Pacific* identified certain BNSF investments and properly excluded their costs its RCNLD valuation of the Line. *See Crouch VS* at 58–59.

²² *Baranowski/Zebrowski RVS* at 2.

²³ *See Mathur RVS* at 27 (“The CE method will establish the line’s value based on its earnings potential, which as a theoretical and practical matter would be the same regardless of ATSF’s investment.”).

investments, but also fails to show the issue is appropriately addressed by substituting Treasury Bond yields for the cost of capital. As Dr. Mathur explained, under *SSW Compensation*, interest rental payments compensate the owner for the tenant's use of its asset, and the cost of capital is the return that the owner could have obtained if it put the capital invested in the asset to another productive use.²⁴ Even if CE should account for the value of BNSF/ATSF investments in the Line, Union Pacific is entitled to an appropriate return on the value of its investment; an adjustment, if any, would involve changing the interest rental base, not changing the cost of capital. BNSF's claimed investments do not negate the fact that Union Pacific owns the Line and is entitled to an appropriate return on the value of its investment in the Line.

BNSF also attacks the cost of capital standard by arguing Union Pacific's voluntary trackage rights agreements with other carriers use lower rates of return.²⁵ However, the ICC rejected the same argument in *SSW II* and *SSW IV*, explaining that terms of voluntary agreements are irrelevant when the agency is "being asked to set trackage rights compensation due to the inability of parties to achieve a meeting of the minds."²⁶

Finally, BNSF erroneously claims the ICC relied on condemnation principles, not public interest principles, when ruling in *SSW Compensation* that rental costs should be

²⁴ See Mathur VS at 17.

²⁵ See BNSF Reply at 14.

²⁶ *SSW II*, 4 I.C.C.2d at 682 n.13; see also *St. Louis Southwestern Ry.—Trackage Rights Over Missouri Pacific R.R.—Kansas City to St. Louis (SSW IV)*, 8 I.C.C.2d 80, 91 (1991) (irrelevant "that every existing voluntary trackage rights agreement imposed an interest rate that was much less than the applicable current cost of capital rate"). Further, BNSF raised this argument on reply, so Union Pacific could not address the agreements BNSF cited, but nearly all predate *SSW Compensation*'s adoption of the cost of capital standard. See Baranowski/Zebrowski RVS at 64, Chart 4. The one post-*SSW Compensation* agreement BNSF cites uses a 10% return and was signed near the time the Board found the 2003 cost of capital was 9.4%. *Railroad Cost of Capital—2003*, 7 S.T.B. 742 (2004).

shared based on percentage usage.²⁷ The ICC plainly considered the public interest when addressing the usage issue in *SSW II*, explaining a “percentage usage” approach “places the parties on [an] identical and competitive footing and ensures continued joint provision of service an adequate investment.”²⁸ BNSF also erroneously claims it need not pay a fair share of interest rental because it will pay a usage-based share of maintenance and operating costs and thus “compensate UP for all the assets consumed by BNSF at current value.”²⁹ BNSF’s claim mixes apples and oranges: *SSW Compensation*’s interest rental component addresses the appropriate economic return on the ownership value of an asset, not the costs to maintain and operate the asset. BNSF must pay its fair share of *both*.

BNSF’s claim that it should forever pay less than its fair share for using Union Pacific Line based on the terms of a 1912 voluntary agreement that expired in 1961 serves its immediate private interests. However, requiring Union Pacific to subsidize BNSF’s operations and accept less than a reasonable return on capital employed in the business is contrary to the public interest considerations the ICC identified in *SSW Compensation*. Forever binding railroads to the terms of long-expired agreements is also contrary to the public interest in encouraging railroads’ use of voluntary trackage rights agreements.

III. BNSF’s must pay interest rental based on the Tehachapis Line’s fair market value calculated using earnings from all traffic moving over the Line.

On opening, BNSF acknowledged that under CE, “the value of the trackage rights line segment to the landlord is based on the earnings attributable to the line for shipments

²⁷ See BNSF Reply at 16.

²⁸ *SSW III*, 5 I.C.C.2d at 530.

²⁹ BNSF Reply at 15.

that use the line.”³⁰ However, BNSF significantly understated the Tehachapis Line’s fair market value because its calculations improperly excluded two categories of earnings attributable to the Line: (i) BNSF and Union Pacific earnings from double-stack traffic, and (ii) 50% of BNSF earnings from non-double-stack traffic. BNSF’s reply largely repeats the flawed arguments BNSF previously offered for excluding substantial earnings attributable to the Line from its valuation of the Line.

A. The Tehachapis Line’s fair market value must reflect BNSF and Union Pacific line earnings from double-stack traffic.

Union Pacific’s reply refuted BNSF’s arguments for excluding line earnings from double-stack traffic in developing the Line’s fair market value. Union Pacific showed:

- *BNSF has its facts wrong:* Union Pacific would be using the Line to move double-stack traffic whether or not ATSF contributed to tunnel improvement costs in the mid-1990s,³¹ and Union Pacific repaid Southern Pacific’s share of the costs decades ago.³²
- *BNSF has its economics wrong:* Using CE rather than RCNLD to value the Line avoids the need to consider ATSF’s contribution to tunnel improvement costs by basing the Line’s value on its future earning potential, including its potential use for moving double-stack traffic, which is unaffected by ATSF’s investment.³³
- *BNSF has its legal analysis wrong.* Using CE rather than RCNLD to value the Line is consistent with the parties’ agreement not to increase the Line’s interest rental

³⁰ Baranowski/Zebrowski VS at 9–10.

³¹ See UP Reply at 26–27; Hughes RVS at 9–11. Also, some double-stack traffic could have moved over the Line without the improvements. See Hughes RVS at 9–10 & 10 nn.32 & 33; Mathur RVS at 29.

³² See UP Reply at 26; Hughes RVS at 8–9.

³³ See UP Reply at 20–24; Mathur RVS at 24–48.

base by the cost of the tunnel improvements,³⁴ while BNSF's exclusion of double-stack traffic reduces the value of the interest rental base by approximately {{ }} which is {{ }} times the value of ATSF's contribution to the improvements.³⁵

Union Pacific's reply also explained that BNSF's proposal to effectively attribute all double-stack earnings only to the tunnel improvements would deprive Union Pacific of an appropriate return on its vastly greater amount of investment in all the other infrastructure needed to move double-stack traffic over the Line.³⁶

BNSF never explains how excluding earnings from double-stack traffic from the Line's interest rental base is consistent with CE or the parties' agreement not to increase the Line's interest rental base by the cost of the tunnel improvements. In fact, BNSF's witnesses confirm Dr. Mathur's testimony that using CE eliminates the need to account for ATSF's contribution to tunnel improvements:

CE moves away from the question of how to develop a valuation based on an asset inventory that fully accounts for BNSF/ATSF's capital contributions and focuses instead on the relevant earnings of the joint users generated by the Line as it has developed over time.³⁷

BNSF's exclusion of double-stack earnings is inconsistent with CE and contrary to the parties' agreement on how to account for ATSF's contribution to tunnel improvement costs.

³⁴ See UP Reply at 24–26; Hughes RVS at 12–13.

³⁵ See UP Reply at 5–6; Mathur RVS at 31–32. Dr. Mathur showed how the cost of ATSF's contribution to tunnel improvements could be excluded from the Line's interest rental base, if the Board were to conclude such an exclusion is required, by subtracting the indexed cost of ATSF's contribution from the properly calculated interest rental base.

³⁶ See Mathur RVS at 26, 30.

³⁷ Baranowski/Zebrowski RVS at 2.

B. The Tehachapis Line's fair market value must reflect all BNSF line earnings from non-double stack traffic.

Union Pacific's reply also refuted BNSF's arguments for excluding 50% of BNSF's line earnings from non-double-stack traffic. Union Pacific showed:

- *BNSF's exclusion is not needed to avoid "circularity."* BNSF witnesses concede no "circularity" issue exists because both parties use BNSF's line earnings, not BNSF's current interest rental payment, in their CE valuations of the Line.³⁸
- *BNSF's exclusion is not "equitable."* A straightforward application of CE produces "a reasonable and *equitable* basis of compensation."³⁹ Excluding 50% of BNSF's line earnings from CE means BNSF would not pay rent based on the Line's fair market value, placing Union Pacific in a position where it would be subsidizing BNSF's use of the Line, which would be *inequitable* to Union Pacific.

Union Pacific's reply also refuted BNSF's claim that a straightforward application of CE would give BNSF no benefit from using the Line, showing BNSF considered only its ATC-allocated line earnings, rather than its total earnings from traffic using the Line.⁴⁰ In other words, BNSF's benefit from using the Line should be measured by its total revenues and expenses associated with traffic moving over the Line, not just the revenues and expenses allocated to the 67.8-mile Line.⁴¹ Moreover, Union Pacific is entitled to

³⁸ See Mathur RVS at 33–34; see also Baranowski/Zebrowski VS at 11 ("The circularity issue would only arise . . . if we used the . . . current BNSF interest rental payment to determine the new interest rental amount that BNSF should pay UP.").

³⁹ *SSW IV*, 8 I.C.C.2d at 95 (emphasis added).

⁴⁰ See UP Reply at 29–30; Mathur RVS at 37.

⁴¹ BNSF plainly profits from its use of the Line. See *infra* p. 29; cf. *SSW II*, 4 I.C.C.2d at 536 ("SP receives enormous quantitative and qualitative benefits as a result of this trackage rights grant.").

compensation regardless of BNSF's profitability because BNSF's use of the Line imposes opportunity costs on Union Pacific—*i.e.*, Union Pacific might have moved the traffic and would have had more capacity to handle other traffic but for BNSF's use of the Line.⁴²

BNSF's reply offers a new but equally invalid justification for excluding 50% of its line earnings: BNSF says a portion of the earnings are properly allocated to its non-roadway assets.⁴³ However, unlike RCNLD, CE does not base a line's value on the value of its road property assets. As BNSF's witnesses recognize, CE adopts a different approach to valuation: "the value of the trackage rights line segment to the landlord is based on the earnings attributable to the line for shipments that use the line."⁴⁴ CE does not require attributing line earnings to roadway assets, non-roadway assets, and other factors (*e.g.*, a railroad's reputation for service). Further, as discussed above, BNSF's exclusion of BNSF line earnings improperly assumes Union Pacific would not be handling the traffic at issue or other traffic but for BNSF's use of the Line.

Finally, even if BNSF's suggestion that CE should account for use of non-roadway assets had merit, which it does not, BNSF does not show the issue is appropriately addressed by excluding 50% of the tenant's earnings in developing the line's valuation.

BNSF's exclusion of 50% of its line earnings from its non-double-stack traffic violates the core CE principle that "valuation should be based on fair market value."⁴⁵

⁴² See Mathur RVS at 36–37.

⁴³ See BNSF Reply at 6–7.

⁴⁴ Baranowski/Zebrowski VS at 9–10.

⁴⁵ *SSW II*, 4 I.C.C.2d at 674.

IV. The Tehachapi Line's fair market value must be calculated using a market-based multiplier rather than an inverse cost of capital multiplier.

Under *SSW Compensation's* CE method, the interest rental base is determined by multiplying the earnings assigned to the trackage rights line by an earnings multiplier that “relates corporate earnings to corporate value.”⁴⁶ In other words, the earnings multiplier converts the line's earnings into the line's fair market value. Union Pacific used market data to relate its corporate earnings to its corporate value. BNSF simply multiplied line earnings by the inverse cost of capital. As Dr. Mathur explained, the critical difference is that a market-based multiplier properly incorporates the market's expectations of future earnings growth, while an inverse cost of capital multiplier assumes no earnings growth.⁴⁷

BNSF criticisms of Dr. Mathur's development and use of market-based multiplier fail to substantiate their assertions. Dr. Mathur applied well-accepted financial valuation methods that are entirely consistent with CE.

First, BNSF erroneously criticizes Dr. Mathur's application of a Union Pacific-based multiplier to BNSF traffic.⁴⁸ Applying a Union Pacific-based multiplier to BNSF traffic furthers CE's objective, which is to determine the value of the asset *to the owner*, but for the tenant's use of the asset.⁴⁹ The Board implicitly followed this principle in *New England Central*, where it approved a methodology that applied the owner's line earnings

⁴⁶ *SSW I*, 1 I.C.C.2d at 787.

⁴⁷ See Mathur VS at 26–28; 58–60.

⁴⁸ See BNSF Reply at 8; Baranowski/Zebrowski RVS at 34–35.

⁴⁹ See Mathur VS at 17 (“An economically appropriate interest rental payment compensates the landlord for the economic return on its capital that the landlord would generate by moving its own traffic over the line for profit, or by selling the asset and putting the capital to another productive use but for the tenant's use of the line.”).

per car mile to the tenant's traffic to calculate line earnings attributable to the tenant.⁵⁰ Dr. Mathur did not apply Union Pacific's line earnings to BNSF's traffic to calculate line earnings because differences in profitability of the two railroads' traffic moving might have been idiosyncratic to each movement.⁵¹ However, the multiplier applied to line earnings is system-based, so concerns about idiosyncratic movement factors are not relevant in applying the multiplier. Moreover, even if applying BNSF-based multiplier to BNSF's traffic were more appropriate, it is not possible because BNSF is owned by Berkshire Hathaway, a conglomerate with many disparate businesses. However, Dr. Mathur showed Union Pacific's multiplier falls within the range of multipliers for other public Class I railroads, so it is a reasonably proxy for a BNSF multiplier.⁵²

Second, BNSF erroneously criticizes Dr. Mathur's application of a system-based multiplier to the mix of traffic on the Tehachapis Line.⁵³ Union Pacific's application of a system-based multiplier is appropriate regardless of any mix-of-traffic difference between the Union Pacific system and the Line. The CE method requires use of a multiplier that converts line earnings into line value. However, it is not possible to derive a multiplier tailored specifically to the line in question, so *all* applications of CE—including BNSF's—rely on multipliers derived from system-wide data. Dr. Mathur's multiplier is superior to BNSF's because Dr. Mathur developed a multiplier that appropriately incorporates the market's expectations of future earnings growth.

⁵⁰ See *New England Cent. R.R.*, slip op. at 17.

⁵¹ See Mathur VS at 75. As Dr. Mathur noted, {
} See *id.*

⁵² See *id.* at 61 & Ex. 16.

⁵³ See BNSF Reply at 8; Baranowski/Zebrowski RVS at 36–37.

Third, BNSF erroneously claims a market-based multiplier cannot be developed without an asset purchase price and purchase price allocation study.⁵⁴ BNSF does not dispute that Dr. Mathur followed established financial methods to develop the two components of a market-based multiplier: Union Pacific's corporate value and earnings. BNSF also provides no support for its implicit claim that Dr. Mathur's valuation would be different from one based on a purchase.⁵⁵ If anything, Dr. Mathur's approach was conservative, as purchasers have paid large premiums in recent railroad acquisitions.⁵⁶

BNSF also provides no support for its claim that a purchase price allocation study is required to apportion corporate value to road property. The Board has previously justified such an apportionment by stating that "only road property is being rented."⁵⁷ However, that justification misconstrues the role of a multiplier under CE, which is to convert line earnings into a line value based on the relationship between corporate earnings and corporate value. As Dr. Mathur explained, applying an apportionment factor to reduce corporate value improperly creates a disconnect between the market-based multiplier's numerator (*i.e.*, corporate value) and denominator (*i.e.*, corporate earnings):

From a valuation perspective, the market valuation used in the numerator of a multiple and the earnings used in the denominator must correspond to the same operations.⁵⁸

⁵⁴ See BNSF Reply at 9; Baranowski/Zebrowski RVS at 38–48.

⁵⁵ BNSF notes Dr. Mathur's valuation is based on Union Pacific's stock price on a given date, *see* BNSF Reply at 9, but purchase prices also reflect a valuation on a given date.

⁵⁶ See Kansas City Southern, Form 8-K, Ex. 99.2 (Sept. 15, 2021) (34% premium over stock price); Nick Zieminski, *Buffet Buying Burlington Rail in His Biggest Deal*, Reuters, Nov. 3, 2009 (31.5% premium over stock price).

⁵⁷ *CSX Corp.*, 4 S.T.B. at 80.

⁵⁸ Mathur VS at 60 n.156.

Essentially, “[a]pplying an adjustment factor only to the enterprise value [numerator] assumes that railroad earning [denominator] are solely derived from road assets and not also from equipment.”⁵⁹ The economically correct approach, as Dr. Mathur explained, is to “apply an unadjusted multiplier to the [Tehachapis] Line earnings to arrive at a valuation of the line as a going concern.”⁶⁰ However, even if the Board were to conclude it should exclude earnings attributable to non-road property assets when applying CE—which would be fundamentally inconsistent with using CE to value a line based on the earnings the line generates—that still would not change the multiple. Applying a roadway apportionment factor to both the numerator and denominator would not affect the multiple, because the factors would simply cancel out each other.

The same cancelling-out explains the irrelevance of the BNSF reply’s claim that Union Pacific’s roadway apportionment factor did not account for intangible assets.⁶¹ Specifically, BNSF claims Dr. Mathur’s earnings multiplier is overstated because she “wrongly assumes that it is realistic for an entire current market valuation of a railroad to be allocated to only road property and equipment,” and more specifically, because Dr. Mathur “attributed none of the enterprise valuation to intangible assets.”⁶² However, BNSF admits “[i]ntangible assets are crucial for . . . generating *earnings* and value.”⁶³ BNSF fails to connect that intangible assets affect both the numerator (value) and denominator (earnings) of the multiplier, thus cancelling out.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See BNSF Reply at 10; Baranowski/Zebrowski RVS at 46–48.

⁶² Baranowski/Zebrowski RVS at 44, 48.

⁶³ *Id.* at 46 (emphasis added).

Dr. Mathur's opening statement developed and applied a roadway apportionment factor as a conservative measure in acknowledgement of agency precedent.⁶⁴ The Board could adopt the multiplier calculated by Dr. Mathur or recognize the economically correct approach and abandon use of a roadway apportionment factor.

Finally, BNSF erroneously claims Dr. Mathur's use of a market-based multiplier builds unrealistic earnings growth expectation into the interest rental.⁶⁵ The CE method "requires the generation of a number, the earnings multiple, which relates corporate earnings to corporate value."⁶⁶ Dr. Mathur's multiplier uses Union Pacific's share price as an important determinant of corporate value, and Union Pacific's share price reflects, among many other factors, investor's expectations of earnings growth. There is no reason to believe market expectations are unrealistic. BNSF says capacity constraints may constrain earnings growth on the Tehachapis Line,⁶⁷ but even in a capacity-constrained environment, earnings can increase as costs decrease and rates increase in response to

⁶⁴ See Mathur VS at 60 n.156. Consistent with Board precedent, Dr. Mathur applied the roadway apportionment factor only to the numerator, which reduced the multiplier. See *id.* at 61, Figure 12.

BNSF complains that Dr. Mathur did not develop the apportionment factor using current asset values for roadway property and equipment, but as it acknowledges, such information does not exist because Union Pacific has not been purchased recently. See BNSF Reply at 9. Further, BNSF offers no reason to believe using current asset values would produce a lower apportionment factor. In fact, Dr. Mathur's use of Union Pacific net book values to develop an 82% apportionment factor was likely *conservative*: using net book values likely understated the current value of a railroad's long-lived road property assets in relation to its shorter-lived equipment assets. Notably, following Canadian Pacific's acquisition of Kansas City Southern, KCS's net road property to net road property and equipment assets ration increased from 0.76 to 0.87. See The Kansas City S. Ry Form R-1 for the Year Ended Dec. 31, 2022, Tables 200, 330, and 335; The Kansas City S. Ry. Form R-1 for the Year Ended Dec. 31, 2023, Tables 200, 330, and 335.

⁶⁵ See BNSF Reply at 10; Baranowski/Zebrowski RVS at 37, 48–52.

⁶⁶ *SSW I*, 1 I.C.C.2d at 787.

⁶⁷ See BNSF Reply at 10.

changes in customer demand and broader macroeconomic factors. BNSF's recent, substantial investments in facilities used to move traffic over the Line show BNSF expects the Line's value to grow.⁶⁸ By contrast, BNSF does not deny its proposed inverse cost of capital multiplier assumes no growth in earnings—an assumption that is flatly inconsistent with evidence submitted by both parties.⁶⁹

Further, BNSF is wrong in suggesting that adjusting its interest rental payment to account for inflation would adequately address potential earnings growth.⁷⁰ Accounting for inflation does not address earnings growth; rather, accounting for inflation preserves the real value of the rental payment over time without repeating on an annual basis the valuation exercise required under CE.

Dr. Mathur's market-based multiplier appropriately relates Union Pacific's corporate earnings to its corporate value. Her multiplier is thus superior to a multiplier based on the inverse of the railroad industry's cost of capital in using the Tehachapis Line's earnings to determine the Line's fair market value.

V. BNSF's interest rental payment must be adjusted annually for inflation using an index of railroad costs.

On opening, Union Pacific followed Board precedent in proposing to adjust BNSF's interest rental payment annually for inflation using a railroad-based regional cost index.⁷¹ BNSF erroneously claims Union Pacific “triple counts inflation” in developing a proposed interest rental payment using an earnings multiplier that includes inflation, an

⁶⁸ See Hughes RVS at 14.

⁶⁹ See Mathur VS at 58; Baranowski/Zebrowski RVS at 51–52.

⁷⁰ See BNSF Reply at 10; Baranowski/Zebrowski RVS at 51.

⁷¹ See Mathur VS at 65 (citing *New England Cent. R.R.*, slip op. at 19, 41).

interest rate that includes inflation, and adjusting 2021 and 2022 earnings to 2023 levels.⁷²

None of those steps adjusts the rental payment going forward to account for inflation—that is, to preserve the real economic value of the rental payment over time.

First, inflation has no impact on the earnings multiple used by Dr. Mathur. The approach Dr. Mathur applied is called an EV/EBIT multiple. Mathematically, the EV/EBIT multiple is represented as:

$$\frac{EV}{EBIT} = \frac{(1 - \tau) \cdot (1 - RIR)}{(R - G)}$$

where τ is the tax rate, RIR is the reinvestment rate, R is the nominal cost of capital, and G is the nominal growth rate.⁷³ Both the nominal cost of capital and nominal growth rate include the inflation rate as an additive component, but the inflation term in each cancels out when calculating the difference between the nominal cost of capital and nominal growth rate, so the EV/EBIT multiple Dr. Mathur used is unaffected by inflation.⁷⁴

Second, using the nominal cost of capital as the interest rental rate does not address the need to adjust BNSF’s interest rental payment for inflation. In *New England Central*, the Board properly recognized the need to adjust the trackage rights payment for inflation even when using the nominal cost of capital as the interest rate.⁷⁵ The nominal cost of

⁷² See BNSF Reply at 16–17; Baranowski/Zebrowski RVS at 68–70.

⁷³ See Aswath Damodaran, *Investment Valuation* 557 (4th ed. 2025).

⁷⁴ The relationship between the nominal cost of capital (R), real cost of capital (r), and inflation rate (π) is such that $R = r + \pi$. Similarly, the relationship between the nominal growth rate (G), real growth rate (g), and inflation rate (π) is such that $G = g + \pi$. Thus, the denominator of the EV/EBIT ratio can be rewritten as $(r + \pi) - (g + \pi)$ and simplified to $(r - g)$, which means the ratio is not impacted by the inflation rate.

⁷⁵ See *New Eng. Cent. R.R.*, slip op. at 19 (“The trackage rights payments will be adjusted annually for both inflation and changes in the Board’s annual railroad industry cost-of-capital determination . . .”).

capital includes an inflation component (as discussed above), but its use in calculating the interest rate reflects the expected erosion of purchasing power *at the time of valuation*; its use does not preserve the real value of the resulting dollar amount *into the future*. Stated differently, including inflation in the cost of capital allows future cash flows (as implied by the earnings multiplier) to be discounted into today's dollar value, but once that present-value amount (the interest rental payment) is calculated, it is fixed in nominal terms. Charging the same nominal amount into the future without adjusting for inflation—the result BNSF seeks—would steadily erode its real economic value to Union Pacific, leaving Union Pacific to increasingly subsidize BNSF.

Further, because applying the nominal cost of capital simply develops an appropriate rental for a specific period based on the line's value in that period, recomputing BNSF's rental payment each year by updating the nominal cost of capital also would not account for inflation. If updating the nominal cost of capital were sufficient to adjust for inflation, one would expect the railroad industry cost of capital to increase over time in line with inflation. However, this is not the case: the railroad industry cost of capital has not shown a consistent upward trend over time. In fact, the 2023 cost of capital is lower than the 2022 cost of capital.⁷⁶ Unless the Line's value is also constantly updated, the rental will not account for the compounding of historic inflation. That is why *New England Central* says a CE-based rental must be adjusted “annually for both inflation and changes in the Board's annual railroad industry cost-of-capital determination.”⁷⁷

⁷⁶ See Surface Transportation Board, *Economic Data*, <https://www.stb.gov/reports-data/economic-data/>.

⁷⁷ *New Eng. Cent. R.R.*, slip op. at 19.

Third, converting 2021 and 2022 dollars to 2023 dollars to calculate a 2023 rental payment does not address the need to adjust BNSF's rental for inflation for the same reason that using the cost of capital does not address inflation. Dr. Mathur's calculations using 2021 and 2022 data establish what would have been an appropriate rental for each of those years individually. Using 2021 and 2022 data to develop a rental payment in 2023 dollars requires adjusting 2021 and 2022 dollars upward for inflation—that is, to preserve their purchasing power. The 2023 rental payment then must continue to be adjusted for inflation to preserve its economic value, as discussed above.

BNSF also says its interest rental payment should not be adjusted for inflation because its payment of maintenance and operating costs compensates Union Pacific for inflation.⁷⁸ This is completely illogical and unfounded. BNSF's payment of maintenance and operating costs compensates Union Pacific for inflation that affects those costs, but they do nothing to preserve the interest rental payment's real value over time.

Finally, BNSF's proposal to account for inflation using the Consumer Price Index (CPI) makes no logical sense.⁷⁹ The CPI tracks inflation in household goods and services, such as food, apparel, housing, education, and healthcare, not the industrial, capital-intensive inputs relevant to railroad infrastructure.⁸⁰ Dr. Mathur appropriately accounted for inflation using the AAR railroad price index adopted in *New England Central*.⁸¹

⁷⁸ See BNSF Reply at 17; Baranowski/Zebrowski RVS at 70–71.

⁷⁹ See BNSF Reply at 16–17; Baranowski/Zebrowski RVS at 71–72.

⁸⁰ See U.S. Bureau of Labor Statistics, *Consumer Price Index*, <https://www.bls.gov/cpi/>.

⁸¹ See Mathur VS at 65 & n.167. BNSF's evidence does not compare the CPI with the AAR index Dr. Mathur used, but the two indices closely tracked each other between 2013 and 2022. In 2023, the CPI did not increase as much as the AAR index, which explains why BNSF prefers CPI. See Association of American Railroads, AAR RR Cost Indexes (continued...)

VI. The Board must correct both parties' ATC calculations of earnings attributable to the Tehachapis Line.

Separate and apart from the issues raised by BNSF's improper exclusion of all earnings from double-stack traffic and 50% of earnings from its non-double-stack traffic in calculating earnings attributable to the Tehachapis Line, and despite the parties' agreement that line earnings should be calculated using ATC, the parties still disagree about several issues relating to their calculations of line earnings. The Board should correct both parties' ATC calculations, or order the parties to submit corrected calculations, after resolving their remaining disputes.

The parties' reply submissions reduced the number of disputes regarding the application of ATC. After reviewing BNSF's reply, Union Pacific agrees BNSF more accurately developed off-line densities for shipments traversing the Line.⁸² However, BNSF exaggerates the impact of Union Pacific's effort to simplify ATC's density-based calculations process by focusing on difference in the parties' allocation of fixed-costs to off-line segments, without acknowledging fixed costs constitute a relatively small percentage of the total costs used to allocate revenue to off-line segments. As Dr. Mathur discussed in her reply statement, apart from BNSF's inappropriate exclusion of earnings from double-stack traffic and one-half of its other line earnings, most of the differences in

at 8 (Mar. 2024); Baranowski/Zebrowski Reply Workpaper "Earning Multiplier Analysis Workpaper.xlsx," Tab "Consumer Price Index."

⁸² Union Pacific also accepts BNSF's corrected identification of certain costs as switching costs in URCS. *See* Baranowski/Zebrowski RVS at 22–23.

the parties' initial line earnings calculations resulted from BNSF's errors in calculating the fixed portion of operating expenses properly allocated to the Line.⁸³

BNSF's opening significantly understated BNSF earnings attributable to the Tehachapis Line in two ways: (i) failing to account for Line's high density line relative to BNSF's system-average density when developing the fixed portion of operating expenses by using the system-wide constant cost markup ratio; and (ii) assuming BNSF movements do not incur below-the-wheel fixed costs when allocating revenue to the Line, but assuming they incur such costs when allocating operating expenses to the Line.⁸⁴

BNSF's reply acknowledges the second error and agrees with Dr. Mathur that Union Pacific's below-the-wheel fixed costs should be assigned to BNSF traffic when allocating BNSF revenue to the Tehachapis Line, so below-the-wheel fixed costs are included when allocating both revenue and operating expenses to the Line.⁸⁵

However, BNSF's calculations continue to incorporate the first error. Specifically, BNSF correctly accounts for the Tehachapis Line's higher density when allocating revenues to the Line by applying ATC to determine the proportion of each movement's

⁸³ See Mathur RVS at 38–48. Aside from correcting BNSF's errors in calculating the fixed portion of operating expenses properly allocated to the Line, which are discussed below, the corrected BNSF line earnings shown in Figure 4 of Dr. Mathur's reply statement are based on BNSF's opening ATC calculation and thus do not reflect the simplified density calculations or any of the other alleged ATC-related errors identified by BNSF. See Mathur RVS at 47, Figure 4.

⁸⁴ See Mathur RVS at 42.

⁸⁵ See Baranowski/Zebrowski RVS at 74–75 (“allocat[ing] revenues to BNSF shipments over the Kern-Mojave Line that did not include a ‘below-the-wheel’ cost allocation, while, in the same earnings calculation, deducting operating expenses that did include a ‘below-the-wheel’ cost allocation” does “pose[] a conceptual problem” (footnotes omitted)).

Union Pacific agrees with BNSF that BNSF's above-the-wheel fixed costs should be applied to BNSF's traffic moving over the Line rather than Union Pacific's above-the-wheel fixed costs, even though the parties use Union Pacific's below-the-wheel fixed costs. See Baranowski/Zebrowski RVS at 22.

URCS variable cost and fixed costs that are “on-segment.” The Line’s higher density means relatively lower fixed costs are allocated to the Line, which means relatively lower revenues are allocated to the Line.⁸⁶ By contrast, BNSF assigns operating expenses to the Line by (i) using URCS to calculate movement-specific variable costs for traffic moving over the line, then (ii) applying the URCS system-wide constant cost markup ratio to calculate total costs. But BNSF’s use of the system-wide constant cost markup ratio to calculate operating expenses incorrectly implies the Line’s density is equal to BNSF’s system-average density, and thus assigns more fixed costs to the Line than in its revenue calculation, creating an overstatement of expenses relative to revenue.⁸⁷ Overstating expenses relative to revenues understates earnings attributable to the Line.

BNSF also offers several spurious criticisms of Union Pacific’s calculations. BNSF erroneously claims Dr. Mathur used “a regression” to calculate URCS variable costs for shipments based on their tonnage. Dr. Mathur simply confirmed calculating URCS costs separately for movements that differed only in terms of tonnage was unnecessary, which is consistent with BNSF’s acknowledgement that “[n]either train mile nor car mile costs are a function of shipment tons in URCS.”⁸⁸ BNSF does not claim Dr. Mathur’s approach produced a different result than BNSF’s.

⁸⁶ See Mathur RVS at 42 (explaining the Line “has significantly above-average density and therefore has relatively low fixed costs on a per-GTM basis”).

⁸⁷ See *id.* On reply, BNSF adjusted the constant cost ratio to remove the effects of return-on-investment, see Baranowski/Zebrowski RVS at 75, but that correction addresses a different mismatch issue than the one Dr. Mathur identified in BNSF’s opening calculations (but that also understated line earnings by overstating the fixed costs BNSF used to calculate operating expenses).

⁸⁸ Baranowski/Zebrowski RVS at 23–24.

BNSF also erroneously criticizes Dr. Mathur for allocating revenues proportional to average variable costs when revenues initially allocated to the Tehachapis Line using average total costs were below URCS variable costs assigned to the Line. BNSF claims the correct approach is to treat shipments generating negative earnings attributable to the Line as generating zero earnings.⁸⁹ However, Dr. Mathur followed the approach advocated by one of BNSF's witnesses and adopted by the Board in *New England Central*.⁹⁰ BNSF has not shown the two approaches produce substantially different results.

Finally, BNSF criticizes Dr. Mathur for creating potential "distortions" in converting URCS costs into operating expenses for the Tehachapis Line without acknowledging its own approach plainly creates distortions. Dr. Mathur converted Union Pacific and BNSF total URCS costs assigned to the Line under ATC into total operating expenses using the ratio of each railroad's system-wide total URCS costs to its system-wide total operating expenses.⁹¹ BNSF claims Dr. Mathur's process introduced distortions because the Line's URCS costs include a return on investment (ROI) component that is not an expense item.⁹² However, as long as ROI's impact on the system-wide ratio is the same as on the Line's ratio, the ROI factor cancels out. For its part, BNSF develops total operating expenses by calculating the URCS variable costs for each shipment, removing

⁸⁹ See Baranowski/Zebrowski RVS at 25.

⁹⁰ See Reply to New England Central Railroad, Inc.'s Opening Statement and Evidence, Verified Statement of Michael R. Baranowski at 38 ("If revenues were less than variable costs, I allocated revenue proportional to the relative variable costs."), *New Eng. Cent. R.R.—Trackage Rights Order—Pan Am S.*, FD 35842 (July 19, 2016).

⁹¹ Dr. Mathur's process for BNSF's costs was actually slightly more complicated because she used Union Pacific's fixed below-the-wheel costs in calculating BNSF's costs, as discussed above.

⁹² See Baranowski/Zebrowski RVS at 25–27.

the ROI component from URCS, then multiplying the result by the URCS constant markup (which it modified on reply to exclude ROI).⁹³ However, as discussed above, BNSF's use of the URCS constant markup overstates the fixed costs assigned to the Line, and thus overstates operating expenses, because the Line's density exceeds system-average density.

If the Board wants to adopt BNSF's movement-specific density calculations but correct BNSF's calculation of operating expenses to account for the Tehachapis Line's above system-average density and avoid distortions created by the inclusion of ROI expenses in movement-level fixed costs, it could calculate revised Line operating expenses by adding (i) URCS variable costs excluding ROI, to (ii) the product of (a) density-adjusted fixed costs from the first step of ATC and (b) the system ratio of fixed costs excluding ROI to fixed costs including ROI. The Board also could order the parties to perform and submit technical corrections to implement its decision.

VII. The Board must reject BNSF's obsolescence adjustment if it uses RCNLD.

BNSF and Union Pacific agree the Board should use *SSW Compensation's* CE method rather than RCNLD to develop the interest rental for the Tehachapis Line. However, if the Board uses RCNLD, it should reject BNSF's proposed adjustment for "obsolescence." As Dr. Mathur explained in her reply statement, BNSF's adjustment does not account for obsolescence; rather, BNSF mechanically applied a mathematical ratio based on the gap between its unadjusted RCNLD calculation and its erroneous CE calculation to reduce that substantial gap.⁹⁴ As a result, BNSF's adjusted RCNLD result does not represent a proper application of RCNLD and thus provides no independent

⁹³ See Baranowski/Zebrowski RVS at 27, 75.

⁹⁴ See Mathur RVS at 55–60.

support for BNSF's CE calculation.⁹⁵ By contrast, Union Pacific's RCNLD analysis and BNSF's *unadjusted* RCNLD analysis both produce estimates of the Line's interest rental base that are very similar to Union Pacific's estimate produced using CE.⁹⁶

VIII. The Board's faithful application of *SSW Compensation* and the CE method will produce an interest rental payment that is in the public interest.

Contrary to BNSF's claim that applying *SSW Compensation* would create a competitive imbalance,⁹⁷ applying *SSW Compensation* would correct an existing imbalance: Union Pacific currently subsidizes BNSF's use of the Tehachapis Line. By design, *SSW Compensation* establishes an interest rental that places the line owner and tenant on an equal footing and ensures neither subsidizes the other.⁹⁸ BNSF says "special circumstances" justify departing from *SSW Compensation*,⁹⁹ but the only "special circumstance" it identifies is the not-so-special fact that this case involves an expired trackage rights agreement.¹⁰⁰ Further, BNSF never tries to explain why charging a usage-based share of interest rental calculated by applying the cost of capital to a valuation

⁹⁵ BNSF does not claim its departures from CE—e.g., use of Treasury Bond yields rather than the cost of capital; exclusion of earnings from double-stack traffic—somehow address "obsolescence."

⁹⁶ See Mathur RVS at 56.

⁹⁷ See BNSF Reply at 2, 21–24.

⁹⁸ See, e.g., *SSW III*, 5 I.C.C.2d at 535; *SSW II*, 4 I.C.C.2d at 682.

⁹⁹ See BNSF Reply at 12; Baranowski/Zebrowski RVS at 54.

¹⁰⁰ Applying *SSW Compensation* in cases involving expired agreements favors tenants because it ensures they can compete on an equal footing with line owners even when marketplace bargaining would have produced a rental more favorable to the owner. See *A&M*, 6 I.C.C.2d at 621 (rejecting line owner's argument that new terms should be determined by the marketplace rather than the competitive access standards incorporated in *SSW Compensation*); *SSW III*, 5 I.C.C.2d at 536 (tenants receive a "special benefit" of access at a lower cost than "the capital investment cost of constructing a comparable line").

reflecting all traffic using the line would produce an anticompetitive result here but not any other case in which the agency has applied *SSW Compensation*.

Unable to identify any flaw in *SSW Compensation*'s design, BNSF recycles two arguments the ICC has previously rejected in applying *SSW Compensation*. *First*, BNSF claims Union Pacific would lack the incentive to compete for traffic moving over the Line because it would earn more from trackage rights than from moving its own cars.¹⁰¹ However, BNSF's calculations consider only earnings attributed to the Line using ATC, not earnings from moving traffic from origin to destination.¹⁰² As the ICC recognized in *SSW III*, the competitive significance of trackage rights depends on their effect on competition for long-haul business.¹⁰³ Union Pacific would always choose winning long-haul business to collecting rental for 67.8-mile movements over the Line.

Second, BNSF compares *SSW Compensation*-based rates for the Tehachapis Line with voluntarily negotiated rates for other lines.¹⁰⁴ However, BNSF's comparisons involve other agreements reflecting "a wide variety of situation-specific factors and trade-offs."¹⁰⁵ As the ICC recognized in *SSW II*, rates paid under voluntary agreements are entirely irrelevant when the agency is "being asked to set trackage rights compensation due to the inability of the parties to achieve a meeting of the minds."¹⁰⁶

¹⁰¹ See BNSF Reply at 21–22.

¹⁰² See *id.* at 22–23; Baranowski/Zebrowski RVS at 83–85.

¹⁰³ Cf. *SSW III*, 5 I.C.C.2d at 534, 535–36 (rejecting claim that tenant would be forced to pay line owner more than line owner charged for shipping on the line).

¹⁰⁴ See BNSF Reply at 22–23; Baranowski/Zebrowski RVS at 86–90.

¹⁰⁵ Hughes RVS at 1; see also *id.* at 2–6.

¹⁰⁶ *SSW II*, 4 I.C.C.2d 682 n.13.

BNSF’s complaint about potential “disruption” to the competitive balance boils down to an argument that applying *SSW Compensation* will increase its rental payment above current levels. But applying *SSW Compensation* shows BNSF’s current rental is far too low, which is why an appropriate increase appears high. Placed in the proper context—that is, in the context of competition between Union Pacific and BNSF for origin-to-destination business—the increased rental will modestly increase BNSF’s total operating expenses for traffic moving over the Line.¹⁰⁷ BNSF offers no evidence the increased expenses will make it uncompetitive. BNSF might find the traffic slightly less profitable—BNSF’s {{ }} profit margin on that traffic would decline to {{ }}¹⁰⁸—but only because it will be competing on a level playing field. The only disruption to the current competitive balance will be removing the advantage BNSF enjoys because it is currently subsidized by Union Pacific.

IX. The Board must make the BNSF’s new interest rental payment retroactive to January 3, 2023.

On opening, Union Pacific explained why the Board should make the new interest rental retroactive to January 3, 2023.¹⁰⁹ BNSF did not contest the issue on reply. Both parties’ evidence addresses rates for 2023.

¹⁰⁷ See *supra* p. 2.

¹⁰⁸ Dr. Mathur calculated BNSF’s allocated 2022 total revenue and operating expenses for movements traversing the on the Line in 2022 as {{ }} and {{ }} respectively. As a result, she calculates BNSF’s total earnings for movements traversing the Line in 2022 as {{ }} See Mathur VS, Ex. 21. This implies a profit margin of {{ }} Union Pacific’s proposed rental of {{ }} would increase BNSF’s total 2022 operating expenses for movements traversing the Line to {{ }}, which implies a reduced profit margin of {{ }}.

¹⁰⁹ See UP Opening at 15.

Applying the new rental as of January 3, 2023, would be consistent with the *1967 Order*, which required ATSF to pay Southern Pacific retroactive compensation dating back to January 1, 1962—the day after the parties’ prior agreement expired.¹¹⁰ Retroactivity would also be consistent with *SSW Compensation*, in which the ICC ordered the tenant to make retroactive payments,¹¹¹ and *A&M*, the first case in which the ICC applied *SSW Compensation* principles to a voluntary agreement.¹¹²

Not applying the new rental retroactively would be inequitable to Union Pacific, which has been charging inequitably low rates established under the *1967 Order* since January 3, 2023. By contrast, BNSF knew by June 29, 2022, that Union Pacific would seek to reopen the *1967 Order* in January 2023,¹¹³ does not claim it lacked sufficient notice, and has benefited for years by paying rent established under the *1967 Order*.¹¹⁴

X. Conclusion

The Board’s straightforward application of *SSW Compensation* will ensure Union Pacific and BNSF compete on an equal footing using the Tehachapis Line and reaffirm the standards that railroads rely on when negotiating to renew trackage rights agreements. The Board should reject BNSF’s arguments for departing from *SSW Compensation*.

¹¹⁰ See *1967 Order*, 331 I.C.C. at 394; see also *id.* at 403–04.

¹¹¹ See *SSW I*, 1 I.C.C.2d at 792; *SSW IV*, 8 I.C.C.2d at 214–15.

¹¹² See *A&M*, 6 I.C.C.2d at 630.

¹¹³ See *Hughes VS* at 4.

¹¹⁴ Union Pacific is not responsible for the proceeding’s length. The Board granted BNSF’s request for mediation, see Decision served May 15, 2023, and the parties cooperatively addressed discovery and scheduling. See Decisions served July 13, 2023, and December 5, 2023. Union Pacific later agreed to BNSF’s request to modify the procedural schedule to give the Board time to rule on a BNSF motion to compel, see Decision served July 12, 2024, then produced the material voluntarily to expedite the proceeding, see Decision served Feb. 11, 2025.

Respectfully submitted,

CHRISTINA B. CONLIN
JAMES B. BOLES
TONYA W. CONLEY
TANYA L. SPRATT
Union Pacific Railroad Company
1400 Douglas Street
Omaha, NE 68179

/s/ Michael L. Rosenthal
MICHAEL L. ROSENTHAL
Covington & Burling LLP
One CityCenter
850 Tenth Street, N.W.
Washington, DC 20001
(202) 662-6000

Attorneys for Union Pacific Railroad Company

April 15, 2025

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, 2025, I caused a copy of the foregoing document to be served by email on all parties of record.

/s/ Michael L. Rosenthal