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VIA E-FILING

Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, SW
Washington, DC 20423

**Re: STB Docket No. FD 22218, Atchison, Topeka & Santa Fe Railway
Co.—Operating Rights—Southern Pacific Transportation Co.**

Dear Ms. Brown:

Enclosed for e-filing in the above-referenced proceeding is a public version of BNSF Railway Company's Final Brief, with appropriate redactions that the Board can place in its docket. We are concurrently filing a highly confidential version of the Final Brief to be filed under seal.

Please contact me with any questions.

Respectfully submitted,

/s/ Peter W. Denton

Peter W. Denton
Attorney for BNSF Railway Company

cc: All parties of record

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 22218

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

**BNSF RAILWAY COMPANY'S
FINAL BRIEF**

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Dated: April 15, 2025

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1. Introduction and Summary

BNSF¹ hereby submits its Final Brief regarding the compensation terms that the Board should impose to govern BNSF's continued trackage rights use of a 68-mile rail line owned by UP that extends between Kern Junction and Mojave, California (the "Kern-Mojave Line" or the "Line"). Each party has submitted hundreds of pages of evidence and argument in two rounds of filings in this proceeding. BNSF's case is set forth in detail in its Opening Statement and Evidence and Reply Statement and Evidence. Instead of attempting to restate and address each technical point made by the parties, BNSF summarizes in this Final Brief the key themes and decision points faced by the Board.

The Line is a critical link in BNSF's network. BNSF operates approximately 20 trains per day over the Line, including a combination of high-priority intermodal traffic, high-priority manifest traffic, loaded and empty grain trains, baretable trains (flatcars) that support the intermodal network, automotive trains, and non-grain bulk unit trains. Without effective access to the Kern-Mojave Line, BNSF would have to take shipments for customers on circuitous routes that are hundreds of miles longer than the routes traveled utilizing the Line, resulting in higher costs.

UP has claimed that the interest rental component of the total compensation paid by BNSF to UP for BNSF's use of the Line has become "inequitable." All railroads, including BNSF and UP, typically negotiate trackage rights compensation terms privately. The Board is rarely asked by railroads to set these

¹ Unless otherwise defined in this Final Brief, the acronyms and defined terms used in this filing are the same as those used by the Board in its decision served on May 15, 2023 in this proceeding, or in BNSF's Opening Statement, filed on May 3, 2024. For ease of use, we often refer in this Final Brief to BNSF or its predecessor ATSF as simply "BNSF" and to UP or its predecessor SP as simply "UP."

terms. But rather than asking BNSF to negotiate a new interest rental amount, UP has asked the federal government to intervene here.

BNSF and UP have both proposed that the STB use the “capitalized earnings” (“CE”) approach to determine the value of the Line and thus establish an interest rental valuation base under the Board’s *SSW Compensation* methodology. Using the CE approach and established Board precedent, BNSF calculated that the annual interest rental payment for its use of the Line should be increased more than { [REDACTED] } percent, from { [REDACTED] } as of 2022 to { [REDACTED] } per year as of 2023.² In contrast, UP concluded that BNSF should pay interest rental payments of approximately { [REDACTED] } per year as of 2023. UP’s interest rental proposal is roughly **22 times more** than BNSF’s current proposal and **36 times more** than BNSF paid under the prior agreement. Moreover, UP’s proposal improperly double counts inflation in the base annual interest rental payment and would count it a third time on a going-forward basis, so the gaps between the proposals would continue to widen over time.

BNSF’s expert witnesses, Michael R. Baranowski and Nathan S. Zebrowski, have explained that UP’s proposal results from an unsound and self-serving application of the Board’s *SSW Compensation* methodology to value the Line. UP made numerous critical errors in its capitalized earnings valuation of the Line that ignore long-established Board precedent. These include an inflated set of revenue

² To be clear, BNSF has not agreed to pay any compensation set in this proceeding retroactively. The Board has made it clear that it will not impose retroactive compensation unless the parties agree to retroactivity. *See New Eng. Cent. R.R.—Trackage Rts. Order—Pan Am S., LLC (NECR)*, FD 35842, slip op. at 28 (STB served Oct. 31, 2017); *Nat’l Rail Passenger Corp. Appl. Under Section 402(a) of the Rail Passenger Serv. Act*, 1 I.C.C.2d 243, 248 (1984) (“In the absence of consent by the parties, this Commission is without jurisdiction to fix compensation retroactively.”); *Nat’l R.R. Passenger Corp. & Union Pac. R.R., Use of Tracks & Facilities & Establishment of Just Compensation*, 348 I.C.C. 926, 935-37 (1977).

allocations based on inaccurate shortcuts and an inflated earnings multiplier. Other mistakes are even more fundamental, such as failing to correctly differentiate switching and linehaul costs in URCS and triple counting inflation. The errors alone would more than double the interest rental amount that UP seeks from BNSF and are so pervasive as to make UP's CE valuation irreparably flawed.

UP also errs by ignoring critical facts in the history of the Line, including (1) the terms of the bargain voluntarily reached by the parties in the early 1900s, (2) the transformational improvements to the Line funded by both parties over the last 125 years, (3) the careful consideration informing the ICC's establishment of equitable compensation in the 1960s, and (4) BNSF's agreement to fund tunnel clearance improvements that unlocked the potential of double-stack intermodal traffic on the Line, provided that BNSF would never be assessed additional interest rental for having done so. UP's twin motives for ignoring these critical facts and falsely casting the *SSW Compensation* methodology as a formula wholly indifferent to them should be obvious. First, UP would be paid more if the Board treats BNSF here as a new tenant buying into trackage rights on the Line for the first time, rather than determining equitable compensation that accounts for the facts and circumstances pertaining to BNSF's joint usage of the Line for over 125 years. Second, UP would force its competitor to dramatically increase its costs.

BNSF's accurate application of the *SSW Compensation* methodology to the particular facts of the Line in this case produces an interest rental amount that, when combined with additional compensation paid by BNSF for its share of the joint use of the Kern-Mojave Line, would yield "all-in" trackage rights compensation that is { [REDACTED] } of prevailing market-based trackage rights rates. In

contrast, UP's flawed interest rental proposal would produce all-in compensation that is { [REDACTED] } with the demonstrated market.

UP's proposal would be contrary to the public interest standard that governs the Board's consideration of trackage rights arrangements, because its proposal would artificially stifle competition. Put simply, if the Board were to accept UP's interest rental proposal, it would cost much more for BNSF to move traffic, disrupting the competitive balance between BNSF and UP. The Board's *SSW Compensation* methodology at issue in this proceeding was never intended to have these effects. Indeed, proper application of that methodology, as BNSF has proposed, would result in reasonable interest rental compensation that would enable the railroads to continue to compete in this territory.

Through this proceeding, UP seeks to achieve through regulatory fiat what UP could never have achieved through private negotiations: a trackage rights compensation windfall and a dramatic increase in the costs of its competitor. The Board serves a critical function as a backstop if railroads cannot agree to compensation for trackage rights that the Board has authorized. But if the Board accepts UP's flawed and self-serving interest rental proposal here, the Board will signal to the railroad industry that its doors are open for regulatory intervention in otherwise well-functioning private markets. The Board should instead set an interest rental amount here that is consistent with the history of this Line and with the Board's precedent and statutory authority.

If UP succeeds, the Board will reset trackage rights compensation between large railroads at a { [REDACTED] } level than the current market demonstrated in this proceeding. This could, in turn, upend the public benefits of increased competition that trackage rights access would otherwise generate by making the

price of access prohibitively high. This is not just a one-off argument by UP, but appears to be part of a larger strategy by UP to curb competition. Indeed, UP is already seeking to apply the same theories it has espoused in this proceeding to other trackage rights compensation negotiations with BNSF. And UP appears to be rolling out the same playbook with other railroads. For example, the Commuter Rail Division of the Regional Transportation Authority d/b/a Metra has alleged that “UP has placed Metra’s service at risk by demanding that Metra pay economically unreasonable and monopolistic rates to continue using [three UP lines in the Chicago area] for its public service.”³ UP is also seeking to curb competition by limiting BNSF’s access to customers that BNSF should otherwise have the right to access. UP routinely denies BNSF’s post-UP/SP merger access to customers, causing delay and forcing BNSF to seek Board intervention.⁴

³ Metra Appl. 1, Mar. 7, 2025, *Commuter Rail Div. of the Reg’l Transp. Auth.—Terminal Trackage Rts. —Union Pac. R.R.*, FD 36844.

⁴ There are a number of open proceedings at the STB where BNSF is seeking to confirm its UP/SP merger access rights over UP’s objections. *See, e.g., BNSF Ry.—Terminal Trackage Rts.—Kan. City S. Ry. (Lake Charles)*, FD 32760 (Sub-No. 46); *BNSF Ry.—Pet. for Enforcement—Serv. to Granite Mountain Quarries*, FD 32760 (Sub-No. 48); *BNSF Ry.—Pet. for Clarification—Serv. to Colo. Materials*, FD 32760 (Sub-No. 49); *BNSF Ry.—Pet. for Enforcement—Interchange with Savage Tooele R.R.*, FD 32760 (Sub-No. 50).

The table below summarizes BNSF's and UP's interest rental determinations in this proceeding. BNSF made { [REDACTED] } in interest rental payments to UP in 2022 for use of the Line.

Line	Description	BNSF Reply	UP Reply
1	Annual Attributable Earnings (2022)	{ [REDACTED] }	{ [REDACTED] }
2	Earnings Multiplier (2022)	7.6	12.6
3	Interest Rental Rate	4%	14.4%
4	BNSF Interest Rental Share	50%	62%
5	Interest Rental Payment (2022) ⁵	{ [REDACTED] }	{ [REDACTED] }
6	Base 2023 Interest Rental Payment ⁶	{ [REDACTED] }	{ [REDACTED] }

2. Background and Legal Framework

2.1. BNSF and UP have jointly used and improved the Kern-Mojave Line for over 125 years, enabling BNSF to compete with UP for rail traffic along the U.S. West Coast.

For over 125 years, the Kern-Mojave Line has served as a critical link in BNSF's rail network. Today, the Line forms a part of the spine of BNSF's north-south route through the state of California and the Pacific Northwest moving traffic along the I-5 corridor. Any freight that BNSF moves between the Pacific Northwest and Central/Southern California, including traffic that moves beyond Southern California and travels across BNSF's southern transcontinental route, must traverse the Kern-Mojave Line. (*See* BNSF Opening 5-6; *see also id.*, V.S. Power 2-3.) There is no feasible alternative for BNSF, as UP has recognized in this proceeding. (*See* UP Opening 3-4.)

⁵ This equals the product of lines 1-4.

⁶ Lines 1-5 show only 2022 results for clarity of illustration. Line 6 shows final 2023 results derived from BNSF's 2019-2022 analysis and UP's 2021-2022 analysis, as adjusted under the parties' respective adjustment methods.

BNSF operates approximately 20 trains per day over the Line. Freight that BNSF moves over the Kern-Mojave Line includes: (1) high-priority intermodal traffic, traveling between Texas, Chicago, Ill., and Northern California; (2) high-priority merchandise traffic – including lumber from the Pacific Northwest and Western Canada and bulk food products from Northern California to various points on the BNSF network; (3) unit trains of grain from the interior of BNSF's network to various Northern California destinations; (4) high-priority manifest traffic, such as animal feed, agricultural products, and ethanol, from the Central United States to the Stockton, CA and Fresno, CA areas; and (5) vehicle/auto traffic moving between Richmond, CA and other parts of BNSF's network. (*See V.S. Power 3-4.*)

BNSF and UP vigorously compete for rail transportation business on the I-5 corridor and across their service territories. Each railroad generally owns and operates its own rail network. But the two competitors have agreed to share thousands of miles of rail lines, often to make critical connections on their otherwise exclusive networks. In addition, trackage rights agreements have resulted from Board conditions imposed on the UP/SP merger whereby BNSF was granted access to portions of the UP network as a method of preserving competition. BNSF operates over 6,000 miles of UP track, and UP operates over 5,000 miles of BNSF track. Like most railroads, BNSF and UP typically negotiate private agreements for the compensation paid by the tenant railroad to the owning railroad for those trackage rights arrangements. This is a well-functioning market where previously BNSF and UP have voluntarily agreed to fee levels for joint operations that are mutually beneficial. (*See BNSF Opening 7-9; V.S. Power 4-12.*)

Just such a voluntary, mutually beneficial relationship started in the late 1800s, when UP invited BNSF to use UP's line between Kern Junction and Mojave,

California, running approximately 67.8 miles through the Tehachapi Mountains. Although BNSF was ready and able to build its own parallel line, UP had excess capacity to offer on the Kern-Mojave Line, and the two railroads voluntarily entered an agreement to jointly use the Line. Since then, BNSF and UP have jointly used the Kern-Mojave Line and mutually contributed to its maintenance and improvement for more than a century pursuant to terms that have been set by various agreements over the years between the parties and by the ICC. (*See* BNSF Opening 6-7; V.S. Power 2.)

Under the agreed-upon terms, BNSF pays UP a usage-based share of actual maintenance and operating expenses and tax payments incurred by UP with respect to the Line. BNSF's maintenance and operating expense payments include the cost of capital replacements. Over the course of many asset life cycles, BNSF's payments have covered both asset inflation and successive asset improvements. BNSF also agreed to pay UP a rent for use of the Line (the "interest rental" component). The agreement originally provided that BNSF would pay UP an interest rental at an annual rate of one-half of 4.5% of a valuation base that was equal to BNSF's own estimated cost to construct a parallel line. Over the decades, the rental payment has always respected the railroads' initial agreement for BNSF to pay a one-half share of the interest rental valuation base at an interest rental rate aligned with prevailing interest rate levels. (Opening V.S. Baranowski & Zebrowski 29-31; Reply V.S. Baranowski & Zebrowski 52-61.)

2.2. The Board's *SSW Compensation* methodology is a "flexible approach" that accounts for the particular facts of each case.

Trackage rights agreements are subject to the STB's plenary authority. The STB may set compensation terms in the rare circumstances where the railroads cannot agree on those terms for trackage rights that the STB has already

authorized. In setting those terms, the STB is guided by the same public interest standard that applies when the STB approves the transactions in the first place.⁷ In other words, the compensation terms must be “consistent with the public interest” and thus not result in anticompetitive effects. (*See* BNSF Opening 10-12.)

Over the last few decades, the STB has used a methodology referred to as *SSW Compensation* to set trackage rights compensation terms when necessary. Total compensation under *SSW Compensation* methodology is the sum of three components: (1) the variable cost incurred by the owning railroad due to the tenant’s operations, (2) the tenant railroad’s usage-proportionate share of the line’s maintenance and operation expenses, and (3) an interest or rental component designed to compensate the owning railroad for the tenant railroad’s use of its capital dedicated to the line. (*See* BNSF Opening 12; V.S. Power 11.)

The only *SSW Compensation* element at issue in this proceeding is the interest rental. By agreement, the parties share the first two components based on relative usage. The annual interest rental payment is calculated by first determining the value of the trackage rights line, then by multiplying that value by an interest rental rate, and finally by apportioning the resulting product between the owning carrier and the tenant carrier. (*See* BNSF Opening 12.)

The *SSW Compensation* methodology was initially developed and used by the ICC to set compensation for trackage rights imposed to redress the anticompetitive

⁷ The STB must consider proposed trackage rights agreements and approve them if they are “consistent with the public interest.” 49 U.S.C. § 11324. This public interest inquiry is focused on the possibility of anticompetitive effects. *Id.* Because trackage rights allow railroads to connect or extend their networks, the STB typically finds such arrangements to be procompetitive and consistent with the public interest. Once trackage rights are in place, the STB also must approve any discontinuance of a trackage rights arrangement, applying a similar “public convenience and necessity” test. *See* 49 U.S.C. § 10903.

effects of a railroad merger. See *St. Louis S.W. Ry.—Trackage Rights Over Mo. Pac. R.R.—Kan. City to St. Louis (SSW I)*, 1 I.C.C.2d 776 (1984); *St. Louis S.W. Ry.—Trackage Rights Over Mo. Pac. R.R.—Kan. City to St. Louis (SSW II)*, 4 I.C.C.2d 668 (1987). The methodology was extended beyond the merger context in *Arkansas & Missouri R.R. Co. v. Missouri Pacific R.R. Co. (A & M)* to establish the terms of compensation to be paid for the renewal of a trackage rights agreement where the parties wanted the arrangement to continue but could not agree on all of the terms for establishing compensation. See *A & M*, 6 I.C.C.2d 619 (1990), *clarified*, 7 I.C.C.2d 164 (1990).

The Board has acknowledged that “the *SSW Compensation* method is a flexible approach that can be (and has been) modified to account for the particular facts of each case, including difficulties in valuation, various types of costs, and the specific nature and extent of the line’s use.” *Lake Charles Decision No. 8*, FD 32760 (Sub-No. 46), slip op. at 16. Importantly, the ICC has noted that “any terms so onerous to the tenant as to defeat the purpose of the trackage rights cannot be considered just and reasonable.” *SSW II*, 4 I.C.C.2d at 669.

3. The Board should implement BNSF’s proposed approach for setting an interest rental amount for BNSF’s use of the Kern-Mojave Line.

BNSF and UP agree that the Board should use the capitalized earnings approach to establish an updated interest rental valuation of the Line under the Board’s *SSW Compensation* methodology. BNSF contends that the Board should not disturb the other interest rental terms (i.e., the interest rental rate and share) that have long been established by the parties’ mutual agreement. UP argues that the Board should re-write these provisions on terms more favorable to UP, based on inputs used in more recent *SSW Compensation* cases involving very different circumstances.

BNSF's interest rental proposal appropriately accounted for the facts particular to the parties' 125-year joint use of the Kern-Mojave Line and properly applied the *SSW Compensation* methodology. In contrast, UP failed to tailor its application of the methodology to account for the unique facts and circumstances of this case. Additionally, UP made several errors, improper shortcuts, and self-serving assumptions in its application of the methodology that combine to overstate the value of the Line. Adoption of UP's proposed interest rental rate would "defeat the purpose of the trackage rights" and thus "cannot be considered just and reasonable." *See SSW II*, 4 I.C.C.2d at 669.

3.1. The interest rental rate and share factors that BNSF proposes correctly account for the facts of the Kern-Mojave Line.

BNSF has proposed that the interest rental rate should be four percent, consistent with current interest rate levels. Setting the interest rental rate at current interest rate levels properly adheres to the parties' long-standing and well-justified practice. The parties initially agreed to an interest rental rate aligned with interest rate levels. The ICC likewise set an interest rental rate for the Line aligned with contemporaneous interest rate levels in the 1960s. The parties' most recent settlement agreement was also tied to changes in then-current interest rate levels. (BNSF Opening 20-21; BNSF Reply 11-12.)

The economic reasons behind the use of interest rate levels are clear and well documented. The record shows that very little of the funding for the Line has been provided by UP alone. Nearly all funding has been provided jointly by the parties relative to usage. (Reply V.S. Baranowski & Zebrowski 53-57.) As the ICC previously found in the 1960s, this shared funding provided over many asset replacement cycles based on relative usage has covered both asset inflation and

contributed substantially to the improvement of the Line. (*Id.* at 57-61.) BNSF has raised its share of the funds for these improvements.

While BNSF's contributions do not constitute an ownership stake in the Line, they should influence the selection of the appropriate interest rental rate and interest rental share to apply to the valuation base. Accordingly, the parties' initial agreement on rental terms, which has always been respected to date and without which the Line would have never developed as it has, remains the equitable basis for determining the appropriate interest rental rate and share. (Opening V.S. Baranowski & Zebrowski 29-31; Reply V.S. Baranowski & Zebrowski 52-67.)

In contrast, UP proposed that the STB use the cost of capital as the appropriate interest rental rate, ignoring that the ICC already rejected this approach. *See 1967 Order*, 331 I.C.C. 367, 380; (*see also* Reply V.S. Baranowski & Zebrowski 53-54.) UP relied on abstract reasoning about earning a cost of capital where a company has exclusively committed its own capital to an asset, citing as support certain *SSW Compensation* cases involving this distinctly different type of situation. (*See* UP Reply 10-15.) But UP ignored the critical facts related to the Line that make use of the cost of capital as an interest rental rate inappropriate here.⁸

UP also ignored the obvious reasoning that, because the usage-based payments BNSF already provides fully cover capital costs, there is no reason to override the parties' agreement to share interest rental equally. Contrary to UP's

⁸ UP's reliance on the ICC's reasoning in the *March 1993 Order* regarding BNSF potentially attempting to earn the cost of capital if it built an alternative to the Kern-Mojave Line is misplaced. (*See* UP Reply 11-12.) In reality, BNSF has already funded significant improvements to the Line via maintenance and operating payments under replacement-retirement-betterment accounting and covered inflation in the Line's original assets that has occurred since at least 1912 via replacement capital. (Reply V.S. Baranowski & Zebrowski 56-59.) Therefore, BNSF should not have to pay for this investment again at the cost of capital, and UP is not entitled to earn a cost of capital return for funds it did not raise.

argument, the STB has not overridden prior agreed-upon interest rental terms at the request of one party. Any such new precedent set here by the Board would result in a regulatory windfall inconsistent with both the public interest and the market-based outcomes UP has been able to achieve.⁹ (Reply V.S. Baranowski & Zebrowski 52-67.)

3.2. BNSF’s application of the capitalized earnings approach is sound, while UP’s analysis is irreparably flawed.

The CE method values a railroad line segment by multiplying the specific earnings assigned to the line segment by an earnings multiplier. *March 1993 Order*, FD 22218, slip op. at 2. To measure line-specific earnings, both parties here used the Board’s Average Total Cost (“ATC”) procedures to allocate revenues attributable to the Line and the Board’s Uniform Railroad Costing System (“URCS”) to develop operating expenses attributable to the Line. (Reply V.S. Baranowski & Zebrowski 7.)

BNSF followed the Board’s ATC and CE precedent correctly and developed an accurate measure of line-specific earnings. In contrast, because of a combination of errors, improper shortcuts, and aggressive assumptions, UP’s CE calculations are irreparably flawed. UP’s analysis conflicts with agency precedent and artificially inflates line-specific earnings. Also, unlike UP, BNSF appropriately recognized that, in a case where the tenant’s underlying earnings are considered as part of a capitalized earnings valuation of the owner’s line, only a portion of the tenant’s underlying earnings are properly attributable to the owner’s track infrastructure.

⁹ BNSF showed that UP has { [REDACTED] } obtained through commercial negotiations interest rental rates aligned with prevailing interest rate levels and not the cost of capital. (See Reply V.S. Baranowski & Zebrowski 63-65.)

(*Id.* at 7-30.) Unlike UP, BNSF properly accounted for the parties' agreement related to tunnel clearance improvements in the 1990s.

3.2.1. Only BNSF has conducted an accurate measure of line-specific earnings.

BNSF extensively described its approach for determining line-specific earnings in its Opening and Reply evidence. (Opening V.S. Baranowski & Zebrowski 14-21; Reply V.S. Baranowski & Zebrowski 72-80.) A portion of revenues for every shipment traversing the Line is allocated to the Line using the procedures established by the Board for performing ATC revenue allocations. Operating expenses for the Line are then estimated using fully-allocated URCS costs (removing the effects of ROI). The difference equals line-specific earnings. UP generally does not dispute BNSF's approach. (*See* UP Reply 2.)

The one item raised by UP about the mechanics of BNSF's determination of line-specific earnings relates to an alleged understatement of operating expenses that has no merit. UP's concern is clearly misplaced because both parties' experts develop nearly identical total operating expenses for the Line. (Reply V.S. Baranowski & Zebrowski 97, App. Table A6; Opening V.S. Mathur, Ex. 10A & 10B.) BNSF's method of using fully-allocated URCS less ROI is sound and aligned with Board procedures on operating expense development in simplified stand-alone cost ("SSAC") cases.¹⁰ The *NECR* precedent is irrelevant here because no URCS was available for the owning carrier in that proceeding, and UP's attempt to apply the approach from *NECR* here is unnecessary and introduces distortions and mismatches. (*See* Reply V.S. Baranowski & Zebrowski 26-27.)

¹⁰ *See Simplified Standards for Rail Rate Cases*, EP 646 (Sub-No. 1), slip op. at 49-51 (STB served Sept. 5, 2007).

BNSF already addressed in its Reply the two minor technical items raised by UP regarding proper treatment of ROI in the constant cost markup and accounting for BNSF's "below-the-wheel" costs in both ATC revenue allocations and operating expense calculations. (*Id.* at 72-75.) UP's only remaining criticism, that fully-allocated URCS could theoretically overstate certain expenses, defies the Board's well-established logic behind denying movement-specific adjustments.¹¹ UP focused on why higher densities may drive lower operating expenses on the Line, while it simultaneously ignored why train operations and line maintenance in mountainous territory may drive higher operating expenses on the Line.

UP's approach for determining line-specific earnings contains numerous significant errors. These errors are described in detail in BNSF's Reply evidence. (*See* Reply V.S. Baranowski & Zebrowski 7-30.) UP concluded that it is "computationally infeasible" to accurately perform ATC here, notwithstanding that BNSF successfully performs these very calculations. Instead, UP used a skewed and simplistic approach that significantly overstates line-specific earnings. This approach violates longstanding ATC precedent by treating the entire portion of the move not on the Line as having the same density. UP also mistakenly assigned costs and revenues to the Line for switching activities that did not occur on the Line. This also artificially inflated line-specific earnings. Other errors committed by UP include failing to differentiate between "above-the-wheel" and "below-the-wheel" costs and unnecessarily distorting expense allocations for no apparent reason. UP's mistakes are pervasive and irreparable. The Board should use BNSF's sound determination of line-specific earnings.

¹¹ *See Major Issues in Rail Rate Cases*, EP 657 (Sub-No. 1), slip op. at 48-61 (STB served Oct. 30, 2006).

3.2.2. Earnings related to double-stack intermodal traffic must be excluded from line-specific earnings calculations.

BNSF did not include earnings from double-stack traffic in its determination of line-specific earnings. In the early 1990s, BNSF solely funded the tunnel clearance improvements that allowed for double-stack traffic to move over the Line. And the parties expressly agreed at that time that “neither party shall be entitled at any time to receive or assess interest rental payments with respect to” the improvements. (See Opening V.S. Baranowski & Zebrowski 13-14; Reply V.S. Baranowski & Zebrowski 28) (citing *July 1993 Order*, FD 22218, JSA at 4.) Clearly, the interest rental payment set in this proceeding would be higher if the capitalized earnings valuation included earnings generated by double-stack traffic. In contrast, UP’s determination of line-specific earnings included earnings from double-stack traffic and thus violates the parties’ agreement.

The Board should reject UP’s various attempts to shirk its agreement regarding the impact of the tunnel clearance improvements on the interest rental. First, UP speculated that it would have eventually performed the improvements itself. Even if true, this obviously has no bearing on the parties’ agreement. Next, UP pointed out that it paid BNSF in kind for the improvements as part of a later settlement agreement. This is also irrelevant. The parties could have agreed in that later settlement agreement to add the improvements to the interest rental assessment. They did not do so.

Next, UP suggested that it could presumptively move at least some of this double-stack intermodal traffic in single-stack service, ignoring the heavy imposition of costs which this change in operations would entail. Finally, UP suggested that, because the interest rental developed under the CE approach is technically derived from the earnings generated from traffic that moves because of

the tunnel clearance improvements, rather than the construction costs of the improvements themselves, somehow this permits assessing additional interest rental amounts. (*See Reply V.S. Baranowski & Zebrowski 27-28.*) None of these contrived arguments have any merit. Accordingly, the Board should accept BNSF's implementation of the parties' agreed exclusion of earnings from double-stack intermodal traffic from the capitalized earnings valuation.

3.2.3. Not all of BNSF's line-specific earnings should be paid as rent to UP.

This is the first application of a capitalized earnings valuation in the context of the *SSW Compensation* methodology that considers the underlying earnings of both the longstanding tenant and incumbent. Both UP's and BNSF's experts agreed, generally, that starting with these underlying earnings generated by each parties' operations appropriately addresses past circularity concerns raised by the Board. However, BNSF explained that not all of its underlying earnings are generated exclusively from UP's provision of the track infrastructure. Rather, BNSF's provision of equipment, coordination of operations, marketing efforts, and numerous other activities also contribute to this earnings generation. (*See Opening V.S. Baranowski & Zebrowski 10-12.*)

UP's expert corroborated this view when allocating only a portion of UP's valuation to road property investment, which is also consistent with the *SSW Compensation* methodology. The distinctions between "above-the-wheel" and "below-the-wheel" costs in ATC revenue allocations also corroborate this concept. Moreover, BNSF would have had no incentive to accept UP's original offer to share the Line if BNSF had no prospect of retaining any earnings attributable to the Line. Accordingly, BNSF's experts allocated half of BNSF's line-specific earnings to the

valuation of the Line, and thus to the rental amount that will be paid to UP. (Reply V.S. Baranowski & Zebrowski 27-28.)

In contrast, UP's expert simply assumed without any explanation that, in this uncharted territory involving both the tenant's and incumbent's underlying earnings, all of the tenant's earnings should be attributed to the incumbent's ownership of the track infrastructure. UP attempted to justify this position on the basis that *SSW Compensation* methodology requires basing interest rental payments on a line's "fair market value," which UP reasoned must include all value related to the Line. (UP Reply 28.) But Board cases implementing *SSW Compensation* methodology have never considered a tenant's earnings when performing a capitalized earnings valuation. In past capitalized earnings valuations in *SSW Compensation* cases, **local traffic** was excluded from line-specific earnings. *See, e.g., SSW II*, 4 I.C.C.2d at 684. This precedent contradicts UP's notion that "fair market value" means all value and supports BNSF's approach to identify a relevant subset of earnings attributable to the Line. This same concept also applies to BNSF's treatment of double-stack intermodal traffic discussed above.

Accordingly, only BNSF has proposed a coherent framework for performing a CE valuation based on both the incumbent and tenant's existing underlying earnings. The Board should reject UP's self-serving attempts to claim all of BNSF's attributable earnings as rent.

3.2.4. Because of the serious flaws identified with UP's earnings multiplier calculation, the Board should use BNSF's proposed earnings multiplier.

Under the capitalized earnings valuation approach, after developing base annual line-specific earnings, an earnings multiplier is applied to convert this amount into a line valuation. In this case, BNSF followed Board precedent and

applied the STB's pre-tax industry cost of capital as the earnings multiplier. Under the *SSW Compensation* methodology, this approach is used when, as in this case, the alternative option of developing an earnings multiplier based on a recent transaction is not possible. Here, Board precedent should prevail. (*See id.* at 51) (citing *Trinidad Ry.—Aban. Exemption—in Las Animas Cty., Colo.*, AB 573X (STB served Apr. 17, 2002); *NECR*, FD 35842 (STB served Oct. 31, 2017).)

In contrast, UP's expert developed a so-called "market-based" earnings multiplier based on what UP's stock price happened to be on December 31, 2021 and 2022. Such an arbitrary approach has never been tried, much less accepted, in any *SSW Compensation* cases, for good reason. BNSF's experts explained in detail the numerous and significant flaws with this approach. Among these, UP (1) inexplicably applied a UP-based multiplier to BNSF earnings; (2) ignored its own testimony that the Kern-Mojave Line is at capacity; (3) locked into perpetuity growth rate assumptions that are several-fold higher over those that UP has actually achieved in recent history; and (4) determined the share of its valuation to allocate to road property in a way that manages to simultaneously contradict *SSW Compensation* precedent, purchase price allocation outcomes from recent railroad transactions, and UP's own views on valuing intangible assets. (*Id.* at 31-52.) The Board should reject UP's approach and use BNSF's cost of capital approach to determine the earnings multiplier.

3.3. UP's interest rental proposal improperly triple counts inflation, so the gaps between the parties' proposals would continue to widen in future years.

The Board has addressed issues related to inflation in *SSW Compensation* methodology, in each case resolving them in a way that ensures inflation is only counted once. Only BNSF's proposal properly accounted for inflation. BNSF

explained how capital replacement payments under the maintenance and operating component of the existing trackage rights agreement already compensate UP for inflation. BNSF recommended use of the CPI to adjust its recommended interest rental payment, which it has adjusted to 2023 levels, on a going-forward basis if the Board deems this necessary. This would possibly overstate inflation in UP's favor due to capacity constraints on the Line and separate compensation that UP receives from BNSF under the existing trackage rights agreement that covers the effects of inflation. But this approach is justifiable because UP's and BNSF's system-wide earnings have closely tracked inflationary trends reflected in the CPI over the last decade. (*See id.* at 71.)

In contrast, UP inexplicably counted the same full effects of inflation on three separate occasions within the interest rental component alone, not even recognizing that inflation is also covered by other aspects of the existing trackage rights agreement that will continue in force. The Board should reject this approach.

First, Dr. Mathur applied an earnings multiplier that already includes inflation and earnings growth. However, the UP stock price on which her multiplier is based is influenced by expected future earnings, and these future earnings include inflation. Second, Dr. Mathur used the STB's nominal pre-tax cost of capital (which includes inflation) as the interest rental rate. Third, Dr. Mathur then took the interest rental payments from her capitalized earnings valuations based on 2021 and 2022 earnings, which already account for inflation twice, and increased these interest rental payments to so-called 2023 levels by applying an input cost-based index, which also covers inflation. Messrs. Baranowski and Zebrowski concluded that none of Dr. Mathur's approaches for accounting for inflation are

sound and that adding them together creates an “irrational” and “impermissible” triple count of inflation. (*See id.* at 69-70.)

3.4. BNSF correctly accounted for economic obsolescence in its RCNLD analysis.

Neither party has recommended using the “replacement cost new less depreciation” or “RCNLD” approach to value the Line for *SSW Compensation* methodology purposes, given the difficulties in ascertaining the replacement cost of the Line and the lack of ledger information that BNSF requested and UP did not produce. But if the Board were to decide to use the RCNLD valuation approach or consider it relevant in any way, the Board must apply an adjustment for economic obsolescence when valuing the Line,¹² because the Line generates fewer attributable earnings than the cost required to replace the Line. (Opening V.S. Baranowski & Zebrowski 21-28; Reply V.S. Baranowski & Zebrowski 90-93.)

BNSF explained that, under basic valuation principles long embraced by the Board, when an asset generates a lower level of earnings than the costs to replace that asset in its present condition, economic obsolescence must be accounted for as part of the depreciation component in an RCNLD valuation. The net present value of all attributable earnings generated by the Kern-Mojave Line, i.e., its CE valuation, of approximately { [REDACTED] } is well below the unadjusted RCNLD amount in the range of { [REDACTED] }. Therefore, economic obsolescence must be accounted for.

¹² In the *NECR* proceeding, the Board likewise rejected a cost-based approach that failed to account for economic obsolescence and considered as relevant a RCNLD valuation that accounted for economic obsolescence. *See NECR*, FD 35842, slip op. at 12-14.

3.5. The level of interest rental compensation proposed by BNSF is equitable and aligned with market-based outcomes, unlike UP's proposal.

As discussed above, the Board's authority to prescribe trackage rights fees is governed by a public interest standard that is focused on the potential for anticompetitive effects. 49 U.S.C. § 11324. UP has not met its burden of establishing that its proposal is consistent with this public interest standard. Indeed, UP has not even paid lip service to the relevant statutory standard. BNSF has shown that UP's proposal would not serve the public interest by identifying three ways in which UP's proposal could reduce competition between UP and BNSF for shipments over the Kern-Mojave Line.

First, UP would have less economic incentive to compete with BNSF for traffic over the Line. Absurdly, under UP's proposal, UP would earn {{ [REDACTED] }} per car mile in rent for a BNSF shipment moving over the Kern-Mojave Line than UP would earn from its own shipments moving over the Line. (Reply V.S. Baranowski & Zebrowski 84.) This would result in an incentive for UP to collect rent from BNSF rather than move UP's own traffic over the Line.

Second, in order to use an essential element of BNSF's network, BNSF would have to pay its competitor UP { [REDACTED] } than under either the prior arrangement for the Line or any other trackage rights arrangement between the parties. (*See id.* at 87-88.)

Third, UP claimed that the current interest rental compensation for BNSF's use of the Kern-Mojave Line requires UP to subsidize BNSF's operations. UP based this claim on the false premise that UP is entitled to earn the cost of capital on funds provided by BNSF for the Kern-Mojave Line. The ICC already properly rejected this claim. *See 1967 Order*, 331 I.C.C. 367, 380; (*see also* Reply V.S. Baranowski & Zebrowski 53-54.) Indeed, UP's proposal would result in BNSF

subsidizing UP, not the other way around. UP would reap financial and anticompetitive advantages from receiving trackage rights compensation here that is {{ [REDACTED] }} higher than other UP/BNSF market-based rates. (*See Reply V.S. Baranowski & Zebrowski 82-90.*)

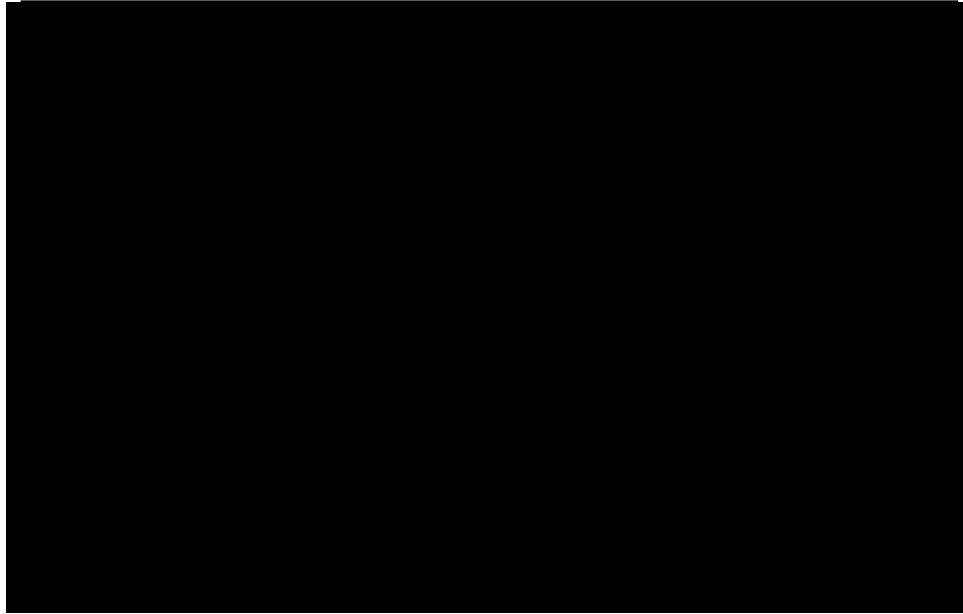
The inequitable level of UP's interest rental proposal becomes even more evident when comparing UP's proposed interest rental payment to other trackage rights rates that UP has entered into through commercial negotiations with BNSF and other carriers. (We refer to these rates as "market-based" trackage rights rates.) BNSF's CE interest rental rate proposal of {{ [REDACTED] }} per year as of 2023 is equitable and aligned with the market-based rates, while UP's proposal of {{ [REDACTED] }} per year as 2023 would be an extreme market outlier. (*See Opening V.S. Baranowski & Zebrowski 31-34; Reply V.S. Baranowski & Zebrowski 86-90.*) BNSF and UP have established a narrow band of market-based commercially-viable GTM rates. (*See BNSF Opening 21-24.*) After analyzing {{ [REDACTED] }} all-in GTM-based rates, Messrs. Baranowski and Zebrowski demonstrated that the minimum UP/BNSF all-in GTM rate was {{ [REDACTED] }} mills per GTM and that the maximum UP/BNSF all-in GTM rate was {{ [REDACTED] }} mills per GTM. This resulted in an average UP/BNSF all-in GTM rate of {{ [REDACTED] }} mills per GTM. (*Opening V.S. Baranowski & Zebrowski 32.*)

BNSF's interest rental proposal would result in "all-in" trackage rights compensation to UP at the {{ [REDACTED] }} of the established band of market-based rates. UP's proposal would result in compensation that is {{ [REDACTED] }} than any other trackage rights rates that UP has entered into through commercial negotiations with BNSF.¹³ The same holds true with respect to the agreements

¹³ As the Board stated in its February 7, 2025 decision in this proceeding, "BNSF's argument here—that the rates UP receives under trackage rights

between UP and other carriers that Messrs. Baranowski and Zebrowski reviewed in the context of this proceeding. The chart below illustrates these discrepancies.

**UP “All-In” GTM Trackage Rights Rates Commercially Negotiated with
BNSF and {{ [REDACTED] }} Compared to “All-In” Kern-Mojave
Trackage Rights Rate Using Dr. Mathur’s Proposed Interest Rental
{{**



}}

(See Reply V.S. Baranowski & Zebrowski 88-89.)

4. Conclusion

For the reasons stated above and in BNSF’s Opening and Reply Statements, BNSF requests that the Board: (1) use BNSF’s capitalized earnings methodology to determine a valuation for the Kern-Mojave Line of {{ [REDACTED] }}, (2) adopt an interest rental rate of 4.0%, and (3) determine that BNSF is responsible for one-half of the interest rental, taxes, and other special charges and assessments. BNSF’s

agreements with other carriers bear on the reasonableness of the rate BNSF pays for access to the Line—goes to the main issue in this proceeding: i.e., what the ‘new interest rental rate’ should be for BNSF’s use of the Line.” *Atchison, Topeka & Santa Fe Ry.—Operating Rts.—S. Pac. Transp.*, FD 22218, slip op. at 4 (STB served Feb. 7, 2025).

proposal will yield total compensation that is equitable, in the public interest, procompetitive, and broadly consistent with a range of “market” rates that the parties and {{ [REDACTED] }} have privately negotiated.

Respectfully submitted,

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Dated: April 15, 2025

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, 2025, I have caused the foregoing BNSF Railway Company's Final Brief to be served electronically or by first-class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Onika K. Williams

Onika K. Williams
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