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February 1, 2017

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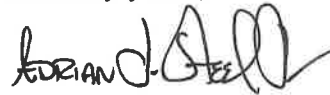
Re: Finance Docket No. 32760, Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company—Control and Merger—Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp. and the Denver and Rio Grande Western Railroad Company

Dear Ms. Brown:

Enclosed for electronic filing in the above-captioned proceeding is the Joint Petition of BNSF Railway Company and Mission Rail Industrial Park, LLC for Enforcement of Decision No. 44. A check in the amount of \$300 will be delivered today pursuant to Item 88 of the STB Fees Schedule.

Please contact me if you have any questions. Thank you.

Sincerely yours,



Adrian L. Steel, Jr.

Enclosures

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TRANSPORTATION BOARD

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 32760

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

**JOINT PETITION OF BNSF RAILWAY COMPANY AND
MISSION RAIL INDUSTRIAL PARK, LLC
FOR ENFORCEMENT OF DECISION NO. 44**

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Verified Statement of Richard Kinsel

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 32760

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

**JOINT PETITION OF BNSF RAILWAY COMPANY AND
MISSION RAIL INDUSTRIAL PARK, LLC
FOR ENFORCEMENT OF DECISION NO. 44**

INTRODUCTION AND SUMMARY

Pursuant to Decision No. 44 and Decision No. 21 (General Oversight) in the above-referenced proceeding, BNSF Railway Company (“BNSF”)¹ and Mission Rail Industrial Park, LLC (“MRIP”) (collectively “Petitioners”) petition the Surface Transportation Board (“Board”) for enforcement of the conditions imposed by the Board in Decision No. 44.²

In 2013, FRAC Resources, L.P. (“FRAC Resources,” now known as Mission Rail Holdings, LLC), a non-carrier, constructed 7,391 feet of private track between the terminus of the Elmendorf switching district at milepost (“MP”) 16.1 and MP 17.5 on a former SP line in

¹ The acronyms used herein are the same as those in Appendix B to Decision No. 44.

² In Decision No. 21 of the UP/SP General Oversight Proceeding, the Board stated that, while it was concluding its formal oversight process for the UP/SP merger, it retained “continuing authority to enter supplemental orders and to modify decisions entered in merger and control proceedings under 49 U.S.C. 11323” and that “the conclusion of the formal oversight process does not preclude any party from invoking [the Board’s] jurisdiction to address any merger-related concerns arising out of [the Board’s] conditions.” STB Finance Docket No. 32760 (Sub-No. 21), UP/SP Merger Proceeding, General Oversight, Decision No. 21, slip op. at 5-6. Further, in Decision No. 72, the Board stated that “any beneficiary of the Decision No. 44 conditions has the right to seek relief from the Board if it believes that these conditions have not been implemented in a manner that achieves their competition-preserving objectives.” UP/SP Merger Proceeding, Decision No. 72, slip op. at 20-21 (internal footnote omitted; emphasis added). *See also id.* at 20 n.18 (“We wish to clarify that shippers have rights under the BNSF agreement because we have imposed the terms thereof as a condition of the merger. * * * [S]hippers have recourse to the Board for enforcement of the merger conditions.”).

Bexar and Wilson Counties, Texas, designated as Track 793 (the “Track” or the “Line”), to serve the Mission Rail Park (the “Park”). See Overview Map of Elmendorf area attached hereto as Exhibit 1. FRAC Resources expected that the Park would be served by both BNSF and Union Pacific Railroad Company (“UP”) under the conditions imposed on the UP/SP merger by the Board, since both carriers served Elmendorf, the Track would connect with the Elmendorf switching district, and the Park was near a UP track over which BNSF had trackage rights. See Verified Statement of Richard Kinsel (“Kinsel V.S.”) at 3. The industry track agreement which UP and FRAC Resources signed reflected this expectation. *Id.* at 4-5. Under a separate agreement between UP and FRAC Resources, UP was to reimburse FRAC Resources for its construction costs by paying a refund for each loaded car moving to and from the Park over the course of three years, subject to a cap. *Id.* at 4.

As the construction of the Track approached completion over the summer and fall of 2013, BNSF sought to implement its right under the BNSF-UP Restated and Amended BNSF Settlement Agreement, dated March 1, 2002 (the “RASA,” attached hereto as Exhibit 2) to serve the Park.³ UP flatly rejected BNSF’s access request, and, in apparent response to BNSF’s request, UP approached FRAC Resources to offer it a lump sum payment for the Track payable upon the completion of the Track rather than over a period of three years. Having engineered the immediate acquisition of ownership of the Track, UP filed a verified notice of exemption under 49 C.F.R. § 1150.31 in Finance Docket No. 35776 to operate over the Track.

³ The RASA is a revised version of the BNSF Settlement Agreement that was adopted by the Board as a condition to the UP/SP merger. The Board directed the submission of the RASA in Decision No. 20 of the UP/SP General Oversight proceeding, STB Finance Docket No. 32760 (Sub-No. 21). As pertinent here, the RASA incorporates conditions imposed by the Board in the decision approving the UP/SP merger (Decision No. 44), as clarified and supplemented in subsequent Board decisions. See UP/SP Merger Proceeding, General Oversight, Decision No. 20, slip op. at 2, 13-14.

BNSF requested that the Board reject UP's notice, because the exemption procedures were not appropriate due to the non-routine and controversial nature of the transaction – namely relating to BNSF's right to access shippers located at the Park via the Track. Although the Board decided to allow the exemption to take effect in order to allow immediate rail service to customers by UP, the Board noted that the facts surrounding the construction of the Track set forth above "raised questions as to whether Board authority to construct the Line under § 10901 was required and whether the transaction between UP and FRAC Resources was structured purposefully to avoid seeking such authority." *Union Pac. R.R. Co.—Operation Exemption—In Bexar and Wilson Counties, Tex.*, STB Finance Docket No. 35776, slip op. at 2 (STB served March 2, 2015) (hereinafter "Operation Exemption Dec. No. 2"). As discussed below, the Board's Acting Chairperson at the time stated that the track construction process was structured purposefully to avoid seeking otherwise-required construction authority from the Board.

The Board expressly stated that its decision did "not preclude BNSF from seeking . . . a determination that it also is entitled to access the line" and that its decision "shall not be construed as permitting UP to defeat any rights that BNSF may have had to serve shippers on the Line had the exemption not become effective." *Union Pac. R.R. Co.—Operation Exemption—In Bexar and Wilson Counties, Tex.*, STB Finance Docket No. 35776, slip op. at 4 (STB served Dec. 24, 2013) (hereinafter "Operation Exemption Dec. No. 1"). BNSF and Petitioners seek such a determination through this Joint Petition. Specifically, Petitioners request that the Board issue an order requiring UP to allow BNSF to provide competitive rail service to the Park by granting BNSF the right to access the Track and an approximately 580-foot extension of Track 793 to

serve the Park. The extension, which is designated as Track 795, was built by the Park's developers and sold to UP in 2016.⁴

Under the RASA, BNSF is entitled, *inter alia*, to access all New Shipper Facilities located post-UP/SP merger (i) at "2-to-1" points (such as Elmendorf, Texas), and (ii) on Trackage Rights Lines (such as the UP line to which the Track connects). The Park is a New Shipper Facility that is both "at" a "2-to-1" point and "on" a Trackage Rights Line. Therefore, under the RASA, BNSF should be able to access the Park by operating over the Trackage Rights Line to reach the "2-to-1" point of Elmendorf and connecting to the Track to reach the Park.

Moreover, absent BNSF access to the Park and other shipper facilities on the Track, indirect siting competition at Elmendorf would be negated by UP's refusal to grant BNSF access. And finally, as explained below, it has been BNSF's and UP's custom and practice, which UP itself has recognized, that BNSF is entitled to access New Shipper Facilities located at industrial parks, like the Park at issue here, that are connected to a Trackage Rights Line by an industrial lead that has the purpose of serving those facilities.

In opposing Petitioners' request for BNSF service to the Park, UP has advanced a hard-and-fast rule that would run contrary to the letter and intent of the RASA and the Board's merger conditions. UP asserts that any New Shipper Facility (including the Park) physically located beyond the stated switching limits of a "2-to-1" point – regardless of distance – is not entitled to BNSF service under the RASA. Such location, however, should not preclude BNSF access under the RASA since, as established below, pre-merger siting competition undeniably existed at such locations near "2-to-1" points, and shippers would have been able – had the UP/SP merger not occurred – to enjoy the benefits of that pre-merger competition. The Board must reject UP's

⁴ See Overview Map at Ex. 1 and schematic track diagram at Kinsel V.S., Ex. 2. For the balance of this Petition, the term "Track" will include both Track 793 and Track 795. UP has apparently not sought authority from the Board for its operations on Track 795.

asserted position in order to ensure that its merger conditions and shippers' rights to two-carrier service are fully protected over the 99-year term of the RASA.

BACKGROUND

Mission Rail Park is a recently-constructed rail complex consisting of just over 1,000 acres near Elmendorf, Texas in southeast Bexar and Wilson Counties. The Park plans to serve and is serving industrial tenants of all sizes, ranging from large distribution and manufacturing centers to small rail users, as well as oil field service companies and oil midstream companies looking to transport products to and from the Eagle Ford Shale region of Texas. *See Union Pac. R.R. Co.—Operation Exemption—In Bexar & Wilson Counties, Tex.*, STB Finance Docket No. 35776, Reply of FRAC Resources, L.P. & Mission Rail Industrial Park LLC to BNSF's Petition to Reject Notice of Exemption, at 1 (filed Dec. 11, 2013) (hereinafter "FRAC Reply"). Many of the existing and prospective tenants of the Park are "heavily dependent upon receiving rail service that will involve a combination unit train, train load and manifest train operations." *Id.* at 2.

Prior to construction of Track 793 in 2013, the Park had no connection to the general rail system, but the facility was adjacent to an abandoned rail right-of-way previously owned by SP, and now owned by UP since the UP/SP merger. FRAC Reply at 1-2. On August 14, 2012, one of the partners in MRIP, ST One Logistics ("ST One"), entered into a Memorandum of Understanding with UP (the "MOU"). Kinsel V.S. at 3 and Ex. 1. Under the MOU, ST One was to construct trackage running from the Park to a UP line that extends onto a UP main line in the Elmendorf, Texas switching district in order to obtain rail service to the Park. Kinsel V.S. at 3. Ultimately, FRAC Resources, another partner in MRIP, helped finance the construction. *Id.* at 4. On March 22, 2013, UP and FRAC Resources entered into a Confidential Rail Contract by which UP was to provide transportation and pay a refund for each loaded railcar, over the course

of the next three years, commencing on January 1, 2014, following which the Track would be owned by UP. *Id.*

Shortly thereafter, on May 21, 2013, FRAC Resources and UP entered into an Industry Track Agreement (the “ITA”) which partially incorporated the terms of the MOU. Kinsel V.S. at 4.⁵ Under the ITA, FRAC Resources was to construct certain tracks within the Park and complete the construction of Track 793 to connect with UP’s Rockport Industrial Lead at Elmendorf. *Id.* at 3, 4-5. Once UP completed paying for Track 793, UP would own that track, while FRAC Resources would own the track within the Park. *Id.* at 5. Importantly, the ITA also provided that other railroads would have the right to provide service to the Park if any such railroad has the right to use the Track, either by agreement with UP or order of competent public authority. *Id.* at 5. As the Board stated in its decision, “in entering into the [ITA], [FRAC] anticipated that other railroads (specifically BNSF) would be able to serve Mission Rail Park.” Operation Exemption Dec. No. 1, slip op. at 3.

In the summer and fall of 2013, BNSF sought, through an exchange of letters with UP (attached hereto as Exhibits 3, 4, 5, and 6), to implement BNSF’s right under the RASA to provide direct BNSF service to the Park via the Track. In a September 30, 2013 letter in this exchange, BNSF noted that “Section 4(a) of the RASA grants BNSF the right to provide direct service within the switch limits of ‘2-to-1’ points, in this case up to and including MP 16.1 in Elmendorf. BNSF is entitled to access any New Shipper Facility, as long as the track and/or connection is located at or between the mileposts which define the switch district.” Ex. 5 at 1. UP

⁵ The ITA, certain track drawings and the names of Twin Eagle’s customers are either subject to confidentiality agreements or are otherwise commercially sensitive. MRIP will provide this information once an appropriate protective order is issued in this proceeding or if UP otherwise agrees to waive confidentiality restrictions on these materials. However, UP filed a copy of this ITA with the STB in Finance Docket 35776, *Union Pacific Railroad Company – Operations Exemption – in Bexar and Wilson Counties, TX*, which is discussed below in paragraph 22.

rejected BNSF's request on the ground that the MRIP is located approximately 1.4 miles beyond MP 16.1, outside the limit of the Elmendorf switching district, and thus, in UP's view, neither within the switching district nor located on a Trackage Rights Line. *See* Exhibits 4 and 6.

As noted, the initial agreement between FRAC Resources and UP for construction of the Track provided for UP reimbursement to FRAC Resources for its construction costs by paying a refund for each loaded railcar moving from or to the Track over the course of three years, subject to a cap on the total. *See* Kinsel V.S. at 4. In an acceleration of the previously planned schedule, and apparently prompted by BNSF's assertion of its rights to provide direct service to the Park, UP approached FRAC Resources on October 17, 2013 with the goal of amending this initial agreement between the parties to provide for UP's payment to FRAC Resources of a lump sum, rather than carload reimbursements over three years. *Id.* at 5-6. Thereafter, UP consummated its purchase of the Track, thereby extending the mainline track beyond the Elmendorf switching district in an apparent attempt to prevent BNSF access.⁶ However, FRAC Resources was not aware that UP's lump sum payment for Track 793 and the subsequent reclassification of that track as jurisdictional might be used as a pretext to preclude service by BNSF. *Id.* at 5-6.

On October 21, 2013, UP filed with the Board a verified notice of exemption under 49 C.F.R. § 1150.31 to operate as a rail common carrier over the Track. Operation Exemption Dec. No. 1, slip op. at 2. BNSF requested that the Board reject this notice, because the exemption procedures were not appropriate due to the non-routine and controversial nature of the transaction, particularly in light of UP's refusal to acknowledge BNSF's right to access the Track.

⁶ The bill of sale for the Track was executed on October 17, 2013, but UP did not pay for the Track until December 27, 2013. Kinsel V.S. at 7.

The Board noted that the facts surrounding the construction of the above “raise questions as to whether Board authority to construct the Line under § 10901 was required and whether the transaction between UP and FRAC Resources was structured purposefully to avoid seeking such authority.” Operation Exemption Dec. No. 1, slip op. at 3. However, due to “unique circumstances” requiring FRAC Resources to receive rail service immediately, the Board decided to allow the exemption to take effect while it investigated the circumstances under which the Track was built. *Id.*

The Board investigated the matter, but did not take further action. At the time, the Board had only two Members and was “unable to reach a majority decision on whether remedial action is appropriate.” Operation Exemption Dec. No. 2, slip op. at 2. However, Acting Chairman Miller commented in a separate expression that the record before the Board indicated that “UP’s verified notice contained false and misleading information regarding the circumstances under which the Line was built,” and that UP sought to avoid the 49 U.S.C. § 10901 requirement that UP receive construction authority from the Board. *Id.* at 3-5.

ARGUMENT

As established below, BNSF is entitled under the RASA to access the Park via the Track because the facility is located (i) “at” a “2-to-1” point, and (ii) “on” a Trackage Rights Line. UP’s denial of BNSF access to the Track violates these RASA provisions, as well as the Board’s “new facilities condition,” upon which the RASA provisions are based. In addition, UP’s denial of BNSF access frustrates one of the fundamental purposes of these RASA provisions and the new facilities condition by effectively eliminating the indirect siting competition at Elmendorf

that would otherwise be available to the Park and its tenant shippers, contrary to the applicable laws, regulations, decisions and orders of the Board.⁷

A. Mission Rail Park Is a New Shipper Facility Located at a “2-to-1” Point

The RASA entitles BNSF to serve the Park via the Track because the Park is a “New Shipper Facility” located after the UP/SP merger at a “2-to-1” point. Consistent with the Board’s new facilities condition imposed in Decision No. 44, the RASA includes provisions affording BNSF the right to serve “any New Shipper Facility located subsequent to UP’s acquisition of control of SP at points listed on Exhibit A to this Agreement.” Ex. 2, § 4(b). The RASA Exhibit A “2-to-1” points include Elmendorf, Texas. *Id.*, Ex. A at 50.

The boundaries for “2-to-1” points, such as Elmendorf, “shall be deemed to include all areas within the switching limits” of the point, as designated by tariff as of September 25, 1995. Ex. 2, Definitions at 2-3 (cross-referencing § 9(g)). The Track plainly begins at and connects with MP 16.1, the southern boundary of the Elmendorf switching limits, and later the Track terminates at the Park. *See* Ex. 1.⁸

UP has argued that the Park is not located at a “2-to-1” point, but this contention is wrong. UP correctly noted in its July 29, 2013 letter to BNSF that the Park is “located

⁷ Opponents of the UP/SP merger argued that UP-SP competition embraced not only existing “2-to-1” shippers but also shippers and potential shippers that would have had various options for obtaining competitive rail service, including the option to build out, transload, shift production among numerous plants, and relocate plant facilities as well as “the ability to play UP and SP against each other in deciding where to locate new facilities.” UP/SP Merger Proceeding, Decision No. 61, slip op. at 20.

⁸ UP has previously acknowledged that Elmendorf is a “2-to-1” point under the RASA, that the south edge of the Elmendorf switch district is located at MP 16.1, and that the Track connects with UP’s line at MP 16.1. *See* Ex. 4; *Union Pac. R.R. Co.—Operation Exemption—in Bexar & Wilson Counties, Tex.*, STB Finance Docket No. 35776, Verified Notice of Exemption, Ex. 1 (filed Oct. 21, 2013) (map showing the Track connecting to UP track at MP 16.1). These Elmendorf switching limits are also consistent with those in effect on September 25, 1995 – the effective date for determining switching limits for purposes of establishing the parameters of “2-to-1” points set forth in the RASA. *See* S. Pac. Transp. Co. Tariff ICC SP 9500-C, Item 11920 (effective Aug. 1, 1995) (excerpt attached hereto as Exhibit 7). As evident from the SP tariff, the Elmendorf switching district runs along approximately 3.5 miles of track from MP 16.1 northward. UP has further acknowledged this by granting BNSF the right to serve the Park’s competitor, Alamo Junction, located at approximately MP 13.6. *See infra* at 20-21; *see also* Ex. 1.

approximately 1.4 miles beyond Mile Post 16.1.” Ex. 4 at 1. However, UP is incorrect that, for the competition-preserving purposes of the Board’s merger conditions at “2-to-1” points, this location places the Park “outside the Elmendorf Switch District.” *Id.* The fact that a New Shipper Facility may be physically located just beyond the stated switching limits should not preclude BNSF access under the RASA. Under UP’s reasoning, BNSF would not be entitled to access any New Shipper Facility that was located outside the switching limits of a “2-to-1” point. This hard-and-fast rule runs contrary to the letter and intent of the RASA and the Board’s merger conditions. Any New Shipper Facility that connects to a “2-to-1” point through a spur or industrial track should be considered to be located within the switching limits of that “2-to-1” point, and, therefore, should be considered to be located “at” that “2-to-1” point for the purposes of BNSF’s access rights under the RASA. Otherwise, the direct “2-to-1” competition that the Board sought to preserve would not be fully protected.

A contrary determination would unduly restrict the scope of the new facilities condition. Before the UP/SP merger, a shipper locating a new facility within the switching limits of a “2-to-1 point” would have been entitled to service from both UP and SP. Post-merger, it is indisputable that such a shipper would have access to UP and BNSF under the RASA and the Board’s conditions. By the same token, before the UP/SP merger, a shipper contemplating locating a new facility just over a mile from the terminus of the switching limits of a “2-to-1” point *also* would have been able to avail itself of the benefits of UP-SP competition by building the very Track that was built here.⁹

⁹ Here, there is nothing speculative about the ability to connect to the switching district via private, industrial, or other similar track. It was actually done. That UP attempted to convert the Track to jurisdictional status is irrelevant. UP should no more be permitted to change Mission Rail Park’s status as a “2-to-1” shipper, which accrued upon the completion of the construction of the trackage, than it could redefine switching limits in order to transform a shipper located at a “2-to-1” point into a solely-served shipper. *See* UP/SP Merger, Decision No. 81 (holding that UP’s post-merger changes to switching limits at San Antonio, TX could not alter BNSF’s right to access under the pre-merger switching limits).

Specifically, in the case of a new shipper considering whether to locate just outside the switching limits of a “2-to-1” point, the shipper would have had the considerable bargaining leverage available to a customer who can play two competitors off each other. If either UP or SP tried to deny such a shipper service from the other railroad, the shipper could threaten to build in to the other railroad or to locate somewhere else, entirely cutting out, or at least seriously disadvantaging, the railroad trying to block the other’s access. Thus, in *both* the case of the facility built within the switching limits at a “2-to-1” point *and* the facility built just outside those limits, the shipper would, for all practical purposes, be “at” the “2-to-1” point, because the shipper would have competitive options for UP and SP service.

In this respect, the analogous principles that determine whether a facility is located “on” a Trackage Rights Line are instructive. As demonstrated in Section B(2), *infra*, in Decision No. 86 the Board clarified that a shipper facility is located “on” a Trackage Rights Line by virtue of its location adjacent to a spur or industrial track connecting to a Trackage Rights Line. Similarly, a facility must be deemed to be located “at” a “2-to-1” point if it is adjacent to a spur or industrial track that connects to the track within the switching district that is used to define to the “2-to-1” point. This is a particularly apt analogy where, as here, the switching district runs from point to point along specified track, rather than consisting of the area around a given terminal.

When the Track was initially constructed and completed, UP represented that it was spur or private (that is, non-jurisdictional) track. *See* Operation Exemption Dec. No. 2, slip op. at 3 (“UP claimed that, at the time it purchased the [Track], the track was properly classified either as ancillary track excepted from Board licensing pursuant to 49 U.S.C. § 10906 or private track outside the Board’s jurisdiction.”) (internal footnote omitted). UP should be deemed estopped from claiming anything to the contrary now. The Board, therefore, should find that BNSF’s right

to serve the Park via the Track (and the parallel rights of the shippers at the facility to BNSF service) accrued upon the completion of Track construction. Once that right accrued, UP's unilateral, after-the-fact actions should not be allowed to strip BNSF and Park shippers of these rights. Rather, the Board should find that those rights continue today.

Thus, the Board's decision to allow the UP operating exemption for the Track to take effect does not preclude the relief sought here by Petitioners. As the Board stated in Operation Exemption Dec. No. 1, slip op. at 4, "UP's right to seek authority to operate over the Line as a common carrier is separate and distinct from BNSF's asserted right to access shippers on the Line under the terms of the RASA." Furthermore, the decision to allow the UP operating exemption to take effect "shall not be construed as permitting UP to defeat any rights that BNSF may have had to serve shippers on the Line had the exemption not become effective." *Id.* As noted, the Board was pressured to allow the UP-requested operating exemption to take effect immediately due to the urgent need for rail service by Park shippers.¹⁰

Therefore, the Board should determine that the Park is a "New Shipper Facility" located "at" a "2-to-1" point and that BNSF is entitled under the RASA to serve the facility via the Track, because, when the Track was constructed and BNSF's right of access accrued, (i) the Track was a spur or industrial track for the purposes of RASA, and (ii) the Track connected the Park to a UP rail line within the Elmendorf switching district.

¹⁰ If UP had not sought to improperly avoid Board review and approval for the construction of the Track, then the Board and BNSF could have made a full inquiry into the circumstances of the deal between UP and MRIP parties and its effects on BNSF's access rights.

B. Mission Rail Park is Located “On” a Trackage Rights Line

1. The RASA Supports the Conclusion that the Park is “On” a Trackage Rights Line

The RASA also entitles BNSF to serve the Park via the Track because the Park is a “New Shipper Facility” located “on” a Trackage Rights Line, within the meaning of the RASA. The RASA provides that UP/SP was required to grant BNSF trackage rights on certain UP/SP lines in South Texas, including “SP’s line between SP Junction (Tower 112) and Elmendorf, TX,” the line to which the Track connects. Ex. 2, § 4(a). The reference in Section 4(a) to “Elmendorf, TX” includes “all areas within the switching limits of the location designated by tariff, . . . in effect as of September 25, 1995” *Id.*, § 9(g). As noted above, the southern edge of the Elmendorf switch district is located at MP 16.1, and the Track connects to the Trackage Rights Line at MP 16.1. Accordingly, as a condition to the UP/SP merger, BNSF’s trackage rights are required to extend to MP 16.1 on the relevant Trackage Rights Line.¹¹

The RASA provides that BNSF would receive access on such Trackage Rights Lines to any New Shipper Facility located after the UP/SP merger “on” such Trackage Rights Lines. Ex. 2, § 4(b). As noted above, a New Shipper Facility is “on” a Trackage Rights Line for RASA purposes if the facility is “adjacent to a spur, an industrial track, or a yard that is itself served by such Trackage Rights Line.” Ex. 2, Definitions, at 4; *see also* UP/SP Merger Decision No. 86, slip op. at 4. New shipper facilities are not “on” a Trackage Rights Line “if they can be accessed

¹¹ The fact that the parties’ trackage rights agreement dated June 1, 1996, provides for trackage rights for BNSF to serve the City Public Service Board (“CPSB”) facility located near MP 12.6 in Elmendorf does not restrict the broader grant of trackage rights in the RASA. That agreement was signed prior to the Board’s imposition of enhanced conditions in Decision No. 44 to facilitate BNSF service to the CPSB facility, and was not intended to define the scope of BNSF’s RASA rights. Pursuant to the RASA and Decision No. 44, UP must amend the June 1996 trackage rights agreement to extend the trackage rights to MP 16.1 at BNSF’s request. Like the other June 1996 trackage rights agreements, the trackage rights agreement has not been revised or updated to reflect the modifications required by the Board in Decision No. 44. As discussed *supra* in note 8, UP has granted BNSF the right to serve the Park’s competitor, Alamo Junction, located at approximately MP 13.6. *See also infra* at 21-22; Exhibit 1.

only via a 49 U.S.C. 10901 ‘line of railroad’ which is not a Trackage Rights Line.” Ex. 2, Definitions, at 4.

The Park is clearly “adjacent to” the Track, and the Track, when it was constructed and BNSF’s right of access accrued, was a spur or industrial track that connected to a Trackage Rights Line for the purposes of the RASA. *See* Operation Exemption Dec. No. 2, slip op. at 3 (“UP claimed that, at the time it purchased the [Track], the track was properly classified either as ancillary track . . . or private track . . .”). Therefore, BNSF is also entitled under the RASA to serve the Park via the Track because the Park is a “New Shipper Facility” located “on” a Trackage Rights Line.

2. The Conclusion that the Park is “On” a Trackage Rights Line is Consistent with Decision No. 86.

UP may seek to invoke Decision No. 86 to support its position that the Park is not “on” a Trackage Rights Line. As noted above, in Decision No. 86, slip op. at 5, the Board clarified that a New Shipper Facility is not “on” a Trackage Rights Line “if a facility can be accessed only via a 49 U.S.C. 10901 ‘line of railroad’ over which BNSF does not have trackage rights under [the UP/SP] merger conditions.” *See also* Ex. 2, Definitions, at 3-4. As a result of UP’s track construction and purchase ruse, the Park today can be accessed only via a 49 U.S.C. § 10901 “line of railroad.” In this case, however, Decision No. 86 does not support UP’s position.

First, UP has acknowledged that when construction of the Track was completed, the Track was not jurisdictional. UP itself told this Board in its October 21, 2013 Notice of Exemption that, at the time of its construction by FRAC Resources, the Track “was properly classified either as ancillary track excepted from Board licensing pursuant to 49 U.S.C. § 10906 or private track outside the Board’s jurisdiction.” Operation Exemption Dec. No. 2, slip op. at 3. The Track was therefore undeniably a spur or industrial lead, and, as initially agreed upon, would

have remained private track for three years had not UP induced MRIP to allow UP to accelerate its purchase of the track.

BNSF's right of access accrued at the time the Track was constructed and completed, and UP cannot subsequently strip Park shippers of their right to BNSF service. Although the separate expression of Acting Chairman Miller in Operation Exemption Dec. No. 2, slip op. at 3-5, tentatively concluded that UP may have intended to circumvent the prior approval requirements of 49 U.S.C. § 10901 and the Board's environmental regulations, UP may have had an altogether different (though equally improper) motive for its actions. UP may have accelerated the payment, filed the notice of exemption, and obtained operating authority from the Board over the Track in order to argue that the Track is now a "line of railroad which is not a Trackage Rights Line" for the purposes of the RASA, thereby defeating BNSF's claim. Ex. 2, Definitions, at 4. Any such argument by UP should be rejected.

For one thing, the Board expressly stated that its decision "shall not be construed as permitting UP to defeat any rights that BNSF may have had to serve shippers on the Line had the exemption not become effective." Operation Exemption Dec. No. 1, slip op. at 4. Moreover, acceptance of this argument would allow UP to evade its competition-preserving obligations under the RASA simply by purchasing and subsequently operating the Track. The Board should not encourage such gamesmanship.¹²

Second, Decision No. 86 should not be construed to apply to track constructed post-merger. Decision No. 86 addressed trackage that existed prior to the UP/SP merger. The applicability of the jurisdictional limitation discussed in Decision No. 86 to track constructed after the UP/SP merger in order to connect to a new facility has never been raised or resolved.

¹² Indeed, as Acting Chairperson Miller noted, there is ample evidence of gamesmanship by UP in order to evade regulatory requirements in the very construction of the Track in the first place.

Third, the actual arguments that UP made in the lead-up to Decision No. 86 did not focus on the jurisdictional nature of the track at issue there. In particular, UP did not predicate its argument in its Reply (UP/SP-365) to BNSF’s Petition for Enforcement (addressed by the Board in Decision No. 86) on the jurisdictional status of the yard lead connecting the facility at issue there (Four Star Sugar) to the Trackage Rights Line. Rather, UP argued that the yard lead – an existing pre-merger line – was not a “simple industrial lead to a shipper facility” but rather was an active multi-purpose line of railroad. UP/SP Merger Proceeding, UP’s Reply to BNSF’s Petition for Clarification (UP/SP-365) at 12-13 (June 1, 1999). UP was concerned that BNSF would seek to assert that essentially any UP line connecting to a Trackage Rights Line could be the basis for a finding that a new facility is “on” a Trackage Rights Line. *Id.* at 2. Additionally, in response to BNSF’s argument that UP’s refusal to provide BNSF with access to the Four Star Sugar facility was inconsistent with other situations where BNSF gained access to new industries on spurs (*e.g.*, BNSF’s access to R.R. Donnelley, as addressed in Decision No. 75), UP stated that “those other facilities were located in industrial parks along leads off of the main line which had the single purpose of serving a number of shippers” and thus were open to BNSF service. *Id.* at 14.

The R.R. Donnelley situation described by UP is exactly the situation here. The Track was constructed to enable rail carrier service to a number of shippers located at the Park. UP’s own arguments in the lead-up to Decision No. 86 *support* access here.¹³ Moreover, as BNSF advised the Board in its filings leading to Decision No. 86, UP had previously granted BNSF access to industrial parks not located directly adjacent to Trackage Rights Lines at Grand Junction, CO and Fernley, NV that were connected to the Trackage Rights Lines by industrial

¹³ In addition, shipper organizations supported access via industrial leads in the Four Star Sugar proceeding. See Decision No. 86, slip op. at 2, n.4 (citing NITL Reply to BNSF Petition for Clarification (NITL-25) (June 1, 1999) and SPI’s Reply in Support of BNSF’s Petition for Clarification (SPI-26) (June 2, 1999).

leads. *See* UP/SP Merger Proceeding, Petition of BNSF for Clarification (BNSF-86) at 19-20, n.12 (May 12, 1999); Verified Statement of Travis B. Thowe (“Thowe V.S.”) at 5-6. Since 1999, UP has granted access to several new shipper facilities in those two industrial parks. *See* Thowe V.S. at 6.

Furthermore, affording BNSF access would serve the competition-preserving purpose of the UP/SP merger conditions and the RASA whether or not the Track is now a jurisdictional “line of railroad.” The fact that, under certain circumstances, the construction and/or operation of the connecting track may require Board approval does not diminish the fact that BNSF access is necessary to preserve siting competition. If a new facility is sited to receive rail service via a Trackage Rights Line, it is “on” that line, and the particular means of connection to the Trackage Rights Line are immaterial because siting competition exists regardless of such means.

C. BNSF Access to the Park is Required to Fulfill the Board’s Competition-Preserving Merger Conditions

As explained by the Board in Decision No. 44, one of the “key issues” that it considered in evaluating the potential competitive harm that would result from the proposed UP/SP merger was whether the BNSF Settlement Agreement would allow BNSF to serve all shippers whose access to rail service would go from two railroads to one. *See* UP/SP Merger Decision No. 44, 1 S.T.B. 233, 368 n.97 (1996). Thus, the Board focused on and intended to protect shippers whose post-merger service options would be reduced to UP, exclusively.

In Decision No. 86, the Board explained that the “new facilities condition” to the UP/SP merger “was imposed to preserve indirect competition and to enable BNSF to achieve sufficient traffic density on the trackage rights lines,” but that the Board “never intended to limit our condition to facilities served directly from a trackage rights line.” UP/SP Merger Decision No. 86, slip op. at 4. As the Board noted, “UP is correct that the condition is broad, but it was

intended to be.” *Id.* at 5. The “indirect rail-to-rail siting competition” that the Board intended to preserve through the new facilities condition is directly applicable here.

The fact that a New Shipper Facility may be physically located just beyond the stated switching limits should not preclude BNSF access under the RASA. Any New Shipper Facility that connects to a “2-to-1” point through a spur or industrial track should be considered to be located within the switching limits of that “2-to-1” point, and, therefore, should be considered to be located “at” that “2-to-1” point for the purposes of BNSF’s access rights under the RASA. Similarly, the fact that a New Shipper Facility is located some distance from a Trackage Rights Line should not preclude BNSF access, given that the RASA entitles BNSF to serve any New Shipper Facility that is “adjacent to a spur, an industrial track, or a yard that is itself served by [a] Trackage Rights Line.” Ex. 2, Definitions, at 4. The Board recognized this principle in Decision No. 86. A contrary determination would unduly restrict the scope of the new facilities condition and undercut the purposes for which the Board imposed the condition. As noted, one of those purposes is the preservation of direct “2-to-1” competition. Another purpose is the preservation of pre-merger “indirect” rail competition.

Before the UP/SP merger, shippers and facility owners often enjoyed the benefits of this type of indirect competition. *See Thowe V.S.* at 4. In determining where to build such a new facility, a prospective shipper or industrial park developer could contact UP and SP to determine what rate and service offerings each carrier would be willing to make if the facility were to be placed on or near its line. *Id.* These offerings could then be played against each other, and the shipper or industrial park developer could use this competitive leverage to get the best transportation service offering it could for itself (in the case of a shipper’s own facility) or for the

shippers that would be directing rail traffic into the industrial park.¹⁴ *Id.* at 4-5. With the UP/SP merger, however, this indirect siting competition would have disappeared but for the Board's imposition of the new facilities condition. *Id.* at 5. The condition enables BNSF to replicate the pre-merger competition that existed between UP and SP by allowing BNSF to compete post-merger with the combined UP/SP for the facilities' business. *Id.*

Furthermore, the nature of industrial development and relocation has evolved since the UP/SP merger in 1996, with industry increasingly relocating to exurban sites outside the static switching districts established at the time of the merger. *Thowe V.S.* at 5. Over time, urban areas that have historically been industrial in nature can change as industries close or move away. *Id.* These areas are often redeveloped into residential or retail centers, precluding their use for industrial purposes and making land immediately adjacent to them unsuitable for industrial use due to noise, pollution, or other reasons. *Id.* In order to preserve the rate and service competition that existed at switching districts at the time of the UP/SP merger, BNSF must have access to New Shipper Facilities that are physically located beyond, but still connected to, the stated 1995 switching limits. *Id.*

D. MRIP and its Customers Are Also Entitled to the Protection and Benefits of the Merger Conditions

Through its initial approval of BNSF trackage rights and later approval of the RASA, the Board intended to ameliorate the competitive harms that would otherwise have been caused by an unconditioned UP/SP merger. While BNSF was clearly a beneficiary of the Board's ruling in Decision No. 44 granting it trackage rights, the various conditions – including the “new facility”

¹⁴ The importance of such competitive leverage to shippers can be seen in connection with Toyota's location of a new automobile manufacturing facility in the San Antonio TX area in 2006. Toyota selected a site on UP's Corpus Christi Sub on which BNSF does not have trackage rights. UP would not agree to BNSF access, so a rural rail district was set up to acquire the right-of-way to build to Elmendorf so that BNSF could access the facility under its RASA rights. When Toyota requested that State of Texas incentive dollars be allocated to the building of the line to Elmendorf, UP agreed to allow BNSF access to the original site on UP's Corpus Christi Sub. *Thowe V.S.* at 5, n.1.

condition relevant here – were also intended for the express purpose of protecting the interests of shippers like MRIP. *See supra* note 2.

The Park’s developers fully expected to obtain the benefits of the UP/SP merger conditions. When the MRIP site was selected, the developers reasonably believed that the facility would have the benefit of competitive rail service once they built out the approximately 1.25-mile track necessary to make the connection to the Trackage Rights Line and the switching district of Elmendorf, a “2-to-1” point. Kinsel V.S. at 3. The Park’s developers also understood that BNSF was keenly interested in serving the facility and knew that BNSF had explored property purchases in the area for its own purposes. *Id.* at 5.

The initial construction of the Track was financed and completed by ST One, one of the owners of MRIP. Kinsel V.S. at 3-4. That UP subsequently purchased that industrial track and converted it to “jurisdictional” track (although MRIP is the only customer on the line) once BNSF began inquiring about providing service to the Park did not change the facts relating to its construction; similarly, as discussed above, this conversion to jurisdictional track should not disenfranchise MRIP from the rights granted by Decision No. 44 and the RASA.¹⁵

The situation described by Mr. Kinsel in his Verified Statement graphically demonstrates why those access rights are so essential. Without competitive rail service, the economic situation facing MRIP is bleak. Although MRIP has made significant investments in rail-related infrastructure in the Park, it has lost tenants and found that those it still has are losing significant market share to their competitors located in another industrial park (Alamo Junction) a few miles away, but which does currently enjoy both UP and BNSF service. *See Kinsel V.S.* at 8-10; Ex. 1 (showing Alamo Junction on the UP line in the Elmendorf switching district). One of MRIP’s

¹⁵ As the Board only had access to the May 21, 2013 ITA between UP and FRAC Resources, it was not aware of the initial MOU or the subsequent confidential Rail Transportation Contract which would have retained private ownership of the build-out track for a three-year period. *See supra* at 5-7.

customers has also made significant investments in rail-related infrastructure (including silos, rail tracks and transloading facilities), but has not been able to realize the anticipated rail volume due to UP's lack of responsiveness. *Id.*

UP's apparent indifference to the needs of MRIP and its customers, while damaging to the shippers, is understandable in a commercial context. In the absence of BNSF's competition, UP has little reason to be responsive to the Park's captive shippers. MRIP tenants that cannot leave the Park – either because of lease commitments or the possible loss of significant capital investments – are compelled to accept whatever rates and service UP is willing to offer. If other existing or prospective MRIP customers are either forced to leave the Park and move to MRIP's competitor or elect not to contract with MRIP at all, UP will still be able to seek their business since it serves that competing facility.¹⁶

Accordingly, as long as UP does not need to compete with BNSF, MRIP and its customers will not benefit from the important protections provided by Decision No. 44 and the RASA, and the Park – which could be a vibrant player in the development of gas and oil exploration in this important region – will never realize its economic potential.

CONCLUSION

For the foregoing reasons, Petitioners request that the Board issue an order requiring UP to allow BNSF to serve Mission Rail Park over the Track so that the shippers at the Park can enjoy the benefits of the indirect siting competition, and the Board should not permit UP's efforts

¹⁶ UP has previously alleged that “nothing prevented Frac Resources from negotiating to obtain service from BNSF prior to locating in the Mission Rail Park” and that “nothing prevents future shippers in [the Park] from seeking to negotiate for access to BNSF.” *Union Pac. R.R. Co.—Operation Exemption—in Bexar & Wilson Counties, Tex.*, STB Finance Docket No. 35776, UP's Reply to BNSF's Petition to Reject Notice of Exemption, at 4 n.8 (Nov. 18, 2013). As noted in the Kinsel V.S. at 3, FRAC Resources believed that the Park's location would ensure its tenants' access to competitive rail service from both UP and BNSF. The ITA further supported this view. *See Kinsel V.S.* at 5. In light of its gamesmanship in this matter, UP's argument rings especially hollow. Furthermore, as noted above, it is unrealistic to suggest that a “future” shipper located in the Park would have the leverage to successfully negotiate with UP to allow BNSF access.

to orchestrate its acquisition of the Track in such a way as to defeat those rights. The Board expressly stated that its decision to allow UP to operate over the Track “shall not be construed as permitting UP to defeat any rights that BNSF may have had to serve shippers on the Line had the exemption not become effective.” Operation Exemption Dec. No. 1, slip op. at 4. The Board can prevent UP from doing so by granting the relief sought by Petitioners.

Respectfully submitted,



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Dated: February 1, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February, 2017, copies of the foregoing Joint Petition of BNSF Railway Company and Mission Rail Industrial Park, LLC for Enforcement of Decision No. 44 have been served by e-mail or first class mail on the following parties of record in this proceeding:

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Exhibit 1 Overview Map

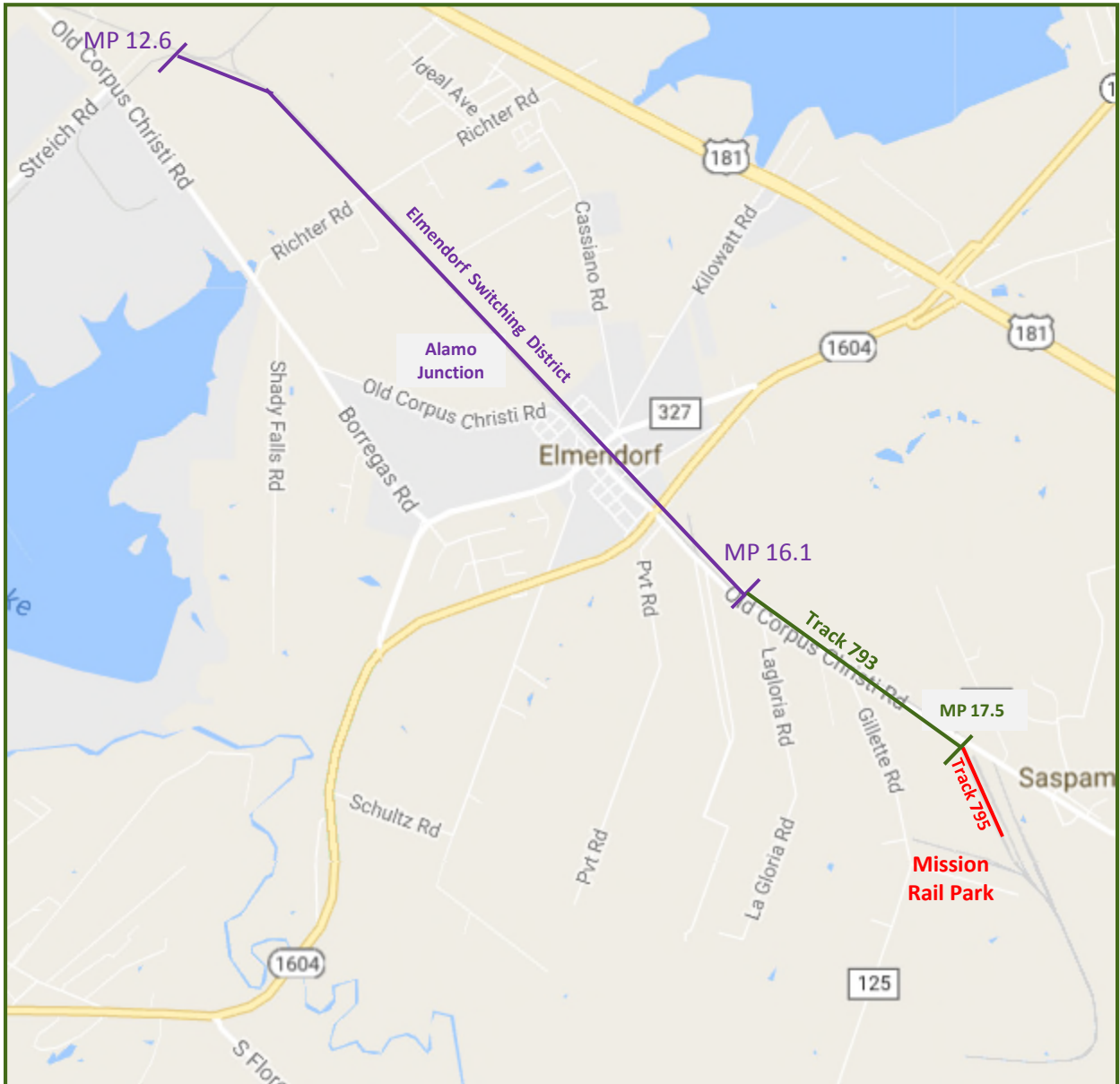


EXHIBIT 2

03/01/02

RESTATED AND AMENDED AGREEMENT

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

WITNESSETH:

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

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

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

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

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

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

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

DEFINITIONS

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

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

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

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

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

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

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

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

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

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

1. **Western Trackage Rights**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. **I-5 Corridor**

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

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

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

3. **Southern California Access**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7. St. Louis Area Coordinations

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

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

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

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

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

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

8. **Additional Rights**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9. **Trackage Rights - General Provisions**

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

Table I		
Trackage Rights Compensation		
(mills per ton-mile)		
	Keddie-Stockton/Richmond	All Other Lines
Intermodal and Carload	3.48	3.1
Bulk (67 cars or more of one commodity in one car type)	3.0	3.0

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11. **Term**

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

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

12. **Adjustment of Charges**

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

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

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

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

13. **Assignability**

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

14. **Government Approvals**

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

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

15. **Arbitration**

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

16. **Further Assurances**

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

17. **No Third Party Beneficiaries**

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

UNION PACIFIC RAILROAD COMPANY

By: _____
Title: _____

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

By: _____
Title: _____

Exhibit A
LIST OF “2-TO-1” POINTS

Points Referred to in Section 1(b)

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

Points Referred to in Section 3(a)

Ontario CA
La Habra CA
Fullerton CA

Points Referred to in Section 4(b)

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

Points Referred to in Section 5(b)

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

Points Referred to in Section 6(d)

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

EXHIBIT F

LIST OF OVERHEAD TRACKAGE RIGHTS

1. Western Trackage Rights

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

2. South Texas Trackage Rights

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

3. Eastern Texas – Louisiana Trackage Rights

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

4. Additional Rights

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

5. Rights to Omnibus Points

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

EXHIBIT 3



Chris Bigoness
*Manager Merger Customer
Access
Network Strategy*

BNSF Railway Company
2500 Lou Menk Drive
AOB 3rd Floor
Fort Worth, TX 76131
Phone: 817-867-6697
Fax: 817-352-7154
Email: chris.bigoness@bnsf.com

June 28, 2013

Mr. Daniel P. Hartmann
Senior Director Interline
Union Pacific Railroad Company
1400 Douglas Street, STOP 1350
Omaha, NE 68179

Re: Mission Rail Park in Elmendorf, TX

Dear Dan,

Pursuant to the Restated and Amended Settlement Agreement between BNSF and UP dated March 1, 2002, Section 4(d), this letter shall serve as notice of BNSF's election to initiate service to Mission Rail Park at Elmendorf, TX. This is a new shipper facility inside the switch district of a 2 to 1 point and also on a Trackage Rights Line (map attached for reference).

BNSF will serve this industry directly. Service is planned to commence the later of 45 days from the date of this letter (August 12, 2013) or immediately upon placement into service of the connection and will be in conformity with the terms of any applicable agreements between BNSF and UP. Upon UP's confirmation of service, BNSF's local Operations personnel will contact UP's local Operations personnel to discuss any concerns.

In accordance with Section 4(d) of the Restated and Amended Agreement, UP must notify BNSF in writing of your approval or disapproval of BNSF's service plan within 30 days (i.e., July 28, 2013) of receipt of this letter. Upon UP's confirmation of service, BNSF's local Operations personnel will contact UP's local Operations personnel to discuss any concerns.

Sincerely,

A handwritten signature in blue ink that reads "Christopher P. Bigoness".

Christopher P. Bigoness
Manager Merger Customer Access
BNSF Railway

Mission Rail Park – Elmendorf, TX

San Antonio

Elmendorf

Saspamco

- Elmendorf Switch District
- Mission Rail Park Trackage
- Mission Rail Park

EXHIBIT 4

UNION PACIFIC RAILROAD

1400 Douglas Street Omaha, Nebraska 68179

July 29, 2013

Mr. Chris Bigoness
Manager Merger Customer Access
BNSF Railway
2500 Lou Menk Drive, AOB 3rd Floor
Fort Worth, TX 76131

VIA: Email

Re: Mission Rail Park, Elmendorf, TX – UP Response

Dear Chris,

Union Pacific has received BNSF's June 28, 2013 letter electing to initiate service to the Mission Rail Park located near Elmendorf, TX. In your letter, you incorrectly state the facility is inside the switch district of a 2-to-1 point and on a Trackage Rights Line.

On December 1, 2011 BNSF submitted a letter to UP asking UP to provide a response confirming access to a proposed new shipper that would be located inside the Elmendorf switch district. Accompanying your letter was a map and an excerpt from the SP circular 9500-C that defines the Elmendorf, TX switch district as follows:

"The switching limits at Elmendorf, TX extend from a point one mile south of the head block of the spur track serving Elmendorf, to a point 2.5 miles north of the head block of the spur track serving Elmendorf".

The current end of UP track southeast of Elmendorf coincides with this definition making it the southern boundary of the switch district (Mile Post 16.1). As depicted on your map included with your June 28th letter, the Mission Rail Park is clearly located approximately 1.4 miles beyond Mile Post 16.1 placing it outside the Elmendorf Switch district.

Additionally, BNSF does not have trackage rights on the trackage from Mile Post 16.1 to the switch leading to the Mission Rail Park facility. Therefore, this is not a New Shipper Facility adjacent to a line over which BNSF has trackage rights.

Regards,



Daniel Hartmann
Senior Director – Interline Marketing
Network and Industrial Development
402 544 3169

dphartma@up.com

CC: L. Wzorek, E. Davies, B. Maher, D. Hughes, C. Sanford, M. White, O. Durkin





EXHIBIT 5

Chris Bigoness
*Manager Merger Customer
Access
Network Strategy*

BNSF Railway Company
2500 Lou Menk Drive
AOB 3rd Floor
Fort Worth, TX 76131
Phone: 817-867-6697
Fax: 817-352-7154
Email: chris.bigoness@bnsf.com

September 30, 2013

Mr. Daniel P. Hartmann
Senior Director Interline
Union Pacific Railroad Company
1400 Douglas Street, STOP 1350
Omaha, NE 68179

Re: Mission Rail Park in Elmendorf, TX

Dear Dan,

BNSF has received your letter of July 29, 2013, in which UP rejected BNSF's election to serve Mission Rail Park (MRP) at Elmendorf, Texas. UP's stated reasons for denying BNSF access to MRP under the Restated and Amended Settlement Agreement (RASA) are that MRP is not located within the Elmendorf switch district and that MRP is not located "on" a Trackage Rights Line. UP's position is not supported by the RASA or the facts.

UP has previously acknowledged that Elmendorf is a "2-to-1" point and that the south edge of the Elmendorf switch district is located at MP 16.1. UP has also acknowledged that the connection for MRP's customer trackage occurs at MP 16.1. UP's own documentation (attached) up to the present time shows that UP's owned and controlled railroad ends at MP 16.1, coinciding with the published switching limits of Elmendorf. Any track connecting to UP trackage within the switch district, in this case MP 16.1, is connecting to UP at the station of Elmendorf. Thus, MRP's trackage connects directly to the Elmendorf switch district at MP 16.1 as depicted on the map included with our access election of June 28.

Section 4(a) of the RASA grants BNSF the right to provide direct service within the switch limits of "2-to-1" points, in this case up to and including MP 16.1 in Elmendorf. BNSF is entitled to access any New Shipper Facility, as long as the track and/or connection is located at or between the mileposts which define the switch district.

Here, the New Shipper Facility is connected directly to the Elmendorf switch district and is entitled to BNSF access.

Again, BNSF requests that UP confirm BNSF's right to access and directly serve Mission Rail Park pursuant to the RASA.

Sincerely,

A handwritten signature in blue ink that reads "Christopher P. Bigoness".

Christopher P. Bigoness
Manager Merger Customer Access
BNSF Railway

EXHIBIT 6

UNION PACIFIC RAILROAD

1400 Douglas Street Omaha, Nebraska 68179

November 21, 2013

Mr. Chris Bigoness
Manager Merger Customer Access
BNSF Railway
2500 Lou Menk Drive, AOB 3rd Floor
Fort Worth, TX 76131

VIA: Email

Re: Mission Rail Park, Purcell, TX – UP Response

Dear Chris,

Union Pacific has received BNSF's September 30, 2013 letter again requesting access to directly serve the Mission Rail Park located near Elmendorf, TX. We reiterate our conclusion that BNSF is not entitled to access Mission Rail Park.

Union Pacific does not contest that Elmendorf, TX is a "2-to-1" station. However, the southern boundary of the Elmendorf switch district (station) is located at MP 16.1. Mission Rail Park is located 1.4 miles beyond this point, at MP 17.5, outside of the switch district. In fact, Mission Rail Park is at a new rail station designated as Purcell, TX.

The line connecting Mission Rail Park to the Union Pacific main line at MP 16.1 is an extension of UP's main line to Purcell, TX. It has been built on abandoned SP right of way that was traversed by a certificated line and is wholly owned by UP. UP will operate over the new line using our rail assets and crews to provide common carrier service to customers in Mission Rail Park and any other customers that may locate on the line at Purcell. As required by the STB, UP is in the process of certificating the line in order to meet the Board requirements to initiate service.

BNSF does not have trackage rights over this new line of railroad. BNSF's trackage rights end at MP 12.1. As a result, Mission Rail Park is not along a line of railroad over which BNSF has trackage rights. Further, Mission Rail Park does not meet the RASA definition of a New Shipper Facility located at a "2-to-1" point. Therefore, BNSF is not entitled to access.

Regards,



Daniel Hartmann
Senior Director – Interline Marketing
Network and Industrial Development
402 544 3169

dphartma@up.com

CC: L. Wzorek, E. Davies, B. Maher, D. Hughes, C. Sanford, M. White, O. Durkin



EXHIBIT 7

SOUTHERN PACIFIC TRANSPORTATION COMPANY		ICC SP 9500-C
RULES --- APPLICATION		ITEM
<u>ECHO, TEXAS</u> (SWITCHING LIMITS) - (Continued)		
EXCEPTION 1:	The switching limits of Echo, TX will also include points of interchange with Sabine River & Northern Railroad Co. on traffic originating at or destined to Mulford, TX when SP receives linehaul to, from or beyond Orange, TX, or Lake Charles, LA.	11895
EXCEPTION 2:	The switching limits of Echo, TX will also include point of interchange with Sabine River & Northern Railroad Co. on traffic for on-track storage only on privately owned or leased tracks at Echo, TX where the SP receives a line haul both to and from Echo, TX.	
<u>EDINBURG, TEXAS</u> (SWITCHING LIMITS)		
The switching limits at Edinburg, TX extend from a point 750 feet north of north boundary line of Chavez Street (Alice Line) on the north, to a point 2,150 feet west of west boundary line of Sugar Road (McAllen Line) on the south, to west boundary line of Jasman Road on the east.		11900
<u>ELAM, TEXAS</u> (SWITCHING LIMITS)		
The switching limits at Elam, TX extend from a point 4,410 feet east of center of Highway Loop 12, to a point 810 feet west of center of Jim Miller Road.		11905
<u>EL CAMPO, TEXAS</u> (SWITCHING LIMITS)		
The switching limits at El Campo, TX extend from a point 1,300 feet west of center of Palacios Street to a point 400 feet east of Elwood Street.		11910
<u>ELDON, TEXAS</u> (SWITCHING LIMITS)		
The switching limits at Eldon, TX extend from Cedar Bayou Bridge on the north, to center of First Railroad Bridge on Baytown Branch on the south, and a point 4 feet south of switch of Houston Lighting and Power Co. tracks on the south.		11915
<u>ELMENDORF, TEXAS</u> (SWITCHING LIMITS)		
The switching limits at Elmendorf, TX extend from a point one mile south of the head block of the spur track serving Elmendorf, to a point 2.5 miles north of the head block of the spur track serving Elmendorf.		11920
For explanation of (other) reference marks, see Item 50000.		
ISSUE DATE :	June 30, 1995	EFFECTIVE DATE: August 1, 1995
-203-		

VERIFIED STATEMENT OF TRAVIS B. THOWE

I. Introduction/Background and Qualifications of Witness

1. My name is Travis B. Thowe, and I am Director Interline Development for BNSF Railway Company. My business address is 2650 Lou Menk Drive, Fort Worth, TX 76131. In my present position, which I have held since March 1, 2014, I am responsible for business development and interline activities at BNSF with other Class 1 railroads, including those where BNSF was granted access rights under the Union Pacific/Southern Pacific Merger in 1995. Prior to my current position, I was Director of Contracts and Joint Facilities.

2. As part of my responsibilities, I have been involved in BNSF's continuing efforts to provide competitive rail service to shippers and customers pursuant to the conditions imposed by the Surface Transportation Board on its approval of the 1996 merger of Union Pacific and Southern Pacific. In particular, I am involved in identifying existing and new shipper facilities, including industrial parks, to which BNSF has access under the Board's merger conditions and the BNSF-UP Restated and Amended BNSF Settlement Agreement, dated March 1, 2002 (the "RASA," attached to the Petition as Exhibit 1). In addition to communicating with prospective shippers and customers interested in locating their facilities at sites where BNSF can provide service, I am involved with BNSF's negotiations with UP concerning BNSF access under the RASA to such new facilities.

II. History of Dispute Concerning BNSF Access

3. Mission Rail Park (the "Park") is a recently-constructed rail complex consisting of just over 1,000 acres near Elmendorf, Texas in southeast Bexar and Wilson Counties. The Park plans to serve and is serving industrial tenants of all sizes, ranging from large distribution and manufacturing centers to small rail users, as well as oil field service companies and oil

midstream companies looking to transport products to and from the Eagle Ford Shale region of Texas. Many of the existing and prospective tenants of the Park are heavily dependent upon receiving rail service involving combination unit train, train load and manifest train operations.

4. Prior to 2013, the Park had no connection to the general rail system. In 2013, the Park's developers constructed 7,391 feet of private track between the terminus of the Elmendorf switching district at milepost ("MP") 16.1 and MP 17.5 on an abandoned rail right-of-way previously owned by SP, and now owned by UP since the UP/SP merger (the "Track" or the "Line"). The Track was designated as Track 793. In 2016, an approximately 580-foot extension to Track 793, designated as Track 795, was built by the Park's developers to serve the Park and subsequently was sold to UP.

5. The Verified Statement of Richard Kinsel ("Kinsel V.S.") attached to this petition describes the negotiations and agreements between the Park's developers and UP regarding the financing, construction, and operation of the Track. As noted by Mr. Kinsel, Park developer FRAC Resources, L.P. ("FRAC Resources") entered into an Industry Track Agreement with UP on May 21, 2013, providing that other railroads would have the right to provide service to the Park under certain circumstances. *See Kinsel V.S. at 4-5.*

6. As construction of the Track approached completion in the summer and fall of 2013, BNSF exchanged a series of letters with UP (attached to the Petition as Exhibits 2, 3, 4, and 5), seeking to implement BNSF's right under the RASA to provide direct BNSF service to the Park via the Track. In a September 30, 2013, letter in this exchange (Exhibit 4), BNSF noted that "Section 4(a) of the RASA grants BNSF the right to provide direct service within the switch limits of '2-to-1' points, in this case up to and including MP 16.1 in Elmendorf. BNSF is entitled to access any New Shipper Facility, as long as the track and/or connection is located at or

between the mileposts which define the switch district.” Ex. 4 at 1. Under the RASA’s terms and conditions, BNSF’s trackage rights at Elmendorf extend to the end of the “2-to-1” point, which is the end of the Elmendorf switching district at MP 16.1. UP, however, rejected BNSF’s request because the Park is located approximately 1.4 miles beyond the MP 16.1 limit of the Elmendorf switching district, and thus, in UP’s view, neither within the switching district nor located on a Trackage Rights Line. *See* Exhibits 3 and 5.

7. As noted by Mr. Kinsel, in a significant departure from the previously planned schedule, and apparently prompted by BNSF’s assertion of its rights to provide direct service to the Park, UP approached FRAC Resources on October 17, 2013 and prevailed on it to amend the initial agreement to accelerate UP’s purchase of the track from FRAC Resources. Kinsel V.S. at 5. Thereafter, UP consummated its purchase of the Track, thereby extending the mainline track beyond the Elmendorf switching district in an apparent attempt to prevent BNSF’s access.

8. On October 21, 2013, UP filed with the Board a verified notice of exemption under 49 C.F.R. § 1150.31 to operate as a rail common carrier over the Track. BNSF requested that the Board reject this notice, because the exemption procedures were not appropriate due to the non-routine and controversial nature of the transaction, particularly in light of UP’s refusal to acknowledge BNSF’s right to access the Track. Mr. Kinsel states that FRAC Resources was not aware that UP’s acceleration of the purchase of the Track and the subsequent reclassification of that track as jurisdictional through this operation exemption might be used as a pretext by UP to preclude service by BNSF. Kinsel V.S. at 5.

III. BNSF Access is Required to Fulfill the Board’s Merger Conditions

9. I understand that in the Petition, BNSF is arguing that the RASA entitles BNSF to serve the Park via the Track because the Park is a “New Shipper Facility” located after the

UP/SP merger at a “2-to-1” point. BNSF argues that the fact that a New Shipper Facility may be physically located just beyond the stated switching limits should not preclude BNSF access under the RASA. Any New Shipper Facility that connects to a “2-to-1” point through a spur or industrial track should be considered to be located within the switching limits of that “2-to-1” point, and, therefore, should be considered to be located “at” that “2-to-1” point for the purposes of BNSF’s access rights under the RASA. Otherwise, the direct “2-to-1” competition that the Board sought to preserve would not be fully protected.

10. Similarly, as BNSF shows in the Petition, the fact that a New Shipper Facility is located some distance from a Trackage Rights Line should not preclude BNSF access, given that the RASA entitles BNSF to serve any New Shipper Facility that is “adjacent to a spur, industrial track, or a yard that is itself served by [a] Trackage Rights Line.” RASA, Definitions. The Board recognized this principle in 1999 in UP/SP merger Decision No. 86.

11. Under UP’s hard-and-fast rule, BNSF would not be entitled to access any new shipper facility located outside the switching limits of a “2-to-1” point. As BNSF argues in the Petition, such a determination would unduly restrict the scope of the new facilities merger condition and undercut the purposes for which the Board imposed the condition. As noted, one of those purposes is the preservation of direct “2-to-1” competition. Another purpose, as BNSF shows in the Petition, is the preservation of pre-merger “indirect” rail competition.

12. This argument is consistent with both pre- and post-UP/SP merger conditions. Before the UP/SP merger, shippers and facility owners often enjoyed the benefits of this type of indirect competition. In determining where to build such a new facility, a prospective shipper or industrial park developer could contact UP and SP to determine what rate and service offerings each carrier would be willing to make if the facility were to be placed on or near its line. These

offerings could then be played against each other, and the shipper or industrial park developer could use this competitive leverage to get the best transportation service offering it could for itself (in the case of a shipper's own facility) or for the shippers that would be directing rail traffic into the industrial park.¹ With the UP/SP merger, however, this indirect siting competition would have disappeared but for the Board's imposition of the new facilities condition. The condition enables BNSF to replicate the pre-merger competition that existed between UP and SP by allowing BNSF to compete post-merger with the combined UP/SP for the facilities' business.

13. Furthermore, the nature of industrial development and relocation has evolved since the UP/SP merger in 1996, with industry increasingly relocating to exurban sites outside the static switching districts established at the time of the merger. Over time, urban areas that have historically been industrial in nature can change as industries close or move away. These areas are often redeveloped into residential or retail centers, precluding their use for industrial purposes and making nearby properties unsuitable for industrial use due to noise, pollution, or other reasons. In light of these changes to patterns of development and land, use, in order to preserve the rate and service competition that existed at switch districts at the time of the UP/SP merger, BNSF must have access to New Shipper Facilities that are physically located beyond, but still connected to, the stated 1995 switching limits.

IV. UP's Practice under RASA Conflicts with the Position It Now Advances

14. UP's position denying BNSF access to MRIP is inconsistent with the positions it has taken previously with respect to other industrial parks. For instance, BNSF was granted

¹ The importance of such competitive leverage to shippers can be seen in connection with Toyota's location of a new automobile manufacturing facility in the San Antonio TX area in 2006. Toyota selected a site on UP's Corpus Christi Sub on which BNSF does not have trackage rights. UP would not agree to BNSF access, so a rural rail district was set up to acquire the right-of-way to build to Elmendorf so that BNSF could access the facility under its RASA rights. When Toyota requested that State of Texas incentive dollars be allocated to the building of the line to Elmendorf, UP agreed to allow BNSF access to the original site on UP's Corpus Christi Sub.

access by UP to new shipper facilities located in industrial parks at Grand Junction, CO (Conoco, Inc. and Total Petroleum) and Fernley, NV (Quebecor) under the new facilities condition notwithstanding the fact that the facilities are located on spurs, industrial tracks and yard tracks which receive main line service via a BNSF Trackage Rights Line. At no point in BNSF's discussions with UP concerning BNSF access to those facilities did UP even raise the issue of the location of the facilities in relation to a stated switching district or the Trackage Rights Lines. Since 1999, UP has granted BNSF access to several New Shipper Facilities in these two industrial parks.

V. Patterns of Industrial Development and Expectations of Shippers

15. Shippers that locate their facilities in industrial parks in a switching district or adjacent to spurs, industrial tracks or yard tracks that are served by nearby main lines expect to receive main line rail service. Indeed, the decision to site new facilities in such locations often is driven by the expectation of obtaining service from main lines. Because shippers seek and expect to obtain service via main lines when they locate their facilities in a switching district or adjacent to spurs, industrial tracks or yard tracks served by main lines, they have long understood that the competitive leverage to be obtained from siting competition is available even if their siting options include points near to a switching district or adjacent to spurs, industrial tracks or yards. In considering their options in this respect, shippers never have deemed themselves bound to locate in a switching district or immediately adjacent to a main line in order to take advantage of siting competition.

16. As noted by Mr. Kinsel, the Park's developers fully expected to obtain the benefits of the UP/SP merger conditions. *See Kinsel V.S.* at 2-3. The Park's developers understood that BNSF was interested in serving the facility and knew that BNSF had been

interested in bidding on the same parcel. *Id.* at 5. BNSF and UP both serve another industrial park a few miles away from the Park, and Mr. Kinsel states that the Park is losing significant market share to its nearby competitor that enjoys two carrier service. *Id.* at 8-10. Without competitive rail service from BNSF, the Park will continue to struggle to retain its tenants. UP will benefit regardless – customers that remain at the Park will be captive to UP and must accept its rates, and UP can still compete for the business of the customers that move to the Park’s competitor. The Board could not have intended such a scenario when it provided shippers with the important competitive protections imposed as conditions to the UP/SP merger.

VERIFICATION

I, Travis B. Thowe, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on January 31, 2017.



Travis B. Thowe

Travis B. Thowe

Jan. 31, 2017
Kristi D. Green

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 32760

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

VERIFIED STATEMENT OF RICHARD KINSEL

I, Richard Kinsel, of lawful age and being first duly sworn on my oath, state as follows:

1. I am a manager of the Mission Rail Industrial Park, LLC (“MRIP”), a Texas company. As will be explained below, MRIP has a direct interest in this proceeding, in which BNSF Railway Company (“BNSF”) and MRIP seek enforcement of Decision No. 44 (the “Petition”) in order to provide rail service to MRIP.

2. As I understand it, the Petition requests that the Surface Transportation Board (“STB”) issue an order requiring Union Pacific Railroad Company (“UP”) to grant BNSF the right to serve the Mission Rail Park (the “Park”) facility over approximately (a) 7,391 feet of track between milepost (“MP”) 16.1 and MP 17.5 in Bexar and Wilson Counties, Texas and (b) approximately 580 additional feet of track from the endpoint of MP 17.5 that is within the Park.

3. The Park is located in Bexar and Wilson counties, near Elmhendorf, Texas, on approximately 1,000 acres and has existing spots for more than 800 railcars. The Park is owned

by MRIP, which was established for the specific purpose of acquiring the Park and improving it for commercial development.

4. MRIP is owned by FRAC Partners of Friendswood, LLC (“FPF”) and a company called ST One Logistics (“ST One”). FPF also owns Mission Rail Logistics Services, LLC (“MRLS”), a company which provides switching services within the Park and manages and operates the facility.

5. FPF is owned by two companies in equal shares: AK Services, LLC and Mission Rail Holdings, LLC formally Frac Resources, LP. Twin Eagle Sand Logistics, LLC (“Twin Eagle”) is the Park’s largest tenant. Twin Eagle provides transportation, storage and trans-loading services to its customers engaged in the fracking process in the Eagle Ford Shale area.

6. Twin Eagle was established in 2014, when Enserco Midstream, LLC, a privately-held subsidiary of Twin Eagle Resource Management, LLC, bought a controlling interest in its predecessor, a company called FRAC Resources, LP (“FRAC Resources”). FRAC Resources was a co-developer of the Park along with ST One.

7. From its inception, the Park was designed, constructed and managed to serve industrial tenants of all sizes, ranging from large distribution and manufacturing centers to small rail users, oil field service companies and oil midstream companies.

8. The location of the Park was selected at its present site due to its proximity to the community of Elmendorf in southeast Bexar and Wilson counties. In selecting the site, the developers wanted to enable entities situated in the Park to serve both the Eagle Ford Shale region and greater San Antonio and surrounding communities. In addition, the Park’s proximity to Elmendorf provided its tenants with access to a significant workforce from that community.

9. The investors in the Park believed that the Park's location would ensure its tenants' access to competitive rail service from both UP and BNSF. This understanding stemmed from the fact that the Park, which is situated within approximately one mile off a UP main line and in the immediate proximity to Elmendorf, Texas, would be a "new facility" at a "2-to-1" point as set forth in the Restated and Amended Settlement Agreement ("RASA") in this proceeding. As the investors understood it, the "2-to-1 point" designation meant that BNSF would have the right to provide competitive rail service to shippers located at the Park over the UP main line in order to replace the rail competition of Elmendorf that was lost when UP acquired the Southern Pacific Transportation Company.

10. One of the partners in MRIP, ST One, approached UP with a request for rail service shortly after acquiring an option on the Park in April 2012. The resulting negotiations culminated in the parties' entering a Memorandum of Understanding, dated August 14, 2012 ("MOU") (Exhibit 1).

11. Under the MOU, ST One was to construct the track that ran between the Park and the UP line, which track was designated as Track 793. As described in the MOU, Track 793 is "the private extension of the Rockport Industrial Lead track from the current end of the track to the ST One property." Track 793 was to be constructed within a UP-owned right-of-way south of Elmendorf, Texas, which had previously been abandoned by UP's predecessor, the Southern Pacific Transportation Company, in 1994. (*Southern Pacific Transportation Company; Abandonment Exemption; in Bexar, Karnes, and Wilson Counties, TX*, Docket No, AB-12 (Sub No. 163X) (decided April 20, 1994).) The track runs from milepost 16.1, which is in the switching district of Elmendorf, TX, to milepost 17.5, which is the boundary of the Park.

12. Track 793 was designed to connect a point just short of the Park to the UP main line in the Elmendorf, TX switching district. Once ST One completed the construction, UP was to acquire Track 793 and assume its maintenance. And, at the end of Track 793, Mission Rail constructed Track 795, which runs into the Park. In other words, to reach the Park, UP would operate over Track 793 and continue along Track 795.

13. Subsequently, the other partner in MRIP, FRAC Resources, joined the project to help finance the purchase and development of the Park. As part of the arrangement, on December 13, 2012, FRAC Resources and ST One entered into an agreement pursuant to which FRAC Resources assumed ST One's obligation to construct Track 793.

14. On March 22, 2013, UP and FRAC Resources entered into a Confidential Rail Transportation Contract, pursuant to which UP was to reimburse FRAC Resources for its construction of Track 793 by paying a refund for each loaded railcar moving from or to the Track 793 over the course of 3 years subject to a cap on the total ("Refund Agreement"). The Refund Agreement described Track 793 as "an industry track infrastructure accessible to railroad at customer's facility." The Refund Agreement was set to become effective on January 1, 2014 and its terms were to remain confidential for the period of its duration plus an additional six months.

15. Shortly thereafter, on May 21, 2013, UP and FRAC Resources entered into a confidential Industry Track Agreement ("ITA"), which partially incorporated the MOU entered into by UP and ST One and which was subsequently assigned to FRAC Resources.¹ The ITA

¹ The ITA, certain track drawings and the names of Twin Eagle's customers are either subject to confidentiality agreements or are otherwise commercially sensitive. MRIP will provide this information once an appropriate protective order is issued in this proceeding or if UP otherwise agrees to waive confidentiality restrictions on these materials. However, UP filed a copy of this ITA with the STB in F.D. 35776, *Union Pacific Railroad Company – Operations Exemption – in Bexar and Wilson Counties, TX*, which is discussed below in paragraph 22.

provided that FRAC Resources would construct certain tracks within the Park. In addition, the ITA provided for FRAC Resources to construct Track 793 “to establish rail service at or near Milepost 16.” And, upon completion of this construction, FRAC Resources was to convey Track 793 to UP for the purpose of UP’s operating over this common carrier track. However, the tracks inside the Park were to remain in the ownership of FRAC Resources.

16. It is important to note here that the ITA contemplated that other railroads would have the right to provide service to the Park, either by agreement with UP or pursuant to the UP/SP merger conditions. This reflected FRAC Resources’ understanding that the Park, in addition to receiving rail service from UP, would have the benefit of competitive rail service from BNSF. Indeed, FRAC Resources’ understood that BNSF had explored property purchases in the area for its own purposes. Accordingly, when FRAC Resources ended up acquiring the property, it believed that BNSF would be able to access the Park and provide service and reached out to BNSF at that time to confirm that understanding.

17. I was aware that BNSF sent several letters to UP in 2013 seeking the ability to serve shippers within the Park. Although we did not know this at the time, I am advised, however, that in each instance UP denied that request.

18. After those exchanges of correspondence with BNSF, UP approached FRAC Resources with the goal of amending the Refund Agreement. Subsequently, UP and FRAC Resources entered on October 17, 2013 into Supplemental Agreement No. 1, which provided for UP’s payment for the track in a lump sum, rather than over the period of 3 years. The amount was payable upon the completion of construction of Track 793. Nonetheless, and notwithstanding UP’s ownership of this track, we still thought that Mission Rail would have the right to BNSF’s service as well as UP’s and did not understand that changing the track’s

ownership from private industrial to “common carrier” might be an impediment to actually having BNSF service. Certainly, the UP never indicated that its acceleration of the track payment might have that effect. If we would have known this, we would not have agreed to the lump sum payment.

19. Shortly thereafter, on October 21, 2013, UP filed a verified notice with the STB requesting an exemption to operate as a common carrier over Track 793 (the “Notice”). STB Docket No. FD-35776; *Union Pacific Railroad Company – Operation Exemption – In Bexar and Wilson Counties, TX*. In response, BNSF filed a petition with the Board requesting that the STB reject the Notice or, alternatively, issue a stay of the effective date of the exemption. BNSF argued that the exemption procedure was typically reserved for uncomplicated and noncontroversial cases, but that this process was inappropriate with respect to Track 793. Citing its disagreement with UP regarding the access to and the right to provide service to the Park pursuant to the RASA, BNSF contended that the transaction presented competitive issues that should not be regarded as uncomplicated and appropriate for the summary exempt transaction process. As a result of BNSF’s petition, on November 15, 2013, the Board issued a housekeeping stay for the purpose of fully considering the arguments presented by the parties.

20. On December 11, 2013, FRAC Resources and MRIP, in a joint reply, requested the Board to accept UP’s Notice and vacate the housekeeping stay. FRAC Resources and MRIP explained to the Board that UP was refusing to provide service to the Park until the Notice became effective, that there was traffic en route to the Park, and that any further delay in UP’s providing rail service would adversely impact both FRAC Resources and MRIP.

21. More specifically, FRAC Resources advised the Board that 200 cars were already en route to the Park and were badly needed in order to service its customers in the Eagle Ford

Shale area. If UP refused to bring the cars into the Park, this would seriously and adversely affect the Park's customers. In addition, the cars would have needed to be held somewhere else, likely on UP tracks, which would have clogged UP's system and incurred significant costs and operating problems. Moreover, the lack of rail service meant that MRIP could not finalize leases and other arrangements with a number of potential tenants unless it was able to demonstrate that those tenants would have reliable rail service. Finally, although FRAC Resources and MRIP emphasized that they did want to have competitive rail service, they could not afford the delays that would have been experienced if the dispute between UP and BNSF needed to be resolved before any rail service would be provided.

22. On December 24, 2013, the Board issued a decision vacating the stay, so that the Notice of Exemption was able to go into effect, thus enabling FRAC Resources and MRIP to commence receiving rail service. The Board, specifically stated, however, that it would investigate the circumstances surrounding the construction of Track 793 and making it clear that the effectiveness of the Notice of Exemption would not affect any rights BNSF might have to provide competitive service to the Park's shippers.

23. Although UP and FRAC Resources executed a bill of sale for the Track 793 construction on October 17, 2013, UP did not actually pay for the track until December 27, 2013, which was after the Board granted the motion to vacate the stay.

24. UP has been in the process of building a rail yard within the Park on property that the railroad purchased from MRIP. The UP has purchased a tract of land inside the park and FPF has built the rail yard, owned by UP, on the UP parcel.

25. As part of those arrangements, MRLS was to construct additional tracks, including an extension of its Track 795 further into the Park. And, UP insisted on owning the

first 580 feet of Track 795, so that it now would own the first several hundred feet of track from its connection with Track 793 and thereby control the only existing rail access into the Park. MRLS would continue to own the remaining part of Track 795 and all remaining lines to be constructed in the Park under this ITA. The construction of the track has been completed and UP has now purchased this portion of Track 795.

26. A schematic track diagram reflecting Tracks 793 and 795, and their respective ownership, is attached as Exhibit 2. As shown on this diagram, Track 793 (depicted in green) runs from the UP Rockport Industrial Lead in the north (milepost 16.1) to what is shown as Old Corpus Christi Road (milepost 17.5). Track 795 (shown in red) connects at that latter point with Track 793 and runs into the Park. As explained above, UP now owns all of Track 793 and the first 580 feet of Track 795 until it connects with the UP owned track in the Park (shown in blue).

27. MRIP still desires and needs dual rail service from both BNSF and UP, particularly given the fact that the Park's existing tenants are heavily dependent upon receiving competitive rail service. As discussed above, it has always been MRIP's and its predecessors' desire and expectation that the Park would enjoy competitive service from both railroads. Otherwise, the rail competition promised by the RASA merger conditions, and in particular the rail competition for new industrial sites, would be lost.

28. The Park's major tenant, Twin Eagle is in the business of trans-loading frac sand for oil and gas production companies drilling in the Eagle Ford Shale area. Twin Eagle has made a major investment in its facility in the Park, spending millions of dollars for silos, rail tracks and trans-loading facilities to serve its customers. At one time, this sand came into the Park in unit train shipments that typically comprised 150 cars, 6 times per month. In addition, Twin Eagle

also received an additional 400 cars per month in regular merchandise trains, all service provided by UP. This commodity is then transshipped out of the Park to Twin Eagle's customers by truck.

29. However, Twin Eagle's market share has fallen dramatically in the past two years. For example, in the 3rd Quarter of 2014, it had a 13% market share in trans-loading frac sand for customers in the Eagle Ford Shale area. That has fallen to only 6% as of the 1st Quarter of 2016, which explains why its rail shipments have also fallen down to where Twin Eagle is now only receiving approximately 200 cars per month.

30. In May of 2015, Twin Eagle opened a frac sand silo infrastructure at Mission Rail and materially increased its volume throughput through the terminal. In addition to its anchor customer, Twin Eagle served a number of other companies. As the downturn in the oil sector continued, customers became increasingly focused on finding the lowest cost solutions and Twin Eagle lost all customers not contractually committed to it at the Park by take-or-pay contracts.

31. Even those customers that have contractual commitments have reduced their shipments, so that they are now taking only minimum volumes from Twin Eagle. Indeed, those Twin Eagle customers were sufficiently harmed by the lack of competitive rail service that, in addition to reducing their volumes, at least one moved all of its business directly to Alamo Distribution LLC ("Alamo Distribution") located at Alamo Junction in response to the unit train freight rate advantages provided by the BNSF at that location.

32. Some of the reduced sales of Twin Eagle are attributable to the slowdown of oil and gas exploration and production in the Eagle Ford Shale area. That is only part of the story, however, as UP has not been appropriately responsive to the rate and service needs of this shipper. Accordingly, the downturn in the oil and gas industry does not account for the entirety of our tenant's loss of market share.

33. Not having access to competitive rail service has adversely affected MRIP, as the Park has consistently lost business to its direct competitor, Alamo Distribution, which is another industrial park near Elmhendorf, TX, located only a few miles away from the Park and on the same rail line as MRIP. The tenants of Alamo Distribution have access to rail service from both UP and BNSF and as a result enjoy better quality service and lower, more competitive rates. For instance, although UP has more recently become more responsive from a rate standpoint, Alamo Distribution's customers served by BNSF are enjoying inbound rail rates that are still significantly less expensive than what UP has been willing to offer the Park's tenants. Not surprisingly, this is attributable to the fact that UP has to compete with BNSF at Alamo Distribution, but is not required to compete with anyone to provide rail service at the Park.

34. The Park's existing, former and future tenants have all been deprived of the siting competition that existed at Elmhendorf prior to the UP/SP merger. As a result, existing tenants are presently captive shippers in the full sense of that term, as they do not currently have access to rail service by another railroad and the type of traffic moving into the Park is not subject to intermodal competition. As a consequence, due to the existing situation, MRIP has difficulty attracting new tenants and those that are here are in an increasingly tenuous situation since they do not currently have the benefit of receiving competitive rates or service and are hard pressed to compete in their markets against other companies located just a few miles away.

35. MRIP is accordingly joining the petition of BNSF that would require UP to abide by the letter and spirit of the RASA and allow BNSF to provide direct competitive rail service into the Park.

VERIFICATION

I, Richard Kinsel, hereby certify that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: 1-3, 2016

Richard Kinsel

Richard Kinsel

STATE OF Texas)
)
COUNTY OF Harris)

ss:

SUBSCRIBED AND SWORN TO before me this 3 day of January 2016 by Richard Kinsel.

Witness my hand and official seal.

Melinda Nichols

Notary Public

My commission expires:

6-4-2019

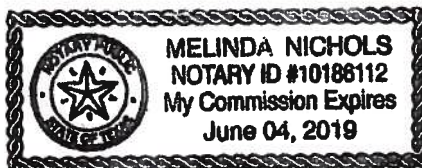


EXHIBIT 1

UNION PACIFIC RAIL ACCESS MEMORANDUM OF UNDERSTANDING

Union Pacific Railroad Company ("UP") has reviewed ST One Logistics' ("Company") request for rail service in Elmendorf, TX. Based on the representations made to UP, UP agrees to move forward with its track authorization process subject to Company satisfying the conditions detailed below. This memorandum ("MOU") is being provided to Company to outline the infrastructure elements that UP requires to efficiently and safely provide rail service to Company's new facility (the "Facility") and to establish an understanding of UP's track authorization process. The criteria outlined below are consistent with Union Pacific's Guidelines for Rail Service and Union Pacific's Industry Track Standards, a link to which can be found at http://www.uprr.com/customers/attachments/industry_guidelines.pdf. This MOU terminates and fully replaces the Memorandum of Understanding by and between UP and Company fully executed on April 5, 2012.

In addition to the requirements of Union Pacific's Guidelines for Rail Service and Union Pacific's Industry Track Standards, the following terms and conditions must be met prior to Company proceeding with its new construction:

- Company understands that cars shall not be held in or stored in rail yards or other railroad owned or controlled trackage beyond normal staging activities.
- Company shall manage the inventory of inbound and outbound railcars at their facilities so as not to adversely impact railroad operations and shall cooperate with the railroad operational requirements regarding railcar inventory management.
- After the private extension of the Rockport Industrial Lead track from the current end of track to the ST One property line has been completed, inspected and approved by UP, ownership will be transferred to UP, who will then take ownership and future maintenance of all track on UP right-of-way
- UP will provide service to the future customers that locate within the facility subject to the installation of required rail infrastructure needed to accommodate future rail tenants. Such rail infrastructure requirements will be reviewed and determined by UP on a case by case basis. Additional infrastructure will not be at UP's expense.

Once Company has satisfied the aforementioned terms and conditions, the next steps in UP's track authorization process are as follows:

1. Company will work with its UP Marketing and Sales representative to prepare a Customer Service Plan, if applicable, and determine the rail service Company would receive and the corresponding rates. Additionally, the UP Marketing and Sales representative will coordinate with other UP departments to determine any other requirements necessary for UP to provide service to Customer.
2. Company must prepare the Facility's track design/construction drawings and submit them to UP via the Engineering Document Exchange (web application) for approval.
3. Company must execute an Industrial Track Agreement with UP.

UP shall only authorize construction of the industry track upon the execution of an Industrial Track Agreement.

ST One Logistics
Elmendorf, TX
August 14, 2012

Union Pacific's offer of conditional acceptance shall expire if Company does not execute and return this MOU to Dave Purcell at Union Pacific Company, 8616 Traciney Blvd., San Antonio, TX, 78255, within 90 days from the date of this MOU.

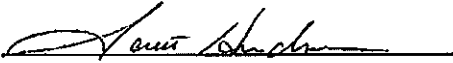
Once executed, this MOU shall terminate twelve (12) months after execution unless Company has requested an extension of the MOU. The extension must be requested in writing and approved by Union Pacific.

Company understands that Union Pacific will not authorize construction of the planned industry tracks until the entire track authorization process is complete. Company understands that at no time prior to authorization of track construction is UP agreeing to provide rail service at Facility. Further, Company understands that Union Pacific will not operate on industry owned tracks until UP has approved the Facility track design/construction drawings and Company has fully executed an Industrial Track Agreement with Union Pacific. Additionally, Company understands that all of UP's approvals and authorizations are based on Company's representation of particular volumes and commodities that will be shipped to and/or from the Facility. Any changes in volumes or commodities may change UP's requirements to provide service to the Facility. Consequently, if volumes or commodities change after rail service has begun, UP may not be able to meet Company's expectation for increased or additional rail service without Company making modifications to the infrastructure or constructing additional Infrastructure.

ST One Logistics
Elmendorf, TX
August 14, 2012

**ACKNOWLEDGEMENT: I HAVE READ AND UNDERSTAND UP'S REQUIREMENTS FOR
NEW SERVICE AS SET FORTH ABOVE:**

ST One Logistics
17304 Bell North Dr.
Schertz, TX 78154

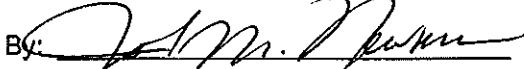
By: 

Printed Name: Scott Hudson

Title: Manager

Date: 8-15-12

Union Pacific Railroad Company

By: 

Printed Name: John Newman

Title: APP INO PRM - SALOS

Date: 8/21/12

ST One Logistics
Elmendorf, TX
August 14, 2012

**UNION PACIFIC RAIL ACCESS
Track Construction Project Contacts**

**Prepared for: ST One Logistics
Track Construction Project Location: Elmendorf, TX
August 14, 2012**

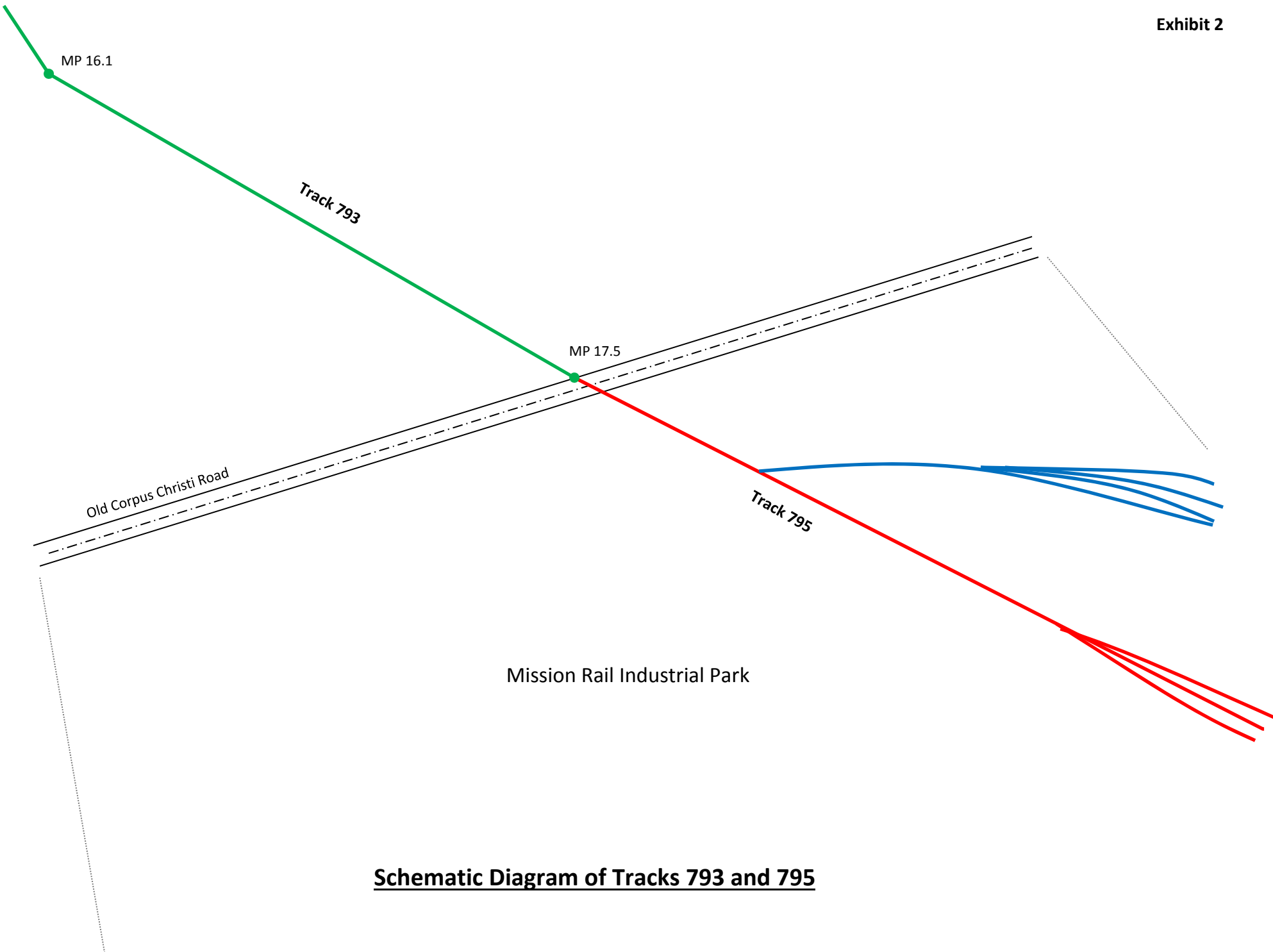
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EXHIBIT 2



Schematic Diagram of Tracks 793 and 795