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BEFORE THE
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 32760

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

**UNION PACIFIC’S REPLY TO JOINT PETITION
FOR ENFORCEMENT OF DECISION NO. 44**

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TABLE OF CONTENTS

	Page
I. BACKGROUND	3
II. ARGUMENT	9
A. The Park Is Not A New Shipper Facility Located At A 2-to-1 Point.	9
B. The Park Is Not A New Shipper Facility On A Trackage Rights Line.....	16
C. The Board Should Reject Petitioners’ Arguments That Amount To Requests For New Conditions On The UP/SP Merger.	19
D. The Park And Shippers Using The Park Benefit From The Conditions Imposed On The UP/SP Merger, Even Without Access To BNSF.	22
III. CONCLUSION.....	26

VERIFIED STATEMENTS

Reply Verified Statement of Steven L. Bybee

Reply Verified Statement of Chris Sanford

Reply Verified Statement of Eric O. Watkins

Reply Verified Statement of Jacqueline Bendon

EXHIBITS

Exhibit 1: Restated and Amended Settlement Agreement

Exhibit 2: Map of Rockport Subdivision Near Elmendorf and Purcell

Exhibit 3: SP Tariff ICC SP 9500-C, Item 11920 (effective Aug. 1, 1995)

Exhibit 4: Industry Track Agreement and Supplemental Agreement No. 1

Exhibit 5: Photographs of Rockport Subdivision

Exhibit 6: Letter from Christopher P. Bigoness to Daniel P. Hartmann (June 28, 2013)
(Mission Rail Park)

- Exhibit 7: Letter from Daniel P. Hartmann to Christopher P. Bigoness (July 29, 2013)
(Mission Rail Park)
- Exhibit 8: Letter from Christopher P. Bigoness to Daniel P. Hartmann (Sept. 30, 2013)
(Mission Rail Park)
- Exhibit 9: Letter from Daniel P. Hartman to Christopher P. Bigoness (Nov. 21, 2013)
(Mission Rail Park)
- Exhibit 10: Letter from Christopher P. Bigoness to Daniel P. Hartmann (Sept. 17, 2013)
(Alamo Junction Rail Park)
- Exhibit 11: Letter from Daniel P. Hartmann to Christopher P. Bigoness (Oct. 17, 2013)
(Alamo Junction Rail Park)
- Exhibit 12: Letter from Christopher P. Bigoness to Daniel P. Hartmann (Sept. 17, 2013)
(Southton Rail Yard)
- Exhibit 13: Letter from Daniel P. Hartmann to Christopher P. Bigoness (Oct. 17, 2013)
(Southton Rail Yard)
- Exhibit 14: Letter from Bobby Strong to Daniel P. Hartmann (Aug. 24, 2015)
(VP Racing Fuels)
- Exhibit 15: Letter from Daniel P. Hartmann to Bobby Strong (Sept. 28, 2015)
(VP Racing Fuels)

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The Board should deny the petition filed by BNSF Railway Company (“BNSF”) and Mission Rail Industrial Park, LLC (“MRIP”). The UP/SP merger’s new facilities condition does not entitle BNSF to serve shippers in Mission Rail Park (the “Park”) because (1) the Park is located outside the switching limits of Elmendorf, Texas, the nearest 2-to-1 point, and (2) the Park can be accessed only via a 49 U.S.C. § 10901 line of railroad over which BNSF did not obtain trackage rights in the merger.

Petitioners recognize their access claim fails under the new facilities condition. They therefore ask the Board to expand the condition. They say BNSF should be allowed to access new facilities that are “just beyond” the switching limits of a 2-to-1 point, or “some distance” from a trackage rights line. Petition at 18. The Board should reject this obvious overreach. The new facilities condition already allows BNSF to serve new facilities at all 2-to-1 points and on any of the approximately 4,000 miles of line over which BNSF obtained trackage rights in the UP/SP merger. It would be fundamentally unfair and unlawful to expand the condition now,

more than two decades after the merger, especially under the guise of a petition for “enforcement.”

Even if the Board were inclined to adopt such amorphous standards as “just beyond” switching limits and “some distance” from a trackage rights line, there is no factual basis for reopening the merger. Petitioners’ own evidence shows the new facilities condition effectively preserves pre-merger competition. Moreover, shippers using the Park benefit from competitive forces. Union Pacific currently has strong incentives to encourage the Park’s growth and success. It has acted on those incentives, recently constructing a new \$16.4-million yard to support operations in the Park. If Union Pacific does not provide attractive rates and service, shippers using the Park can readily turn to nearby facilities that are served by BNSF.

Union Pacific’s reply is supported by testimony from witnesses who bring personal knowledge and experience to bear on the issues raised by this proceeding:

Steven Bybee, Union Pacific’s Superintendent – Transportation Services for the San Antonio Service Unit. Mr. Bybee explains that the line over which BNSF would have to operate to serve the Park is indistinguishable from Union Pacific’s other mainline track in the area. He also explains that the line is used to provide regularly scheduled, continuous transportation service to the Park, and that no loading, unloading, storage, or switching takes place on the line.

Chris Sanford, Union Pacific’s Director, Interline Marketing. Mr. Sanford explains why Union Pacific concluded that BNSF’s request to serve the Park was not consistent with the new facilities condition. He also describes Union Pacific’s many positive responses to other BNSF requests for access to shippers in the Elmendorf area and elsewhere under the new facilities condition.

Eric Watkins, Union Pacific’s Regional Director of Network and Industrial Development for the Southern Region. Mr. Watkins describes Union Pacific’s dealings with the companies that developed the Park and explains that Union Pacific never led anyone involved in the project to believe that BNSF would have access to the Park over the line at issue here.

Jacqueline Bendon, Union Pacific’s Senior Business Director, Marketing and Sales. Ms. Bendon describes how Union Pacific’s rates and service to the Park are essentially identical to Union Pacific’s rates and service to nearby facilities that also obtain service from BNSF. She further explains why Union Pacific has strong incentives to support the growth and success of the Park.

For the Board’s convenience, we include a single set of consecutively numbered exhibits that are referenced in this reply, including the verified statements.

I. BACKGROUND

This dispute involves the UP/SP merger’s new facilities condition, which is incorporated in the Restated and Amended BNSF Settlement Agreement (“RASA”). *See* Ex. 1.¹ The Park is a new facility located adjacent to Union Pacific’s mainline near Milepost 17.5, at Purcell, Texas, approximately 1.42 miles beyond the southern end of the switching limits of Elmendorf, Texas, on Union Pacific’s Rockport Subdivision. *See* Ex. 2; *see also* Bybee VS at 1; Sanford VS at 3.

Petitioners say BNSF has the right to serve shippers in the Park because the RASA grants BNSF the right to serve new facilities “at” 2-to-1 points such as Elmendorf, *see* Petition at 9, and “on” lines over which BNSF obtained trackage rights in the UP/SP merger, including the former

¹ The RASA is a revised version of the BNSF Settlement Agreement, which the Board imposed as a condition to the UP/SP merger. *See Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233, 419 (1996). The RASA incorporates conditions the Board imposed in approving the merger, as interpreted, clarified, and supplemented in subsequent Board decisions and through agreements between the parties. *See Union Pacific/Southern Pacific Merger, General Oversight*, Decision No. 21, 5 S.T.B. 1173, 1178 (2001).

Southern Pacific line between SP Junction (Tower 112) and Elmendorf, *see id.* at 13. However, the Park is neither “at” a 2-to-1 point nor “on” a trackage rights line, as those terms are defined by the RASA.

The RASA grants BNSF access to “any New Shipper Facility located subsequent to UP’s acquisition of control of SP *at* points listed on Exhibit A to [the RASA].” Ex. 1, § 4(b)(ii) (emphasis added). Exhibit A to the RASA lists Elmendorf as a 2-to-1 point. *See id.* at 50. It does not list Purcell. *See id.* The RASA defines the “boundaries” of 2-to-1 points “to include all areas within the switching limits of the locations.” *Id.*, Definitions (“2-to-1” Points). It further provides that a location’s “switching limits” means the switching limits “designated by tariff, clarified to the extent necessary by publicly-available information, in effect as of September 22, 1995.” *Id.*, § 9(g).

Petitioners concede the Park is not within Elmendorf’s switching limits. Southern Pacific’s switching tariff in effect as of September 22, 1995, designates the northern boundary of Elmendorf’s switching limits as approximately Milepost 12.6, and the southern boundary as approximately Milepost 16.1. *See* Sanford VS at 3 & Ex. 3; *see also* Petition at 9.²

The RASA also grants BNSF access to “any New Shipper Facility located subsequent to UP’s acquisition of control of SP *on* the Trackage Rights Lines.” Ex. 1, § 4(b)(iii) (emphasis added). The Trackage Rights Lines include “SP’s line between SP Junction (Tower 112) and

² Union Pacific did not own a line to Elmendorf before the UP/SP merger. However, Union Pacific could serve a single shipper, City Public Service Board of San Antonio (“CPSB”), using trackage rights CPSB had obtained over Southern Pacific’s line to the CPSB facility. CPSB’s facility is just within the northern end of Elmendorf’s switching limits, so Union Pacific added Elmendorf to the list of 2-to-1 points and granted BNSF trackage rights over the former Southern Pacific line to “Elmendorf.” *See Union Pacific/Southern Pacific Merger*, 1 S.T.B. at 470. As a result, BNSF gained access to new facilities at Elmendorf and on the line to Elmendorf, even though Union Pacific could not have served facilities at those locations before the merger.

Elmendorf, TX.” *Id.*, § 4(a). The RASA defines precise end-points of Trackage Rights Lines by providing that referenced locations are defined by switching limits. *See id.*, § 9(g). The RASA also directly addresses when a new shipper facility is “on” a Trackage Rights Line. It provides that a new shipper facility is not “on” a trackage rights line if it can be accessed only via a 49 U.S.C. § 10901 line of railroad that is not a Trackage Rights Line:

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.

Id., Definitions (Trackage Rights Lines) (emphasis added).

The Park is not “on” a Trackage Rights Line. The Park can be accessed only via a § 10901 line of railroad that is not a Trackage Rights Line. As defined by Sections 4(a) and 9(g) of the RASA, BNSF’s trackage rights over the line between SP Junction and Elmendorf end at the southern boundary of Elmendorf’s switching limits, at approximately Milepost 16.1. *See* Sanford VS at 4 & Ex. 3; *see also* Petition at 9. To serve shippers in the Park, BNSF would have to operate over 1.42 miles of additional § 10901 line from Milepost 16.1 to Milepost 17.5 (the “Line”). *See* Ex. 2; *see also* Bybee VS at 1.

The Line was constructed in accordance with an Industry Track Agreement (“ITA”) between Union Pacific and FRAC Resources, LP. *See* Ex. 4; *see also* Watkins VS at 2. The ITA provided that FRAC Resources would construct an extension of Union Pacific’s mainline from Milepost 16.1 to what is now the Park and convey the completed track to Union Pacific. *See* Ex. 4, § 4.1; *see also* Watkins VS at 1-2. The parties also agreed that Union Pacific would

reimburse FRAC Resources for constructing the extension. *See* Watkins VS at 2-3.³ The ITA was drafted to reflect that the Line would be used, at least initially, to serve a single shipper, FRAC Resources. As the project progressed, however, Union Pacific recognized that the new facility would likely include multiple shippers and receivers. *See* Watkins VS at 3. Based on this new information, Union Pacific concluded it would need an exemption from the prior approval requirements of § 10901 in order to operate over the Line. It therefore filed a notice of exemption. *See Union Pac. R.R.—Operation Exemption—In Bexar & Wilson Counties, TX*, FD 35776, Verified Notice of Exemption (Oct. 21, 2013).⁴

Construction of the Line was completed in September 2013. *See* Bybee VS at 2. Union Pacific’s notice of exemption became effective on December 24, 2013. *See Union Pac. R.R.—Operation Exemption—In Bexar & Wilson Counties, TX*, FD 35776 (STB served Dec. 24, 2013). Union Pacific operated its first train over the Line in early 2014. *See* Bybee VS at 2.

The Line has the essential characteristics of a § 10901 line of railroad. Before Union Pacific obtained authority to operate over the Line, it could not serve shippers that currently use, and may in the future use, facilities in the Park. *See* Bybee VS at 1-2. “[T]he Park had no connection to the general rail system.” Petition at 5. Union Pacific acquired the Line to extend its mainline beyond Elmendorf, so it could serve shippers using Park facilities. The Line is entirely within a Union Pacific-owned right-of-way. *See* Bybee VS at 2. Historically, the line that ran over the right-of-way was a regulated, common carrier line of railroad: Southern Pacific operated

³ The ITA also contemplated that FRAC Resources would construct additional track from the Line to and within what is now the Park. *See* Ex. 4; *see also* Watkins VS at 2.

⁴ The Board subsequently investigated whether § 10901 authority was required to construct the Line, but it did not reach a majority decision. *See Union Pac. R.R.—Operation Exemption—In Bexar & Wilson Counties, TX*, FD 35776, slip op. at 2 (STB served Mar. 2, 2015).

a mainline between San Antonio and southern Texas over the right-of-way before abandoning the line in 1994. *See id.*⁵

Union Pacific uses the Line to provide continuous transportation service to the Park. *See* Bybee VS at 3. Union Pacific provides regularly scheduled manifest service over the Line from San Antonio to the Park. *See id.* When large volumes of traffic are headed for the Park, Union Pacific also operates additional trains over the Line directly to the Park. *See id.* Union Pacific does not use the Line for loading, unloading, storage, switching, or other purposes that are incidental to movements of its trains. *See id.* When Union Pacific serves the Park, loading, unloading, storage, and switching take place on yard, switching, and industry tracks within the Park or Union Pacific's adjacent yard. *See id.* at 3-4.

The Line is physically indistinguishable from the other mainline track on Union Pacific's Rockport Subdivision. *See id.* at 2; *see also* Exs. 5-A & 5-B. Union Pacific owns and maintains the Line. *See* Bybee VS at 2. The Line is continuously mile-posted as part of the Rockport Subdivision, its speed limit is the same as on other mainline on the Subdivision, and there is a station on the Line—Purcell. *See id.* The Line is constructed with heavy-weight, 135-pound, continuous welded rail, just like other portions of the Union Pacific mainline. *See id.* The other track materials are the same as Union Pacific uses for other portions of its mainline. *See id.* The Line is built to handle large volumes of traffic, just like Union Pacific's other mainline track on the Rockport Subdivision. *See id.*

The Line is operationally distinguishable from the short stretch of track connecting the Line to the Park and the track within the Park. The speed limit drops from 30 mph on the

⁵ *See S. Pac. Transp. Co.—Abandonment Exemption—In Bexar, Karnes, & Wilson Counties, TX*, AB-12 (Sub-No. 163X) (ICC served May 3, 1994).

mainline to restricted speed on the track that connects to the Park. *See id.* at 3.⁶ At Milepost 17.5, the end of the mainline is marked on one side of the track by a sign indicating the end of track warrant control (*i.e.*, dispatching by Union Pacific’s Harriman Dispatching Center using track warrants to control access to the line), and on the other side of the track by a sign indicating the end of Union Pacific’s mainline maintenance responsibility. *See id.* at 2-3; *see also* Exs. 5-C & 5-E.

The Park is one of several new facilities in the San Antonio area whose development was driven by an increased demand for sand used in hydraulic fracturing (“frac sand”) and other drilling supplies for the Eagle Ford Shale. *See* Bendon VS at 1-2. Union Pacific confirmed BNSF’s right under the new facilities condition to access two such facilities, Southton Rail Yard and Alamo Junction Rail Park, on October 17, 2013, less than three weeks after Union Pacific rejected BNSF’s request to serve Mission Rail Park. *See* Sanford VS at 5 & Exs. 11 & 13. Southton Rail Yard is “on” the SP Junction-Elmendorf Trackage Rights Line near Milepost 8 on the Rockport Subdivision; Alamo Junction Rail Park is *both* “on” the SP Junction-Elmendorf Trackage Rights Line *and* “at” Elmendorf, near Milepost 13.67 on the Rockport Subdivision. *See* Sanford VS at 5; *see also* Ex. 2. Southton Rail Yard and Alamo Junction Rail Park are just two of the 44 new facilities to which BNSF has gained access under the UP/SP merger’s new facilities condition since 2013. *See* Sanford VS at 6.⁷

⁶ Restricted speed means the train must be able to stop within half the range of vision on the track. *See id.* at 3.

⁷ In the same timeframe, Union Pacific rejected only five such requests, on the grounds that the facilities were not new, were not on a Trackage Rights Line, or did not have any rail service. *See id.* at 6 n.3.

II. ARGUMENT

Petitioners' admissions in the Petition and the RASA's plain language establish that BNSF is not entitled to serve the Park. The RASA is not just an agreement between Union Pacific and BNSF. The parties drafted and submitted the RASA to the Board to comply with the Board's order that they submit a "*final*" document that would incorporate all the conditions the Board imposed on the UP/SP merger, "as such conditions have been interpreted, clarified, and/or supplemented in subsequent decisions." *Union Pacific/Southern Pacific Merger, General Oversight*, Decision No. 21, 5 S.T.B. at 1178 (emphasis in original).

Petitioners' arguments for expanding the new facilities condition beyond the terms of the RASA are meritless. The new facilities condition already provides tremendous opportunities for shippers to obtain competitive rail service from BNSF by locating new facilities at dozens of 2-to-1 points and on thousands of miles of Union Pacific lines. Petitioners' effort to expand the condition is a clear overreach.

A. The Park Is Not A New Shipper Facility Located At A 2-to-1 Point.

The Park is not a New Shipper Facility located at a 2-to-1 point, because the Park is not located "at" Elmendorf, the only 2-to-1 point Petitioners cite. The Park is located at a station called Purcell, outside of Elmendorf's switching limits. *See* Sanford VS at 3; Ex. 2; *see also* Bybee VS at 1. Purcell is not a 2-to-1 point under the RASA.

Petitioners *concede* the Park is located outside of Elmendorf's switching limits. Their own evidence confirms the southern boundary of Elmendorf's switching limits is Milepost 16.1, and that the Park is located approximately 1.4 miles south of Milepost 16.1, adjacent to the Line near Milepost 17.5. *See* Petition, Ex. 1 (Overview Map); *see also* Petition at 9-10 ("UP correctly noted in its July 29, 2013 letter to BNSF that the Park is 'located approximately 1.4 miles

beyond Mile Post 16.1.’”); *id.* at 1 (conceding that the Line was constructed “between the terminus of the Elmendorf switching district at milepost (‘MP’) 16.1 and MP 17.5”).

Petitioners contend that “[t]he fact that a New Shipper Facility may be physically located just beyond the stated switching limits should not preclude BNSF access under the RASA.” *Id.* at 10. In fact, the RASA *does* preclude BNSF access in such circumstances. It expressly provides that the boundaries for 2-to-1 points “shall be deemed to include all areas *within* the switching limits of the locations.” Ex. 1, Definitions (“2-to-1” Points) (emphasis added).

Petitioners argue in the alternative that a new facility should be considered “within” the switching limits of a 2-to-1 point if the facility connects to the 2-to-1 point through track that is not a § 10901 line of railroad. *See* Petition at 10. In essence, they urge the Board to expand the boundaries of 2-to-1 points by transplanting language from the RASA’s definition of what it means to be “on” a Trackage Rights Line to the RASA’s definition of “2-to-1” Points. *See* Ex. 1, Definitions (Trackage Rights Line) (“New Shipper Facilities shall be deemed to be ‘on’ a Trackage Rights Line if the facility is . . . adjacent to a spur, an industrial track, or a yard that is itself served by such Trackage Rights Line.”). There is no basis for rewriting the RASA in this manner.

Petitioners’ proposal would impermissibly expand BNSF’s rights to serve new facilities beyond the limits established by the Board’s merger conditions. The RASA’s definition of “2-to-1” Points already expressly defines the boundaries of 2-to-1 points as “the switching limits of the locations” that were “in effect as of September 25, 1995,” Ex. 1, Definitions (“2-to-1” Points); *id.*, § 9(g). There is no basis for disregarding this plain text and transplanting language from the

definition of Trackage Rights Lines to the definition of “2-to-1” Points.⁸ Moreover, if the parties or the Board had wanted to use the same definition for both purposes, they could have done so at the time.⁹ They did not. Petitioners’ proposal overreaches for the additional, important reason that it is far too late to impose new conditions on the UP/SP merger, especially to address alleged harms not caused directly by the merger, but rather due to what Petitioners describe as subsequent changes in “the nature of industrial development.” Petition at 19.

In any event, the Board need not address Petitioners’ alternative argument because they *concede* that “the Park today can be accessed only via a 49 U.S.C. § 10901 ‘line of railroad.’” Petition at 14. Petitioners try to escape this fatal concession by claiming that Union Pacific is somehow “estopped” from denying that the track is a spur or a private track, and that it engaged in a “ruse” to convert the Line to a § 10901 line of railroad. Petition at 11, 14. However, Union Pacific’s decision to seek (or not to seek) authority to construct, acquire, or operate the Line is not what makes it a § 10901 line of railroad.¹⁰ Instead, the Line is a § 10901 line of railroad

⁸ Using concepts included in the RASA’s definition of Trackage Rights Lines to expand the definition of “2-to-1” Points would be contrary to basic interpretive principles. *See, e.g., Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (“[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))); *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) (“A familiar principle of statutory construction . . . is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.”).

⁹ *See, e.g., Diamond Coating Techs., LLC v. Hyundai Motor Am.*, 823 F.3d 615, 620 (Fed. Cir. 2016) (rejecting argument that use of “exploitation” in one contract provision should mean “practice” and “sell,” because parties used those two terms in a different provision, so they plainly “knew how to say” practice or sell when that was what they intended); *Bank of Commerce v. Md. Fin. Bank*, 639 F. App’x 929, 933-34 (4th Cir. 2016) (rejecting argument that use of “first” in one contract provision should mean “first out,” because parties had defined “first out” in another provision and thus plainly “knew how to say ‘first out’ if they desired”).

¹⁰ In any event, there is no basis for any estoppel argument, and Union Pacific did not engage in any ruse. As Union Pacific told the Board when seeking an exemption to operate over the Line, plans for rail service changed as the project progressed, and in light of those changes, Union (continued...)

because its use and physical characteristics *make* it a § 10901 line of railroad. *See, e.g., Allied Erecting & Dismantling, Inc.—Petition for Declaratory Order—Rail Easements in Mahoning County, OH*, FD 35316, slip op. at 7 (STB served Sept. 17, 2015) (“In determining whether a particular track segment is railroad line or ancillary track, the agency and courts look primarily at the use of the track (the ‘use test’), and at the track’s physical characteristics.”), *petition for review denied sub nom. Allied Erecting & Dismantling Co. v. STB*, 835 F.3d 548 (6th Cir. 2016).

The evidence and case law plainly support the conclusion that the Line is a § 10901 line of railroad:

- Union Pacific acquired the Line to extend its mainline into new territory, so it could provide common carrier service to shippers that currently use, and may in the future use, the Park—shippers that Union Pacific could not serve before operating over the Line. *See* Bybee VS at 1-2.¹¹ As Petitioners concede, “[t]he Park [previously] had no connection to the general rail system.” Petition at 5. The Line essentially reactivates a portion of what historically had been a § 10901 line of railroad. *See* Bybee VS at 2.¹²
- Union Pacific uses the Line to provide regularly scheduled, continuous transportation service to multiple shippers using the Park. *See* Bybee VS at 3.¹³ Union Pacific does not

Pacific concluded it would be operating the Line as a § 10901 line of railroad. *See Union Pac. R.R.—Operation Exemption—In Bexar & Wilson Counties, TX*, FD 35776, Verified Notice of Exemption (Oct. 21, 2013); *see also* Watkins VS at 3. As illustrated by the cases cited in note 22, *infra*, track that was originally § 10906 track or private track can become, by operation of law, a § 10901 line of railroad if the track’s use or intended use changes. Union Pacific cannot be estopped from accepting what the law requires.

¹¹ *See, e.g., Texas & Pac. Ry. v. Gulf, Colo. & Santa Fe Ry.*, 270 U.S. 266, 278 (1926) (“[I]f the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension . . . , although the line be short.”); *Nicholson v. ICC*, 711 F.2d 364, 368 (D.C. Cir. 1983) (“[T]rack segments . . . intended to be used to carry through trains between points of shipment and delivery, particularly those segments which extend a railroad’s service into new territory,” are § 10901 track).

¹² *See, e.g., SierraPine—Lease & Operation Exemption—Sierra Pac. Indus.*, FD 33679, slip op. at 3 (STB served Nov. 27, 2001) (class exemption properly invoked where “[h]istorically, this line has been operated as a regulated, common carrier line of railroad”).

¹³ *See, e.g., Allied Erecting*, 835 F.3d at 550 (“railroad lines” or “main line tracks” are tracks “designed and used for continuous transportation service”); *New Orleans Terminal Co. v. Spencer*, 366 F.2d 160, 165-66 (5th Cir. 1966) (“If there are traffic movements which are part of the actual transportation haul from shipper to consignee, then the trackage over which the (continued...)”).

use the Line for loading, unloading, storage, switching, or other purposes incidental to movements of its trains. See *Bybee* VS at 3.¹⁴

- The Line’s physical characteristics are those of a § 10901 line of railroad. The Line is indistinguishable from other mainline track on the Rockport Subdivision. Union Pacific owns and maintains the Line. See *Bybee* VS at 2.¹⁵ The Line is continuously mile-posted as part of the Rockport Subdivision, and there is a station on the Line—Purcell. See *Bybee* VS at 1-2.¹⁶ In addition, the Line is constructed with heavy-weight, 135-pound, continuous welded rail; the rail and other track materials are the same as Union Pacific uses on other mainline track; and the Line is designed to handle large volumes of traffic, just like Union Pacific’s other mainline track on the Rockport Subdivision. See *Bybee* VS at 2.¹⁷

movement takes place is a ‘line of railroad, or extension thereof’”); *Allied Erecting*, slip op. at 8 (“regularly scheduled service” is a relevant “characteristic”); *id.* at 8-9 (use of tracks “to serve multiple customers” is a characteristic that “support[s] the notion that the [tracks] are mainline tracks”); *Arkansas Cent. Ry.—Operation Exemption—Line of Herzog Stone Prods.*, FD 31405, slip op. at 2 (ICC served June 7, 1989) (concluding track was not an exempt spur where line was “used for through movement and not just for storage,” the “need for service is regular, not sporadic,” and the “development of an industrial complex presents the likelihood that there will soon be other shippers”); *cf. JGB Props., LLC—Petition for Declaratory Order*, FD 35817, slip op. at 8 (STB served Dec. 10, 2015) (lack of “through or overhead service” and lack of “regularly-scheduled service” are among “classic indicia of excepted track”).

¹⁴ See, e.g., *Nicholson*, 711 F.2d at 366-68 (“[T]rack segments” are ancillary rather than part of “railroad line” when they are “merely incidental to, and not required for, a railroad’s service between points of shipment and delivery,” such as segments used for assembly, disassembly, and preparation); *New Orleans Terminal Co.*, 366 F.2d at 166 (“trackage . . . used in the loading, reloading, storage and switching of cars incidental to the receipt of shipments by the carrier or their delivery to the consignee” is spur, industrial, team, switching, or side track).

¹⁵ See, e.g., *Allied Erecting*, 835 F.3d at 550-51 (tracks are non-mainline where “they are built, maintained, and operated by the shipper to serve only the shipper”), *denying review of Allied Erecting*, slip op. at 8 (“who owns and maintains the track” is among the “specific characteristics [that] have been found relevant in determining whether a track is mainline or ancillary”); *JGB Props.*, slip op. at 8 (“tracks that remain . . . owned and maintained by the property owners” among the “classic indicia of excepted track”).

¹⁶ See, e.g., *JGB Props.*, slip op. at 8 (“no stations” on segment among the “classic indicia of excepted track”).

¹⁷ See, e.g., *JGB Props.*, slip op. at 8 (whether track is capable of “handling large volumes of traffic” is a relevant factor in determining whether it is mainline or ancillary); *Allied Erecting*, FD 34316, slip op. at 8 (“whether the track was constructed with lightweight rail” and “the condition of the track” are factors “relevant in determining whether a track is mainline or ancillary”); *Arkansas Cent. Ry.*, slip op. at 1-2 (finding that 1.3-mile line constructed as exempt industrial spur that was being used for through movement of trains, that had a regular need for service, and that would be used to serve an industrial complex under development was being operated as a § 10901 line of railroad).

In fact, Petitioners do not appear to dispute that the Line is properly classified as a § 10901 line of railroad. Three and a half years have passed since the Board allowed Union Pacific's exemption to take effect, and neither BNSF nor MRIP has ever asked the Board to revoke the exemption.¹⁸ Even now, Petitioners submit no evidence to show the Line is not a § 10901 line of railroad.¹⁹ Indeed, they concede that “the Park today can be accessed only via a 49 U.S.C. § 10901 ‘line of railroad.’” Petition at 14.

Petitioners instead argue the Board should *treat* the Line as if it were a § 10906 spur or industrial track for purposes of applying the RASA. This extraordinary request—to look past both the RASA's express text and the Line's actual use and characteristics—rests on a desperate theory: BNSF's right to serve the Park, Petitioners claim, “accrued upon the completion of [the Line's] construction” and “UP's unilateral, after-the-fact actions should not be allowed to strip BNSF and Park shippers of these rights.” Petition at 12. But BNSF never had a right to serve the Park. Nothing in the RASA or the Board's decision approving the UP/SP merger remotely suggests that BNSF's right to serve a new shipper facility “accrues” before Union Pacific itself

¹⁸ The Board investigated the circumstances surrounding Union Pacific's acquisition of the Line. However, its concern apparently was not whether the Line is § 10906 track rather than a § 10901 line of railroad, but whether Union Pacific should have sought authorization under § 10901 before the Line was constructed. *See Union Pac. R.R.—Operation Exemption—In Bexar & Wilson Counties, TX*, FD 35776 (STB served Mar. 2, 2015).

¹⁹ MRIP's witness notes that certain documents relating to the transaction involving the Line refer to the Line as “an industry track infrastructure.” Kinsel VS at 4. But it is well-established that whether “a track segment is or is not identified as a ‘spur, industrial, team, switching, or side’ track is not determinative of whether it is exempted by [§ 10906] from [Board] jurisdiction.” *Nicholson*, 711 F.2d at 368 n.12; *id.* at 367 (agency jurisdiction “turns on the intended use of the track segment, not the label or cost of the segment”); *see also Arkansas Cent. Ry.*, slip op. at 2 (finding that prior industrial spur track was being used as a rail line subject to agency jurisdiction). In fact, Union Pacific documents occasionally refer to the portion of the Rockport Subdivision from Milepost 11.0 through Elmendorf to Purcell as the “Rockport Industrial Lead,” although there has never been any dispute that the line to Elmendorf is a § 10901 line of railroad. *See Sanford VS* at 3 n.2.

could serve the shipper.²⁰ Indeed, the RASA provides no right for BNSF to serve a location any earlier than Union Pacific, and Union Pacific did not operate its first train over the Line to the Park until early 2014, *see* Bybee VS at 2, after the Board allowed Union Pacific’s exemption to operate a § 10901 line of railroad to take effect, *see Union Pac. R.R.—Operation Exemption*, slip op. at 2.²¹

Moreover, as discussed above, the Line is not a § 10901 line of railroad due to any “unilateral, after-the-fact actions” by Union Pacific. It is a § 10901 line of railroad by operation of law. Indeed, Board precedent makes clear that Union Pacific could not unilaterally change the Line’s status merely by seeking an exemption to operate the Line as a § 10901 line of railroad.²²

²⁰ A right cannot “accrue” before it existed in the first place. *Cf. McLaughlin v. CNX Gas Co.*, 639 F. App’x 296, 300 (6th Cir. 2010) (noting that “one cannot convey that which one does not own”); *Grace-Cajun Oil Co. No. 3 v. Federal Deposit Ins. Corp.*, 882 F.2d 1008, 1011 (5th Cir. 1989) (explaining that company “could transfer no greater right . . . than it had”).

²¹ Petitioners note the Board’s statement that its decision allowing the 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.” Petition at 12 (quoting *Union Pac. R.R.—Operation Exemption*, slip op. at 4). Union Pacific agrees that the Line’s appropriate classification at the time it commenced operations is the relevant issue, not whether the Board allowed the exemption to take effect. Here, even if the Board had *not* allowed the exemption to take effect, the Line still would be a § 10901 line of railroad. That is why Union Pacific could not commence operations until the exemption became effective. If BNSF had begun operating over the Line before that point, it would have been operating in violation of § 10901. In short, Union Pacific is not relying on the Board’s decision, or any putative construction of it, to defeat Petitioners’ current claim. The plain text of the RASA defeats that claim.

²² *Union Pac. R.R.—Operation Exemption—In Yolo County, CA*, FD 34252, slip op. at 4 (STB served Dec. 5, 2002) (rejecting notice of exemption to change the legal status of operations on track to regulated service because railroad “did not meet its burden of demonstrating how its use of the . . . trackage has changed so that it now falls within section 10901”).

However, track originally constructed as § 10906 track or private track can become a § 10901 line of railroad if the track’s use or intended use changes. *See, e.g., Yellowstone Valley R.R., L.L.C.—Discontinuance of Lease & Trackage Rights Operations Exemption—In Richland, Sheridan, Roosevelt & Daniels Counties, Mont., & McKenzie County, N.D.*, AB-991 (Sub-No. 1X), slip op. at 2 n.5 (STB served May 10, 2013) (“YVRR asserts that it constructed these tracks as team tracks while leasing the lines from BNSF and that it did not need Board authority for this construction under 49 U.S.C. § 10906. To now perform common carrier operations, however, it would appear that YVRR would need Board authorization.”); *Saratoga & N. Creek Ry., LLC—* (continued...)

If Petitioners believed the Line is not a § 10901 line of railroad, they could have asked the Board to revoke the exemption either in their Petition or at any point in the past three and a half years. Instead, they concede that “the Park today can be accessed only via a 49 U.S.C. § 10901 ‘line of railroad.’” Petition at 14.

In sum, Petitioners fail to show BNSF has a right to serve shippers in the Park under the RASA’s provisions granting BNSF access to new shipper facilities located at a 2-to-1 point.

B. The Park Is Not A New Shipper Facility On A Trackage Rights Line.

BNSF’s alternative argument—that the Park is a New Shipper Facility on a Trackage Rights Line—also fails. The Line is not a Trackage Rights Line. It could not be—it was not even constructed until 20 years after the merger. The nearest Trackage Rights Line is Union Pacific’s line between SP Junction and Elmendorf. BNSF’s rights over that line end at the southern boundary of Elmendorf’s switching limits, at approximately Milepost 16.1, and the Park is located south of that boundary point, adjacent to the Line, at approximately Milepost 17.5. See Ex. 2; Bybee VS at 1-2; Sanford VS at 3.

Petitioners *concede* the Line is not a Trackage Rights Line. They say the Line “connects to” a Trackage Rights Line. Petition at 13 (“[T]he [Line] connects to the Trackage Rights Line at

Operation Exemption—Tahawus Line, FD 35559, slip op. at 7-8 (STB served May 14, 2012) (stating that railroad may file notice of exemption from prior approval requirements to operate former private track as a common carrier); *Arkansas Cent. Ry.*, slip op. at 1-2 (finding that line constructed as an exempt industrial spur was being operated as a “rail line” under § 10901); cf. *Norfolk S. Ry.—Reinstitution of Service—Between Toledo & Maumee In Lucas County, OH*, FD 34233, slip op. at 1-2 (STB served Mar. 12, 2003) (exempting from prior approval requirements of § 10901 the reinstitution of service on an abandoned line that was used after consummation of the abandonment to provide local rail service to a single shipper); *Burlington N.R.R.—Operation Exemption In Mills & Pottawattamie Counties, IA*, FD 32977, slip op. at 1-2 (STB served Mar. 12, 1997) (exempting from prior approval requirements of § 10901 the reinstitution of service on an abandoned line that was used after consummation of the abandonment for storage and other railroad purposes).

MP 16.1.”); *see also id.* at 1 (stating that the Line was constructed “between the terminus of the Elmendorf switching district at milepost (‘MP’) 16.1 and MP 17.5”).

As Petitioners observe, the Board’s analysis does not end with the recognition that the Park is not adjacent to a Trackage Rights Line. Under the RASA, a New Shipper Facility is also deemed to be “on” a Trackage Rights Line if the new facility is “adjacent to a spur, an industrial track, or a yard that is itself served by such Trackage Rights Line.” Ex. 1, Definitions (Trackage Rights Lines). However, this provision does not help Petitioners. They *concede* the Line is not a spur, industrial track, or a yard. They admit that “the Park today can be accessed only via a 49 U.S.C. § 10901 ‘line of railroad.’” Petition at 14. Accordingly, their argument that BNSF is entitled to serve shippers in the Park flies in the face of the RASA, which expressly provides that “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.” Ex. 1, Definitions (Trackage Rights Lines).

Seeking to avoid a straightforward application of the RASA’s definition of “Trackage Rights Lines” and the law governing what makes a line a § 10901 line of railroad, Petitioners repeat their “estoppel/ ruse” and “accrual” claims to argue the Board should treat the Line as § 10906 track, rather than § 10901 track. *See* Petition at 14-15. However, those arguments fail here for the same reasons discussed above: as discussed extensively in Part II.A, the Line is a § 10901 line of railroad by operation of law because of its use and physical characteristics, not because of any “ruse.” *See* pp. 11-13 & p. 11 n.10, *supra*.

Petitioners argue in the alternative that the RASA’s provision stating new 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” does not apply to lines constructed *after* the

UP/SP merger. Petition at 15-16. However, that distinction appears nowhere in the RASA or any of the Board’s decisions regarding access to new facilities under the UP/SP merger conditions. Petitioners offer no principled reason to draw such a distinction.²³

Petitioners also claim Union Pacific previously granted BNSF access to new facilities in “exactly the situation here.” Petition at 16. That is incorrect. The facilities Petitioners identify—in Grand Junction, Colorado, and Fernley, Nevada—were facilities BNSF could access from a Trackage Rights Line without operating over a § 10901 line of railroad. *See* Sanford VS at 6 & n.4. In other words, Union Pacific granted BNSF access in situations fully consistent with the RASA’s definition of Trackage Rights Line. *See* p. 5, *supra*. Indeed, Petitioners’ own witness states the facilities in Grand Junction and Fernley were “located on spurs, industrial tracks and yard tracks.” Petition, Verified Statement of Travis B. Thowe (“Thowe VS”) at 6. By contrast, Petitioners *concede* that “the Park today can be accessed only via a 49 U.S.C. § 10901 ‘line of railroad.’” Petition at 14.

Finally, Petitioners claim that “affording BNSF access [to the Park] would serve the competition-preserving purpose of the UP/SP merger conditions and the RASA whether or not the [Line] is now a jurisdictional ‘line of railroad.’” Petition at 17. This argument again flies in the face of the carefully negotiated and carefully drafted RASA, which grants BNSF access to new shipper facilities “on” approximately 4,000 miles of Trackage Rights Lines, but which expressly provides that “New Shipper Facilities are not ‘on’ a Trackage Rights Line if they can

²³ As Petitioners note, the RASA’s definition of “on” a Trackage Rights Line reflects the Board’s Decision No. 86 in the UP/SP merger proceeding, in which the Board agreed with BNSF that a new facility need not be adjacent to a Trackage Rights Line to be considered “on” a Trackage Rights Line. Petition at 15-16. Thus, Petitioners’ arguments, which alternatively embrace and reject that decision, appear to reflect the entirely unprincipled concept of “Heads we win, tails you lose.”

be accessed only via a 49 U.S.C. 10901 ‘line of railroad’ which is not a Trackage Rights Line.” Ex. 1, Definitions (Trackage Rights Lines).

In sum, Petitioners fail to show BNSF has a right to serve shippers in the Park under the RASA’s provisions granting BNSF access to new shipper facilities located on a Trackage Rights Line.

C. The Board Should Reject Petitioners’ Arguments That Amount To Requests For New Conditions On The UP/SP Merger.

Because their access claims fail under the new facilities condition as established by the Board, Petitioners urge the Board to expand the condition. They say BNSF should be able to access not only facilities “within the switching limits” of a 2-to-1 point, *see* Ex. 1, Definitions (“2-to-1” Points), but also facilities “just beyond” those limits, Petition at 18. They also say BNSF should be able to access not only facilities “adjacent to a Trackage Rights Line or . . . adjacent to a spur, an industrial track, or a yard that is itself served by such Trackage Rights Line,” Ex. 1, Definitions (Trackage Rights Lines), but also facilities “some distance” from a Trackage Rights Line, Petition at 18. However, these arguments are plainly an overreach. Such requests for new or modified conditions are not appropriate in a petition for “enforcement.” *See Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp.* (Decision No. 106), FD 32760, slip op. at 7-8 (STB served Dec. 20, 2013), *pet. for rehearing denied*, Decision No. 107, FD 32760, slip op. at 4-5 (STB served Dec. 29, 2014), *aff’d sub nom. G3 Enters., Inc. v. STB*, 2017 WL 727576, at *1 (9th Cir. Feb. 24, 2017), *pet. for panel reh’g denied*, No. 15-70597 (9th Cir. May 2, 2017). As the Board explained to the Ninth Circuit in the G3 Enterprises case: “The Board cannot ‘enforce’ what it did not order; it may enforce only those obligations and directives actually imposed in the prior decision.” Respondents’ Answering Brief at 23, *G3 Enters., Inc. v. STB*, No 15-70597 (9th Cir. Aug. 7, 2105) (“STB Brief”).

Petitioners' arguments also fail because their request for expansion of the new facilities condition is untimely, targets alleged harm not directly caused by the UP/SP merger, and lacks evidentiary support. Petitioners' main contention is that the new facilities condition, as written, does not preserve the full extent of indirect competition that existed before the UP/SP merger. *See, e.g.*, Petition at 18 ("Before the UP/SP merger, shippers and facility owners often enjoyed the benefits of this type of indirect competition."). However, indirect competition issues were litigated extensively in the UP/SP merger proceeding. *See, e.g., Union Pacific/Southern Pacific Merger*, 1 S.T.B. at 394-403. The Board specifically addressed the new facilities condition as a remedy for the loss of indirect competition. In fact, the Board expanded the already broad access rights to which Union Pacific, BNSF, and a shipper association had agreed by requiring Union Pacific to grant BNSF access to new facilities located not only on Southern Pacific lines, but also on Union Pacific lines. *See id.* at 420-21. It is far too late to challenge the Board's carefully and correctly reasoned conclusion that the UP/SP merger, as conditioned, would not impair indirect competition. *See* 28 U.S.C. § 2344.²⁴

Petitioners also say the new facilities condition must be changed because "the nature of industrial development and relocation has evolved" since the merger, "with industry increasingly relocating to exurban sites outside the static switching districts established at the time of the merger." Petition at 19. However, the Board may not modify merger conditions to address post-

²⁴ As the STB told the Ninth Circuit in the G3 Enterprises case, "a petition to enforce a Board order . . . is not a device to relitigate the original issues[s]." STB Brief at 23 (internal quotation omitted).

In addition, it is extremely misleading for Petitioners to imply that Union Pacific could have served the Park in competition with Southern Pacific had there been no UP/SP merger. Before the merger, Union Pacific had no right to operate over Southern Pacific's lines to serve new shipper facilities at Elmendorf or on Southern Pacific's line from SP Junction to Elmendorf. Union Pacific had access only to serve CPSB. *See* note 2, *supra*.

merger changes in “the nature of industrial development.” As the Board told the Ninth Circuit in the G3 Enterprises case: “Under the agency’s longstanding policy, merger conditions are applied only to remedy harm caused directly by the merger.” STB Brief at 25; *see also Union Pacific/Southern Pacific Merger*, 1 S.T.B. at 364 (“We attempt to ameliorate harm that is caused by the merger with conditions.”). In fact, as discussed below, shippers can and do locate new facilities at 2-to-1 points, but in any event, Petitioners cannot plausibly claim the UP/SP merger *caused* the changes they describe in “the nature of industrial development.”

In addition, Petitioners fail to show the new facilities condition is not working as intended. They offer no evidence the Park or any shipper was forced to site a facility at a point served exclusively by Union Pacific because it could not find a site where it could receive service from both Union Pacific and BNSF. In fact, two new facilities eligible to receive service from both Union Pacific and BNSF—Alamo and Southton—were established near Elmendorf in the same period MRIP has been developing the Park. *See* Sanford VS at 5; *see also* Ex. 2. Union Pacific agreed that BNSF had rights to serve another new facility at Elmendorf, VP Racing Fuels, in 2015. *See* Sanford VS at 5. And Petitioners themselves point to still another example of a shipper that took advantage of the new facilities condition as applied to Elmendorf: they say Toyota used the prospect of building a facility in Elmendorf with access to BNSF to encourage Union Pacific to give BNSF access to a different site in San Antonio. *See* Petition at 19 n.14. These developments reaffirm that the new facilities condition is working as intended.

Furthermore, Petitioners’ narrow focus on shippers’ options for locating new facilities within the switching limits of 2-to-1 points is highly misleading. As described above, the new facilities condition also applies to facilities located on the approximately 4,000 miles of Trackage Rights Lines across the Western United States, as well as spurs, industrial track, and yards served

by those Trackage Right Lines. Thus, there is no shortage of sites where a shipper can locate a new facility and obtain service from both BNSF and Union Pacific. In fact, in most cases, new facilities located “just beyond” a 2-to-1 point would be on a Trackage Rights Line because BNSF reaches most 2-to-1 points using Trackage Rights Lines. Just since the beginning of 2013, BNSF has gained access to at least 44 new facilities under the merger’s new facilities condition. *See* Sanford VS at 6.

Finally, “[t]he unfairness that would result from imposing a condition of which the consolidating carriers had no advance knowledge at the time of consummation is obvious.” *Guilford Transportation—Control—B&M, et al.*, 5 I.C.C.2d 202, 206 (1988). Typically, “[i]f the carriers do not accept the conditions imposed by the [agency], they need not consummate the transaction.” *Id.* Union Pacific consummated the UP/SP merger twenty years ago. A decision expanding the merger conditions now would improperly deprive Union Pacific of the basic, fundamental “right to walk away from a transaction if it deems the conditions too burdensome.” *Canadian National, et al.—Control—Illinois Central, et al.*, 6 S.T.B. 492, 496 (2002). A petitioner thus “bears a heavy burden to show that new evidence, changed circumstances, or material error require [the Board] to reopen an administratively final merger decision to impose additional conditions.” *Id.* Even if the Board were to treat the petition for “enforcement” as a petition to reopen, Petitioners have not come close to justifying the imposition of more burdensome conditions on a consummated merger two decades after the fact.

D. The Park And Shippers Using The Park Benefit From The Conditions Imposed On The UP/SP Merger, Even Without Access To BNSF.

Petitioners also argue the Board should ignore the RASA’s plain language because “[t]he Park’s developers fully expected to obtain the benefits of the UP/SP merger conditions.” Petition at 20. As discussed below, shippers using the Park are benefitting from the merger conditions,

even though they do not have access to BNSF. However, Union Pacific *never* promised MRIP that BNSF would be able to serve the Park.

MRIP appears to be in a position similar to that of another party that recently petitioned to “enforce” conditions on the UP/SP merger, G3 Enterprises. Like G3 Enterprises, MRIP says it thought BNSF would have access to its facility, but it never took the simple, direct step of asking Union Pacific. MRIP’s witness, Mr. Kinsel, describes what “investors in the Park” supposedly “believed” or “understood.” *See* Kinsel VS at 3 (“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.”); *id.* (“As the investors understood it, the ‘2-to-1 point’ designation meant that BNSF would have the right to provide competitive rail service”). However, Mr. Kinsel is very careful not to claim that Union Pacific actually told him or anyone else that BNSF could access the Park, because that would be untrue. *See* Watkins VS at 3-4.

Mr. Kinsel also words his statement very carefully when he claims the ITA “reflected FRAC Resources’ understanding” that BNSF would have access to the Park. *See* Kinsel VS at 5. He is apparently referring to language in Section 22. But that provision, which is boilerplate language appearing at the end of the ITA, does not mention BNSF access or the UP/SP merger conditions. It is designed to ensure that any railroad allowed to use track covered by the ITA is governed by the ITA. *See* Watkins VS at 3. Section 22 states:

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Ex. 4, § 22.²⁵ Mr. Kinsel is very careful not to claim that Union Pacific made any contrary representations about the meaning of Section 22.

Indeed, Mr. Kinsel's only reference to actual communications with Union Pacific regarding BNSF access to the Park is his acknowledgment that he was "aware that BNSF sent several letters to UP in 2013 seeking the ability to serve shippers within the Park." Kinsel VS at 5. Mr. Kinsel says he was unaware of Union Pacific's replies. *See id.* However, as BNSF's witness acknowledges, Union Pacific repeatedly and clearly told BNSF that BNSF was not entitled to serve the Park. *See* Thowe VS at 2-3; *see also* Petition at 6-7. Petitioners fail to explain why MRIP never asked BNSF about Union Pacific's response, or why BNSF never told MRIP what it knew to be the case.

Mr. Kinsel also tries to suggest Union Pacific somehow tricked MRIP by accelerating its payment for the Line. *See* Kinsel VS at 5-6. However, the timing of Union Pacific's payment has no effect on whether the Line is a § 10901 line of railroad. Under the ITA, the parties had always contemplated that MRIP would convey ownership of the Line to Union Pacific within thirty days of the completion of construction. *See* Ex. 4, § 4; *see also* Watkins VS at 2. The acceleration of Union Pacific's payment thus did not affect Union Pacific's ownership of the Line.²⁶

If Mr. Kinsel had simply asked Union Pacific whether BNSF would have access to the Park, Union Pacific would have said, "No." *See* Sanford VS at 5; Watkins VS at 2-3. That is what Union Pacific told BNSF. And Union Pacific does not just deny access requests as a matter of course. At essentially the same time, Union Pacific said "Yes" when BNSF asked about

²⁵ Material within brackets is Highly Confidential or Confidential. Such material is redacted from the public version of this filing.

²⁶ In any event, ownership of the line is just one of many factors, and a relatively minor factor, that establish the Line is a § 10901 line of railroad. *See* pp. 12-13, *supra*.

access to nearby new facilities for Alamo and Southton. *See* Sanford VS at 5. In fact, Union Pacific has said “Yes” to access requests at least 44 times since the beginning of 2013. *See id.*

Mr. Kinsel claims the Park has lost business to Alamo, another industrial park located just a few miles away in Elmendorf, because Alamo’s tenants “have access to rail service from both UP and BNSF and as a result enjoy better quality service and lower, more competitive rates.” Kinsel VS at 10. However, Union Pacific provides shippers using the Park the same reliable, high-quality service that it provides shippers using Alamo because it serves both sets of shippers using the same local trains. *See* Bybee VS at 5; Bendon VS at 2. Union Pacific also provides the same competitive rates to shippers using the Park that it provides to comparable shippers using Alamo and Southton. *See* Bendon VS at 2-3.

Competitive forces are responsible for these benefits. Union Pacific has very strong incentives to encourage shippers to locate and remain in the Park. If Union Pacific does not provide high-quality service and competitive rates to shippers using the Park, shippers will locate or shift their business to Alamo, Southton, or other nearby facilities where they can obtain service from BNSF. In addition, as Mr. Kinsel recognizes, Union Pacific recently completed construction of a new yard on property acquired from the Park. *See* Kinsel VS at 7. Union Pacific invested \$16.4 million in the project, which provides even stronger incentives to encourage the growth and success of the Park. *See* Bendon VS at 3.

The existence of Alamo and Southton shows the new facilities condition is working as intended to protect siting competition in the Elmendorf area. Alamo and Southton were able to site new facilities in the Elmendorf area and obtain service from both Union Pacific and BNSF. Shippers looking to locate in an industrial park in the Elmendorf area can locate new facilities at Alamo or Southton and obtain service from Union Pacific and BNSF. The Park and its tenants

also benefit from the competitive forces created by the new facilities condition even though they are not at Elmendorf or on a Trackage Rights Line, because Union Pacific must offer competitive rates and service or risk losing business to BNSF at Alamo and Southton.

III. CONCLUSION

The Board should deny the petition for enforcement. BNSF is not entitled to access the Park for the simple reason that the Park is not a new facility “at” Elmendorf or “on” a Trackage Rights Line. The meaning of those terms is established by the RASA. The RASA incorporates the merger conditions imposed by the Board. The Board should reject Petitioners’ overreaching quest to invent new rights beyond the conditions the Board imposed. The Board also should reject any expansion of the new facilities condition on which Union Pacific reasonably relied in consummating its merger with Southern Pacific. The condition is already extremely broad, and the evidence confirms that siting competition remains strong in the Elmendorf area.

Respectfully submitted,

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May 25, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of May, 2017, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, or a more expeditious manner of delivery on the following counsel of record in Finance Docket No. 32760:

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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

REPLY VERIFIED STATEMENT

OF

STEVEN L. BYBEE

REPLY VERIFIED STATEMENT

OF

STEVEN L. BYBEE

My name is Steven L. Bybee. I am the Superintendent – Transportation Services for the San Antonio Service Unit of Union Pacific Railroad Company (“Union Pacific”). I began my career at Union Pacific in 2005 as a conductor in the Pacific Northwest, and I have held various transportation management roles in Union Pacific’s Western and Southern Regions. Prior to my current role, I served as Director of Transportation Services in San Antonio and in the Livonia Service Unit. I have been in my current position since March. As part of my responsibilities, I am familiar with Union Pacific’s operations over the Rockport Subdivision, including Union Pacific’s service to shippers in Mission Rail Park (the “Park”).

I am submitting this statement to describe the use and physical characteristics of the 1.42-mile extension of the Rockport Subdivision over which Union Pacific operates to serve shippers using the Park (the “Line”).

The Rockport Subdivision is located south of San Antonio, Texas. The Subdivision includes five rail stations: Tower 112, Coal Plant, Southton, Elmendorf, and Purcell. Exhibit 2 shows the Rockport Subdivision in the Elmendorf and Purcell area, as well as tracks within the Park.

The Park is located at the southern end of the Rockport Subdivision, near Milepost 17.5, at Purcell. Union Pacific began serving shippers in the Park after obtaining an exemption to operate as a common carrier between Elmendorf and Purcell over the Line.

The Line is an extension of Union Pacific’s mainline, which previously terminated near Milepost 16.1, at the southern boundary of Elmendorf’s switching limits. Before Union Pacific

obtained authority to operate over the Line, Union Pacific could not serve shippers that currently use, and may in the future use, the Park. Construction of the Line was completed in September 2013. Union Pacific operated the first train over the Line in early 2014.

Union Pacific owns and maintains the Line. The Line lies entirely within a Union Pacific-owned right-of-way. Union Pacific's predecessor, Southern Pacific Transportation Company, once operated a mainline between San Antonio and southern Texas over the right-of-way. The track was removed after Southern Pacific abandoned the line in 1994, but the railroad retained the right-of-way.

The Line's physical characteristics are indistinguishable from the rest of the mainline track on the Rockport Subdivision. The Line is continuously mile posted as part of the Rockport Subdivision and ends at Milepost 17.5. It is constructed with 135-pound, continuous welded rail, just like other portions of the Rockport Subdivision. The ties, ballast, and sub-ballast are the same as we use for other portions of its mainline. The Line's capacity and configuration are such that the Line can handle large volumes of traffic, just like our other mainline track on the Rockport Subdivision. Photographs taken looking north and south from Milepost 16.1 are provided as Exhibits 5-A and 5-B.

The Line's operating characteristics are distinct from those on the track leading into the Park and track in the Park. The Rockport Subdivision is not signalized, and trains may operate over the line only after receiving a track warrant from Union Pacific's Harriman Dispatching Center ("HDC"). The Rockport Subdivision mainline terminates near Milepost 17.5, near the entrance to the Park. The end of the mainline and the end of Union Pacific's track warrant control is marked on one side by a sign that says "End TWC." See Ex. 5-C. Union Pacific trains enter the Park on an industry track designated as Track 795. HDC does not control operations on

Track 795 or elsewhere in the Park. The side of the sign facing the Park says “Begin TWC” and marks the entry to the mainline and the beginning of HDC dispatching control by track warrant. *See* Ex. 5-D. Also at Milepost 17.5, on the opposite side of the track, a sign that says “UP MTCE LMT” marks the end of Union Pacific’s mainline maintenance responsibility. *See* Ex. 5-E. The speed of the track changes from 30 mph on the mainline to restricted speed on Track 795, meaning a train must be able to stop within half the range of vision.

Union Pacific serves shippers in the Park by operating trains over our mainline track between East Yard in San Antonio and Purcell. We provide regularly scheduled manifest service six days a week to set out and pick up cars in the Park. We provide this service using the same train that sets out and picks up cars for our other customers on the Rockport Subdivision, including Southton Rail Yard and Alamo Junction Rail Park—two other large facilities that receive sand on the Subdivision.

In addition to providing regularly scheduled manifest service, when trains arrive in San Antonio with large blocks of sand destined to the Park, Southton, or Alamo (or a combination of those facilities), we will move the blocks straight down to those facilities, often without stopping the trains in East Yard. If we have a unit train moving to the Park, we also move it directly to the Park.

Union Pacific uses the Line as part of our route for providing continuous transportation service to shippers in the Park. We do not use the Line for loading, unloading, storage, switching, or other purposes that are incidental to movements of trains. When we serve shippers in the Park, any loading, unloading, storage, or switching takes place on switching and industry tracks in the Park or in the yard adjacent to the Park, which Union Pacific recently constructed to

support our operations in the Park. *See* Ex. 2. I understand our total investment was approximately \$16.4 million.

Union Pacific provides regular manifest service to the Park using two trains, Y61 and Y62. Both jobs operate six days per week. Y61's crew comes on duty at East Yard in San Antonio at 6:45 am. Y61 moves down the Rockport Subdivision, spotting cars at customer facilities, then continues over the Line into the Park.

To access the Park's property, Union Pacific exits the Line and pulls onto a track designated as Track 795. The crew drops inbound cars and switches them to Track 797. The crew then picks up outbound cars that have been staged on Track 796 and switches them to Track 795. When the crew completes these switching operations, they tie down the train on Track 795 and go off duty.

Y62's crew comes on duty at 4:00 pm at East Yard and takes a van to the Park. They move the train down Track 795 onto the Line. Y62 then continues up the Rockport Subdivision, picking up cars from customer facilities as it travels to East Yard.

When Union Pacific moves large blocks of sand or unit trains to the Park, our operations over the Line are essentially the same as for Y61—that is, we move over the Rockport Subdivision to Track 795. We also use our yard next to the Park to hold empty cars after unloading in the Park, until we have enough cars to build a block large enough to justify a separate train rather than return the cars in smaller numbers on the Y62. We do not perform any loading, unloading or switching on the Line.

I understand a witness for the Park witness claims that Union Pacific has not been responsive to the service needs of a major shipper in the Park, Twin Eagle, and that other customers have moved business to Alamo, which is served by both BNSF and Union Pacific.

I am not aware of any service complaints from Twin Eagle or any other shippers in the Park. Our scheduled manifest service to the Park is operating at a very high level of reliability. Our spot/pull ratio, which measures whether Union Pacific drops off and picks up cars on time or early, was {{

}} The similarly high service levels should be expected, since we use the same regularly scheduled trains to serve all three locations. With regard to service for larger blocks that move directly to the Park, we move those cars to the Park as soon as possible—preferably without even a stop in East Yard. We do not want them sitting and occupying space in East Yard.

VERIFICATION

I, Steven L. Bybee, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this Reply Verified Statement.

Executed on May 25, 2017.

/s/ Steven L. Bybee

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

REPLY VERIFIED STATEMENT

OF

CHRIS SANFORD

REPLY VERIFIED STATEMENT

OF

CHRIS SANFORD

My name is Chris Sanford. I am Director, Interline Marketing for Union Pacific Railroad Company (“Union Pacific”). I began my railroad career with Chicago & North Western Railroad, where I worked for 12 years, until that railroad merged with Union Pacific. I have been employed by Union Pacific for 22 years. For the past 20 years, I have worked in Union Pacific’s Interline Marketing Department. As Director, Interline Marketing, my responsibilities include managing various aspects of Union Pacific’s relationship with other Class I carriers. Since the Union Pacific/Southern Pacific merger, I have been part of the team that reviews requests by BNSF Railway Company (“BNSF”) for access to shipper facilities under the conditions the Board imposed on the merger.

I am submitting this statement to address several issues raised by BNSF and Mission Rail Industrial Park, LLC (“MRIP”) regarding BNSF’s right to serve to a facility known as Mission Rail Park (the “Park”). The Park is located adjacent to Union Pacific’s mainline, near Milepost 17.5, at Purcell, Texas, which is approximately 1.42 miles beyond the southern end of the switching limits of Elmendorf, Texas.

In this statement, I first explain why BNSF is not entitled to serve the Park under the UP/SP merger’s new facilities condition. I then discuss the communications in which Union Pacific explained to BNSF that it was not entitled to serve the Park. Finally, I briefly discuss several situations in the Elmendorf area and elsewhere on Union Pacific’s network that help illustrate the broad reach of the new facilities condition.

A. BNSF is not entitled to serve the Park under the new facilities condition.

The new facilities condition is incorporated in the Restated and Amended BNSF Settlement Agreement (“RASA”). The RASA is a revised version of the BNSF Settlement Agreement, which the Board imposed as a condition to the UP/SP merger. It incorporates the conditions the Board imposed on the merger, as interpreted, clarified, and supplemented in subsequent Board decisions and through agreements between Union Pacific and BNSF.

Under the merger conditions, as incorporated in the RASA, BNSF is entitled to serve new shipper facilities “at” 2-to-1 points and “on” lines over which BNSF received trackage rights under the RASA. Specifically, the RASA grants BNSF access to:

(1) “any New Shipper Facility located subsequent to UP’s acquisition of control of SP at points listed on Exhibit A to [the RASA].” Ex. 1, § 4(b)(ii), and

(2) “any New Shipper Facility located subsequent to UP’s acquisition of control of SP on the Trackage Rights Lines.” *Id.*, § 4(b)(iii).¹

The “points listed on Exhibit A” are more commonly called 2-to-1 points—locations where at least one shipper was open to both Union Pacific and Southern Pacific and no other railroad when the BNSF Settlement Agreement was executed in 1995. *See id.*, Definitions (“2-to-1” Points; “2-to-1” Shipper Facilities). The “Trackage Rights Lines” are the lines over which BNSF has been granted trackage rights under RASA, with minor exceptions. *See id.*, Definitions (Trackage Rights Lines).

BNSF is not entitled to serve the Park because the Park is neither “at” any of the points listed on Exhibit A to the RASA nor “on” a Trackage Rights Line.

¹ I refer to the language in § 4 of the RASA because § 4 describes BNSF’s rights in south Texas, which includes the Elmendorf and Purcell. However, BNSF access to new facilities in other geographic areas is governed by the same terms.

1. The Park is not “at” a 2-to-1 point.

The Park is located near Milepost 17.5 of Union Pacific’s Rockport Subdivision at a station called Purcell. Purcell is not a point listed on Exhibit A to the RASA. The point listed on Exhibit A that is closest to the Park is Elmendorf. However, the Park is not “at” Elmendorf. The RASA defines the “boundaries” of 2-to-1 points “to include all areas within the switching limits of the locations.” *Id.*, Definitions (“2-to-1” Points). The RASA further specifies that a location’s switching limits are those switching limits “designated by tariff, clarified to the extent necessary by publicly-available information, in effect as of September 22, 1995.” *Id.*, § 9(g).

Southern Pacific’s switching tariff in effect as of September 22, 1995, states:

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.

See Ex. 3. The tariff’s description establishes that the northern boundary of Elmendorf’s switching limits is approximately Milepost 12.6, and the southern boundary is approximately Milepost 16.1, of what is now Union Pacific’s Rockport Subdivision. See Ex. 2.² The Park is near Milepost 17.5, so it is not within Elmendorf’s switching limits and therefore not “at” a 2-to-1 point.

2. The Park is not “on” a Trackage Rights Line.

The Park also is not on a Trackage Rights Line. The Park is located on an extension of the Rockport Subdivision that was not constructed until 20 years after the UP/SP merger. BNSF was not granted trackage rights over the extension under the RASA. The nearest Trackage Rights

² Some Union Pacific documents suggest the Rockport Subdivision ends at Milepost 11.0, outside Elmendorf’s switching limits, and they call Union Pacific’s tracks beyond Milepost 11.0 the Rockport Industrial Lead, but most refer to the entire mainline as the Rockport Subdivision. In my experience, naming conventions vary and can be inconsistent, and it is not unusual for regulated track to be described in some railroad documents as an “industrial lead.”

Line is Union Pacific's line between "SP Junction (Tower 112) and Elmendorf." Ex. 1, § 4(a). The RASA defines the end-points of Trackage Rights Lines by reference to the switching limits of locations at the end points. *See id.* § 9(g). In other words, BNSF's trackage right over the SP Junction-Elmendorf line terminate at the southern boundary of Elmendorf's switching limits, at approximately Milepost 16.1—short of the Park, which is near Milepost 17.5. The RASA also directly addresses when a new shipper facility is "on" a Trackage Rights Line. It states that a new shipper facility is not "on" a trackage rights line if it can be accessed only via a 49 U.S.C. § 10901 line of railroad that is not a Trackage Rights Line. *See id.*, Definitions (Trackage Rights Lines). My understanding is that the 1.4-mile extension of the Rockport Subdivision to Purcell is a § 10901 line of railroad, which provides an additional reason why the Park is not "on" a Trackage Rights Line.

B. Union Pacific told BNSF that the Park was not entitled to serve the Park under the new facilities condition.

Union Pacific has been clear and consistent in its communications with BNSF that BNSF is not entitled to serve the Park. BNSF first wrote Union Pacific on June 28, 2013. *See* Ex. 6. Union Pacific responded on July 29, explaining that the Park was not a 2-to-1 point because it "is clearly located approximately 1.4 miles beyond Mile Post 16.1, placing it outside the Elmendorf Switch district," and that "BNSF does not have trackage rights on the trackage from Mile Post 16.1 to the switch leading to the Mission Rail Park facility." Ex. 7.

BNSF renewed its request more than two months later, on September 30, arguing that the new Park was "within the switch limits" of a 2-to-1 point because Elmendorf is a 2-to-1 point, and the new track to the Park "connects directly to the Elmendorf switch district at MP 16.1." Ex. 8. Union Pacific responded on November 21, explaining that BNSF was not entitled to serve

the Park because the Park was located 1.4 miles beyond the end of Elmendorf's switch district, and because the Park is located on "an extension of UP's main line to Purcell." Ex. 9.

I am not aware that MRIP ever asked Union Pacific whether BNSF would have access to the Park. If MRIP had asked someone at Union Pacific, I likely would know about the request because those are the types of questions I answer as part of my job. If MRIP had asked, Union Pacific would have given the same answer we gave BNSF.

C. At about same time Union Pacific was responding to BNSF's inquiry about access to the Park, Union Pacific agreed that BNSF had rights to serve other new facilities in the Elmendorf area.

BNSF's request to serve the Park was only one of several BNSF requests to serve new facilities in or near Elmendorf in 2013. On September 17, BNSF requested confirmation that it had the right to serve Alamo Junction Rail Park, located near Milepost 13.67. *See* Ex. 10. Alamo is both "at" Elmendorf and "on" the Trackage Rights Line to Elmendorf. We confirmed BNSF's rights on October 17. *See* Ex. 11. Also on September 17, BNSF requested confirmation that it had the right to serve Southton Rail Yard, located near Milepost 8. *See* Ex. 12. Southton is on the Trackage Rights Line to Elmendorf. Again, Union Pacific confirmed BNSF rights on October 17. *See* Ex. 13.

More recently, on August 24, 2015, BNSF requested confirmation that it had the right to serve VP Racing Fuels, located near Milepost 13.67. *See* Ex. 14. We confirmed BNSF's rights and that location is open to both BNSF and UP. *See* Ex. 15.

Union Pacific continues to receive and respond to many BNSF requests for access under the new facilities condition. Just since the beginning of 2013, BNSF has gained access to at least 44 new facilities under the merger's new facilities condition.³

I understand that a BNSF witness claims that Union Pacific's analysis of BNSF's access rights was inconsistent with our treatment of access issues that arose in the late 1990s in Grand Junction, Colorado, and Fernley, Nevada. I am familiar with those situations. In both locations, Union Pacific granted access to facilities that were not adjacent to a Trackage Rights Line, but that BNSF could access from a Trackage Rights Line without operating over a § 10901 line of railroad.⁴ In other words, we applied the same approach we would currently apply under the RASA. The Park's situation is very different, because BNSF cannot serve the Park without operating over a § 10901 line of railroad over which it does not have trackage rights.

³ In the same timeframe, Union Pacific rejected just five requests, where the facilities either were not new, were not on a Trackage Rights Line, or did not have any rail service.

⁴ In both locations, the facilities at issue were being accessed via spurs or industrial track that branched off the mainline, not an extension of the mainline.

VERIFICATION

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

Executed on May 25, 2017.

/s/ Chris Sanford

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

REPLY VERIFIED STATEMENT

OF

ERIC O. WATKINS

REPLY VERIFIED STATEMENT

OF

ERIC O. WATKINS

My name is Eric Watkins. I am Regional Director of Network and Industrial Development for the Southern Region for Union Pacific Railroad Company (“Union Pacific”). I have been employed by Union Pacific for more than 24 years, and I have worked in a number of areas, including Clerical Operations, Damage Prevention, and Industrial Development. I have been in my current position for more than 5 years. In my current position, I am responsible for leading Union Pacific’s industrial development efforts in Texas, Louisiana, and Arkansas. My team and I assist customers with locating and expanding facilities on Union Pacific’s network. My team also manages Union Pacific’s relationships with Gulf ports served by the railroad, working with the Ports on new commercial opportunities and infrastructure expansions.

I am submitting this statement to address certain issues relating to the development of the facility known as Mission Rail Park (the “Park”) that are raised by the petition filed by BNSF Railway Company (“BNSF”) and Mission Rail Industrial Park, LLC (“MRIP”).

Union Pacific’s involvement with the Park began when we were approached in March 2012 by a company called ST One Logistics, which was interested in locating a new facility on property located approximately 1.4 miles beyond the end of track on the Rockport Subdivision.

Union Pacific signed an initial Memorandum of Understanding with ST One Logistics on April 5, 2012, which was later replaced by a Memorandum of Understanding dated August 14, 2012 (the “MOU”). The MOU contemplated that ST One Logistics would construct an extension of the Rockport Industrial Lead, a term sometimes used by Union Pacific to refer to the portion of the Rockport Subdivision from Milepost 11.0 through Elmendorf, Texas, to the end of track at

approximately Milepost 16.1. The MOU also contemplated that, once the construction was completed, ownership of the line would be transferred to Union Pacific.

The project that ultimately went forward was different than the project described in the MOU. By May 2013, FRAC Resources, LP, became involved in the project.

On May 21, 2013, Union Pacific and FRAC Resources entered into an Industry Track Agreement (“ITA”). *See* Ex. 4. The ITA was drafted to reflect that the new track would be used, at least initially, to serve a single shipper, FRAC Resources. It provided that FRAC Resources would construct the “Track”—three new industry tracks on what is now Park property. It further provided that FRAC Resources would construct the “Track 793 Extension”—an extension of the Rockport Industrial Lead to connect our mainline with the Track and thereby allow us to serve FRAC Resources. *See id.*, Recitals (“In addition, construction of the Track for the purpose of establishing rail service to Industry [*i.e.*, FRAC Resources] will require extension of Railroad’s Rockport Industrial Lead Track 793 . . .”).

Under the ITA, FRAC Resources would retain ownership of the Track. However, FRAC Resources would convey clear title to the Track 793 Extension to Union Pacific within 30 days of FRAC Resources’ completion of the Track 793 Extension. *See* Ex. 4, § 4. Conveyance of satisfactory title was “deemed a condition precedent to the maintenance and operation of the Track 793 Extension by Railroad.” *Id.*

The ITA provides that FRAC Resources would convey title to the Track 793 Extension to Union Pacific “at no expense to Railroad.” *Id.* However, Union Pacific and FRAC Resources had separately agreed that Union Pacific would reimburse FRAC Resources for its construction of the Track 793 Extension by paying a refund for each loaded railcar moving from or to the line over the course of three years, subject to a cap on the total amount.

As the project progressed, however, Union Pacific recognized that the new facility would likely include multiple shippers and receivers. We restructured our arrangement with FRAC Resources so that we would provide a lump-sum reimbursement for the cost to extend the Rockport Industrial Lead, rather than pay a per car refund over a three-year period. *See Ex. 4* (Supplemental Agreement No. 1).

I understand that MRIP's witness, Richard Kinsel, claims that "investors" in the Park believed that tenants would have access to rail service from both Union Pacific and BNSF. I do not know who Mr. Kinsel means by "investors," but Union Pacific never told anyone that BNSF would have access to the facility that became the Park. In discussions with ST One Logistics, there was never any question that the facility would be served exclusively by Union Pacific. I believe ST One Logistics made clear to FRAC Resources when FRAC Resources entered the picture that the facility would be served exclusively by Union Pacific.

I also understand that Mr. Kinsel believes the ITA reflects an understanding that BNSF would have access to the Park under the conditions to the UP/SP merger. I believe he is referring to language in Section 22 of the ITA. Section 22 states:

{

}

Section 22 does not mention BNSF access or the UP/SP merger conditions. It is a provision that appears in many of our agreements and is designed to ensure that any other railroad that obtains access to the track is governed by the ITA. FRAC Resources never asked about the meaning of that provision, but if they had, I would have explained it to them.

During the planning of the project, I never dealt with Mr. Kinsel. I do not believe he had contact with anyone at Union Pacific. If Mr. Kinsel or anyone else involved in the project had

asked me directly, I would have told them that the facility would be served exclusively by Union Pacific.

VERIFICATION

I, Eric O. Watkins, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this Reply Verified Statement.

Executed on May 25, 2017.

/s/ Eric O. Watkins

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

REPLY VERIFIED STATEMENT

OF

JACQUELINE BENDON

REPLY VERIFIED STATEMENT

OF

JACQUELINE BENDON

My name is Jacqueline Bendon. I am a Senior Business Director for Union Pacific Railroad Company (“Union Pacific”). I have been employed by Union Pacific for 19 years. During my career at Union Pacific, I have worked at Union Pacific Distribution Service and in the railroad’s Corporate Audit and Marketing and Sales departments. I have been in my current position since December 2014. As Senior Business Director in Marketing and Sales, I am responsible for developing, implementing, and managing Union Pacific’s overall commercial strategy with regard to our Minerals customers. Our Minerals customers include shippers of sand used in hydraulic fracturing (“fracking”), often called “frac sand.”

I am submitting this statement to address claims about Union Pacific’s rates and service made by BNSF Railway Company (“BNSF”) and Mission Rail Industrial Park, LLC (“MRIP”) in their petition seeking rights for BNSF to serve a facility known as Mission Rail Park (the “Park”), located at Purcell, Texas.

At present, Union Pacific’s traffic to the Park consists primarily of frac sand that our customers ship to Twin Eagle Sand Logistics LLC (“Twin Eagle”), a transloader located in the Park. Most or all of that frac sand is then moved by truck to the Eagle Ford Shale for use in fracking.

The number of customers that ship frac sand to the Park has varied over the years. {{

}}

The Park competes with many other South Texas facilities to attract frac sand ultimately destined to the Eagle Ford Shale. Just a few miles away from Mission Rail Park, Alamo Junction Rail Park at Elmendorf, Texas, and Southton Rail Yard at Southton, Texas, have facilities that transload frac sand destined to the Eagle Ford Shale. We also serve facilities that transload frac sand destined to the Eagle Ford Shale in Dilley, Encinal, Gardendale, George West, Refugio, and Victoria, Texas. BNSF can serve several of these facilities, including Alamo, Southton, Refugio, and Victoria.

I understand that MRIP complains in this case about Union Pacific's rates and service to the Park, and to Twin Eagle in particular, and suggests that Union Pacific's rates and service have hurt Twin Eagle's business in the Park. I further understand that MRIP suggests that shippers using Alamo receive better rates and service from Union Pacific than shippers using the Park because Union Pacific must compete with BNSF for movements of frac sand to Alamo. Based on my knowledge of the market and these customers, MRIP's complaints have no merit.

First, I am not aware of any complaints about our service to the Park or to Twin Eagle. The same regularly scheduled local trains serve the Park, Alamo, and Southton, so service to the three locations should be nearly identical. We also operate full trains of sand to the Park, Alamo, and Southton as needed, and we treat all three facilities equally in that regard. If Twin Eagle or a shipper had raised service issues with Union Pacific, I likely would have known about it, because those are the types of issues I deal with as part of my job.

Second, MRIP's claims about rates are also perplexing. Our tariff rates for moving frac sand to Purcell are exactly the same as our tariff rates for moving frac sand to Elmendorf. In fact, Purcell and Elmendorf are just two of the 84 stations in Union Pacific's "San Antonio Sand UPG Group" in our frac sand tariff, UPRR Tariff 14413, and the same rates apply to each station in

that group. {{

}}

Third, with regard to MRIP's statement that Twin Eagle experienced declining volumes in 2016, I believe the reduced volumes were attributable to changes in the market for frac sand, as oil and gas exploration and production slowed in the Eagle Ford Shale area. By some estimates, consumption of frac sand in the Eagle Ford Shale fell from 23.8 billion pounds in 2015 to 14.9 billion pounds in 2016, or 37%.¹ By comparison, Union Pacific movements of frac sand to the Park fell from {{ }} in 2015 to {{ }} in 2016, or {{ }}. These figures suggest Twin Eagle's facility in the Park actually fared better than others in a down market.

Finally, Union Pacific has very strong incentives to encourage shippers to locate and remain in the Park. We recognize that if we are not offering competitive rates and high-quality service, shippers will locate or shift their business to nearby facilities such as Alamo, Southton, and Victoria, where they can obtain service from BNSF. We recently completed construction of a new \$16.4-million yard on property acquired from the Park, which provides even stronger incentives to encourage the growth and success of the Park so we are effectively utilizing this substantial new investment.

¹ See Thomas Jacob, *FRAC Sand Demand Expected to Exceed Peak 2014 Levels*, IHS Markit (May 3, 2017), <http://blog.ihs.com/frac-sand-demand-expected-to-exceed-peak-2014-levels>.

VERIFICATION

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

Executed on May 25, 2017.

/s/ Jacqueline Bendon

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 Keddle, 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: _____

Exhibits to Restated and Amended BNSF Settlement Agreement

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

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

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

Exhibit D -- Dispatching Protocols

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

Exhibit F -- Overhead Trackage Rights Lines

EXHIBIT A

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

Points Referred to in Section 1(b)

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

Points Referred to in Section 3(a)

Ontario CA
La Habra CA
Fullerton CA

Points Referred to in Section 4(b)

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

Points Referred to in Section 5(b)

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

Points Referred to in Section 6(d)

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

EXHIBIT B

EXHIBIT B

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

Concept

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

Covered Territory

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

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

and points in

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

Traffic Covered

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

Proportional Rates

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

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

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

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

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

Application

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

Service

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

Third Party Consultant

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

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

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

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

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

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

B. Compute BNSF Division on a Specific Move

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

EXHIBIT C

660-3582
342-2280

S.P. Avondale Yard

05/12/16
Crandall
350-7150
== TOTAL PAGE.001 ==

P.01/01
PAGE.001

SEP 24 '95 11:21 FR UP SPRING 713-3507593 13 350 7593 TO B2715955
SEP 24 '95 9:22 FROM UNION PACIFIC AVONDAL

Old Yard Capacity

4- 7900' (Thru X-over)

5- 7800' (" ")

6- 1900'

7- 2500'

8- 2100'

9- 1100'

10- 1200'

11- 1200'

12- 1200'

Old Yard



New Yard

Trk. 40-5300'

37-39-4000'

30-36-2000'

29-1500'

28-1200'

27-1150'

26-1100'

25-900'

Old Yard

13-1800'

14-1400'

15-1800'

16-1700'

17-1600'

18-1500'

19-1400'

20-1300'

21-1200'

22-1100'

Not to scale
not entirely
accurate

EXHIBIT D

April 24, 1996

BNSF - UP/SP DISPATCHING PROTOCOLS

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

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

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

- 3 -

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

EXHIBIT E

2-To-1 Point Identification Protocol

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

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

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

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

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

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

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

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

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

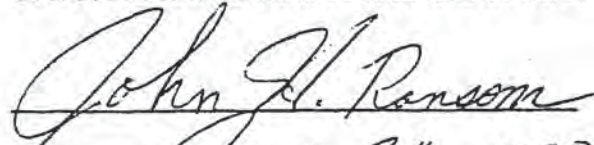
receives its longest haul and UP receives \$3 per car mile beyond that junction. If no joint through rate exists, BNSF receives its longest haul via junctions in existence between UP and BNSF, prior to the date of UP control over SP, September 11, 1996, and UP receives \$3 per car mile beyond. UP must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

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

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

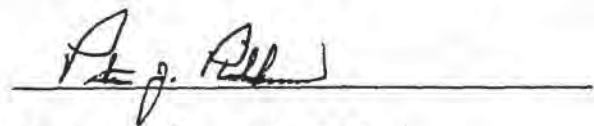
AGREED TO AND ACCEPTED BY:

UNION PACIFIC RAILROAD COMPANY



Date: June 24, 1998

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY



Date: June 26, 1998

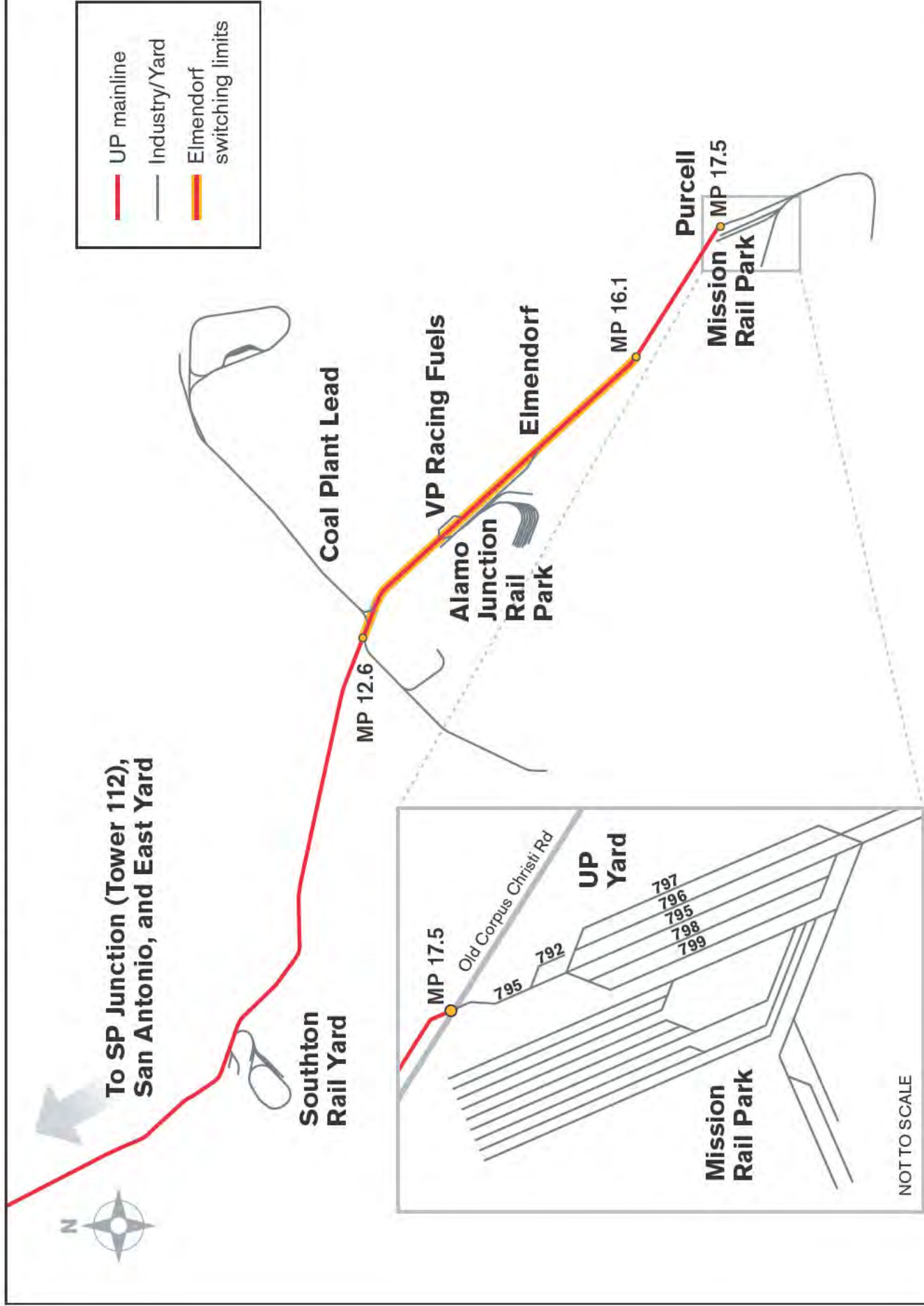
EXHIBIT F

EXHIBIT F

LIST OF OVERHEAD TRACKAGE RIGHTS

1. Western Trackage Rights
 - A. UP/SP shall grant BNSF Overhead Trackage Rights on SP's Valley Subdivision between MP 141.9 near Binney Junction, CA and Roseville, CA in the vicinity of SP's Valley Subdivision MP 106.6.
2. South Texas Trackage Rights
 - A. UP/SP shall grant BNSF Overhead Trackage Rights on the following lines:
 - a) SP's Port Lavaca Branch, between Placedo, TX in the vicinity of MP 14.2, and a point of build-in along said branch in the vicinity of MP 6.93 at Kamey, TX; and
 - b) UP's line between Round Rock, TX, in the vicinity of UP's Austin Subdivision Milepost 161.79, and McNeil, TX, in the vicinity of UP's Austin Subdivision Milepost 166.1.
3. Eastern Texas – Louisiana Trackage Rights
 - A. UP/SP shall grant BNSF Overhead Trackage Rights on UP's Beaumont Subdivision between MP 458.69 in the vicinity of Beaumont, TX and MP 377.98 (Gulf Coast Junction) in the vicinity of Houston, TX.
4. Additional Rights
 - A. UP/SP shall grant BNSF Overhead Trackage Rights on SP's Martinez Subdivision between approximately MP 2 in the vicinity of Oakland, CA and approximately MP 13 in the vicinity of Richmond, CA.
5. Rights to Omnibus Points
 - A. UP/SP shall grant BNSF Overhead Trackage Rights over UP/SP's Jefferson City Subdivision between MP 34.8 near Pacific, MO and MP 43.8 near Labadie, MO.

Rockport Subdivision near Elmendorf and Purcell



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-		

EXHIBIT 4: ITA

REDACTED

Milepost 16.1 - Looking north.



Milepost 16.1 - Looking south.



Looking south Milepost 17.5.



Looking south to Milepost 17.5



Looking north to Milepost 17.5





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

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.

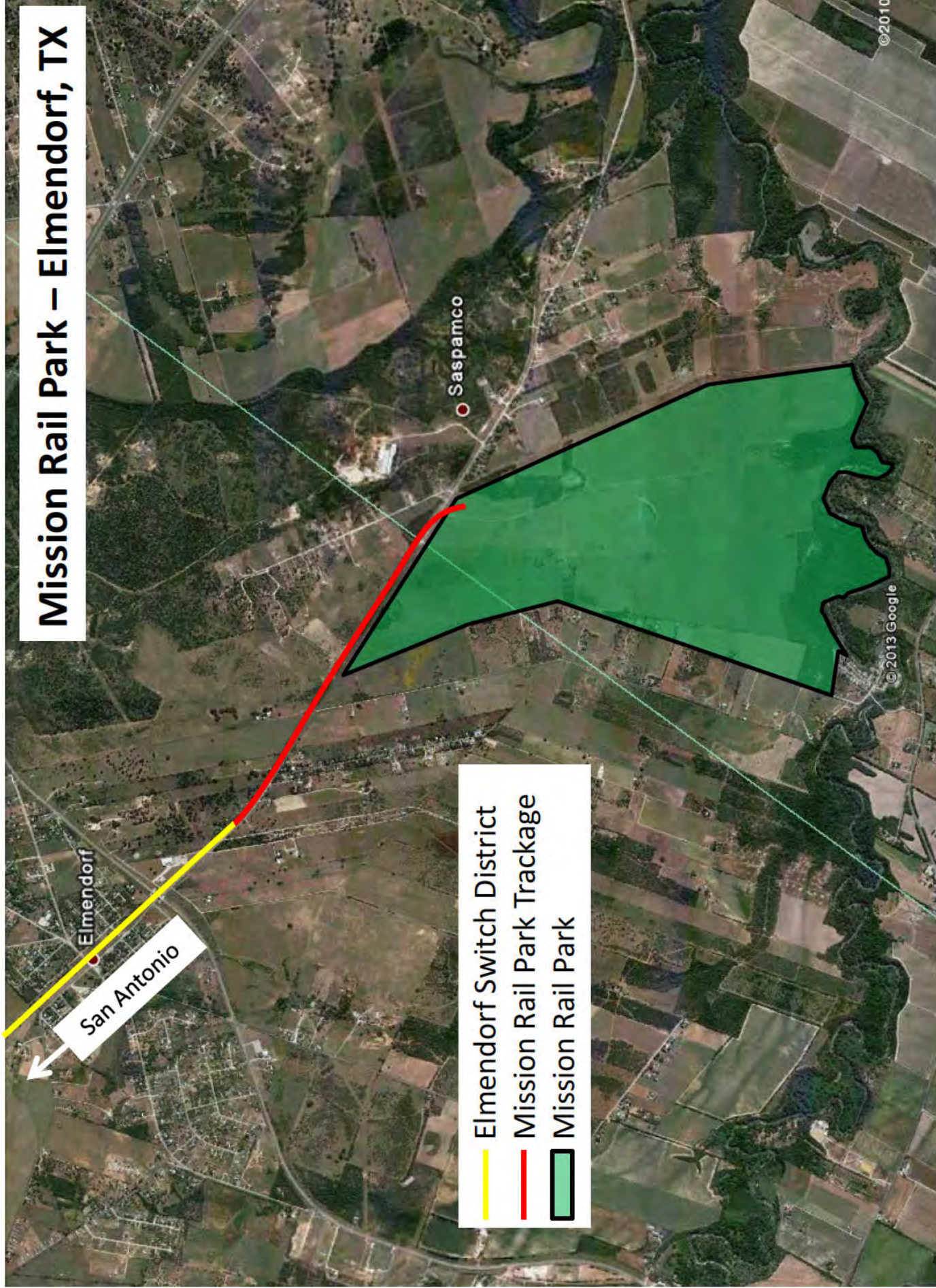
In accordance with Section 4(d) of the Restated and Amended Agreement, UP must notify BNSF in writing of your approval or disapproval of BNSF's service plan within 30 days (i.e., July 28, 2013) of receipt of this letter. Upon UP's confirmation of service, BNSF's local Operations personnel will contact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



Elmendorf Switch District
Mission Rail Park Trackage
Mission Rail Park

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



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

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



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 17, 2013

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

Re: Alamo Junction Rail Park at 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 Alamo Junction Rail Park in the vicinity of MP 13.67, on the Rockport Subdivision. This is a new shipper facility inside the switch district of a 2 to 1 point.

BNSF will serve this industry directly. Service is planned to commence the later of 45 days from the date of this letter (November 1, 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 of receipt of this letter (October 17, 2013). 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

UNION PACIFIC RAILROAD
1400 Douglas Street Omaha, Nebraska 68179

October 17, 2013

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

Re: Alamo Junction Rail Park, Elmendorf, TX

Dear Chris:

Union Pacific has received BNSF's letter of September 17, 2013 concerning BNSF access to the Alamo Junction Rail Park located near MP 13.67 on the Rockport Subdivision. BNSF has requested to serve the location directly.

The Alamo Junction Rail Park facility at the address you identified falls within the definition of a "New Shipper Facility" on a Trackage Rights Line as specified in the RASA. Therefore, UP confirms that BNSF may access the Alamo Junction Rail Park at the above location.

This industry is currently under construction and the rail infrastructure is not in place. Therefore, until the industry is operational and able to ship/receive rail cars, UP does not know what type of support capacity may be needed to ensure efficient operations for UP and BNSF along the Rockport subdivision. Upon identification of the infrastructure needs, BNSF may be required to share equally in any such capital investment (RASA Section 9 c (v)). BNSF may not initiate service until this evaluation is completed, mutually agreed upon, and resolved by UP and BNSF.

BNSF is reminded that RASA requires BNSF provide the specifics of its operating plan over UP/SP trackage. In your letter you state that BNSF local Operations personnel will contact UP Operations personnel to discuss any concerns. BNSF's personnel should promptly discuss the precise nature of BNSF's direct service so conflicts and confusion can be avoided.

Regards,



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

dphartma@up.com

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



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 17, 2013

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

Re: Southton Rail Yard at Southton, 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 Southton Rail Yard at 12070 Center Rd, Unit 1, San Antonio, TX 78223 (UP station of Southton). This is a new shipper facility on a trackage rights line.

BNSF will serve this industry directly. Service is planned to commence the later of 45 days from the date of this letter (November 1, 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 of receipt of this letter (October 17, 2013). 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

UNION PACIFIC RAILROAD
1400 Douglas Street Omaha, Nebraska 68179

October 17, 2013

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

Re: Southton Rail Yard, Southton, TX

Dear Chris:

Union Pacific has received BNSF's letter of September 17, 2013 concerning BNSF access to Southton Rail Yard located at 12070 Center Rd, Unit 1, San Antonio, TX 78223 (UP Station of Southton, TX). BNSF has requested to serve the location directly.

The Southton Rail Yard facility at the address you identified falls within the definition of a "New Shipper Facility" on a Trackage Rights Line as specified in the RASA. Therefore, UP confirms that BNSF may access Southton Rail Yard at the above location.

This industry is currently under construction and the rail infrastructure is not in place. Therefore, until the industry is operational and able to ship/receive rail cars, UP does not know what type of support capacity may be needed to ensure efficient operations for UP and BNSF along the Rockport subdivision. Upon identification of the infrastructure needs, BNSF may be required to share equally in any such capital investment (RASA Section 9 c (v)). BNSF may not initiate service until this evaluation is completed, mutually agreed upon, and resolved by UP and BNSF.

Regards,



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

dphartma@up.com

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



Bobby Strong
*Manager Franchise
Development UP/SP
Network Strategy*

BNSF Railway Company
2500 Lou Menk Drive
AOB 3rd Floor
Fort Worth, TX 76131
Phone: 817-867-6697
Email: bobby.strong@bnsf.com

August 24, 2015

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

Re: VP Racing Fuels at 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 VP Racing Fuels in the vicinity of MP 13.67, on the Rockport Subdivision. This is a new shipper facility inside the switch district of a 2 to 1 point.

BNSF will serve this industry directly. Service is planned to commence the later of 45 days from the date of this letter (October 8, 2015) and will be in conformity with the terms of any applicable agreements between BNSF and UP.

In accordance with Section 4(d) of the Restated and Amended Agreement, please confirm approval of BNSF's service plan within 30 days of receipt of this letter (September 24, 2015). 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, appearing to read "Bobby Strong", with a stylized flourish at the end.

Bobby Strong
Manager Franchise Development UP/SP
BNSF Railway

UNION PACIFIC RAILROAD
1400 Douglas Street Omaha, Nebraska 68179

September 28, 2015

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

Re: VP Racing Fuels, Elmendorf, TX

Dear Bobby:

Union Pacific has received BNSF's August 24, 2015 letter concerning BNSF access to VP Racing Fuels ("Facility") in the vicinity of MP 13.67, on UP's Rockport Subdivision, Elmendorf, TX. BNSF has requested to serve the Facility directly.

The Facility as described meets the definition of a "New Shipper Facility", located at a "two-to-one" point, as specified in the RASA. Therefore, UP confirms that BNSF may access the Facility.

Regarding the BNSF operating plan, inbound cars must be able to be spotted upon arrival and may not hold on the UP Rockport Sub. BNSF trains may not interfere with current UP manifest/unit train business that would cause congestion and back log of current operations.

Referencing the above operating information, please ensure that local BNSF operations personnel contact UP personnel to discuss and resolve any operational issues.

Regards,



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

dphartma@up.com

CC: B. Maher, R. Fortner, M. Fernen, E. Davies, D. Hughes, O. Durkin, C. Sanford, M. White