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BEFORE THE
SURFACE TRANSPORTATION BOARD

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May 16, 2018
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Finance Docket No. 36197

UNION PACIFIC RAILROAD
--PETITION FOR DECLARATORY ORDER AND PRELIMINARY INJUNCTION--

**UNION PACIFIC RAILROAD COMPANY'S
PETITION FOR DECLARATORY ORDER
AND PRELIMINARY INJUNCTION**

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BNSF Railway Company ("BNSF") is unreasonably interfering with Union Pacific Railroad Company's ability to provide rail transportation under a trackage rights agreement. BNSF's refusal to allow Union Pacific to operate in the same manner as we have operated for decades is threatening to disrupt service to customers located at Longview, Washington and customers with traffic moving to or from the rail line between Tacoma, Washington and Vancouver, Washington.

Union Pacific has demanded arbitration under the governing agreement to resolve this issue. Once arbitration has been demanded, the agreement automatically requires preservation of the *status quo* – that operations continue as previously conducted under the agreement – until the arbitral panel has had a fair opportunity to rule. Rather than await conclusion of the arbitration process as contemplated by the agreement, BNSF has instead chosen a path of immediate self-help. By doing so, BNSF has willfully and wantonly violated its contractual obligations and placed in immediate peril continued rail service to Union Pacific customers. BNSF's callous indifference to its obligations combined with the serious disruption to rail service resulting from that indifference requires extraordinary Board intervention. Union Pacific requests the Board

issue a declaratory order and preliminary injunction requiring BNSF to allow Union Pacific to continue operating as it has for decades pending the outcome of the parties' arbitration.

I. BACKGROUND

A. BNSF is Interfering with a Long-Established Operation

This dispute concerns Union Pacific's ability to perform a switching movement at Longview, Washington. In the late-night/early-morning hours this past Friday/Saturday, BNSF unilaterally refused to allow the switching movement. Prior to this, Union Pacific would stop its train on the main line to switch cars into and out of Longview Junction. Union Pacific would leave a cut of cars on a main line track (one of three main line tracks in this location) and use the locomotive to drop or pull cars into or out of Longview Junction.¹ This operation is necessary because there is not sufficient room in the yard tracks at Longview Junction to accommodate the required movements.

According to Union Pacific's transportation plan, the switching operation is scheduled to occur twice each day, once for a northbound train and once for a southbound train. On the northbound movement, the train originates at Lake Yard in Portland, Oregon. The train departs Portland with a block of cars for customers served by LVSW and a block of cars for customers served by the Puget Sound & Pacific Railroad ("PSAP"). At Longview Junction, the train will tie down the PSAP block and move the LVSW block into the LVSW yard. The train then recouples with the PSAP block and departs for Blakeslee, Washington, where the cars are interchanged to PSAP and the train terminates.

¹ Longview Junction is operated by the Longview Switching Company ("LVSW"), which is jointly owned by Union Pacific and BNSF. LVSW physically serves customers in the vicinity of Longview, Washington and interchanges that traffic to Union Pacific and BNSF at Longview Junction.

On the southbound movement, the train originates at Blakeslee with a block of outbound cars from PSAP customers. The train proceeds to Longview where it leaves the PSAP cars on the mainline and uses the locomotives to pick up outbound cars from LVSW customers, which are waiting in the LVSW yard. The train continues south to Albina Yard in Portland where it performs another work event to drop off cars then proceeds to Hinkle (another Portland-area yard) where the train terminates. On average, each train carries traffic for 17 customers served by LVSW and PSAP.

Union Pacific regularly performed this switching operation up to three times per day for decades. In 2014, BNSF began construction of a third main line track on portions of the Line, including at Longview Junction. To accommodate BNSF's construction, Union Pacific agreed temporarily to stop performing the switching operation. During this time, Union Pacific ran shorter trains between Portland and Longview and between Portland and Blakeslee. These trains were short enough to fit inside LVSW's yard at Longview. Because the trains were shorter, this modified operation required Union Pacific to run more trains. During BNSF's construction, Union Pacific operated an average of 1-2 additional trains per day to move the same amount of traffic. Running shorter trains resulted in a less efficient operation because Union Pacific was required to operate more trains, which required more crews and locomotives. Running more, shorter trains used more track capacity on the main line than running fewer, longer trains. It also increased customer transit time by an average of 20 hours per car to the cycle time because cars waited longer to get on one of the shorter trains. But these efficiency losses and increased operational complexities were acceptable due to the finite duration of BNSF's construction project, which promised to provide additional main line capacity.

Union Pacific resumed the switching operation in November 2017, when BNSF's construction was complete. The only change in operations was that we *reduced* the number of switching events from three per day to two per day as a result of other changes in the transportation plan.

On April 23, 2018, BNSF notified Union Pacific that it must stop performing the switching operation no later than by May 3, 2018. BNSF claimed this was necessary because the switching operation blocks one of the main line tracks for five hours per day and interferes with operations on the Line. BNSF did not provide any explanation as to why the switching operation, which had been regularly conducted for decades, was suddenly creating the alleged interference.

BNSF's failure to provide any reason this long-standing operation is no longer acceptable is particularly interesting given the recent completion of BNSF's construction on the Line. BNSF added a third main line at the exact location on the Line where Union Pacific performed the switching operation. Prior to this added capacity, Union Pacific performed the switching operation up to *three* times per day. Now, after increasing capacity by one third at this location, BNSF claims that performing the switching operation *twice* per day is interfering with its operations. Simple arithmetic demonstrates there must be another reason behind BNSF's actions, which BNSF has chosen not to share. Moreover, BNSF's unilateral actions will not necessarily reduce main line track congestion. As explained above, the alternative is running more, shorter trains which will consume more capacity on the main line than fewer, longer trains. When viewed in the light of these incontrovertible facts, BNSF's stated explanation strains credulity.

B. BNSF's Actions Have Already Disrupted Service

Despite BNSF's unwarranted threats, Union Pacific continued performing the switching operation until Friday, May 11. At approximately 9:00 a.m. on May 11, BNSF notified Union

Pacific that BNSF would not allow the switching operation to take place. The next switching operation was scheduled to occur late Friday night/early Saturday morning (on May 11/12).

When Union Pacific's southbound train attempted to stop at Longview Junction and perform the switching operation, the BNSF dispatcher refused to allow the train to stop. This meant that 101 outbound cars from LVSW customers were not picked up as scheduled. This also created operational issues for LVSW because the cars were not removed as planned. LVSW required 10-12 hours to reswitch and transfer cars in its yard to make room for the next scheduled BNSF and Union Pacific trains. These additional movements strained LVSW's crew resources and during this time no traffic could enter or leave LVSW's yard.

On May 12, BNSF briefly relented and allowed the northbound train to perform the switching operation. However, the southbound train on May 12 was not allowed to perform the operation. In order to avoid further disruption to LVSW customers, the southbound train departed Blakeslee without any PSAP cars, so that it would be short enough to pull into the LVSW yard and pick up outbound LVSW customer cars. This created at least a full day of delay for PSAP's customers.

On May 13, BNSF again refused the northbound train. This meant the train again had to be short enough to fit inside LVSW's yard. To accommodate this, the train departed Lake Yard without the inbound PSAP cars. BNSF refused again on the southbound train, which picked up the PSAP cars that were delayed from May 12. This meant it could not make the pick up at Longview, forcing approximately 97 Longview customer cars to wait an additional day.

On May 14, the northbound train was forced to bypass Longview to accommodate the PSAP customers that did not receive cars on May 13. Due to the building backlog of cars in Portland, Union Pacific was forced to run an extra northbound train to Longview, which required

an additional train crew and two additional locomotives and consumed additional capacity on the Line. The southbound train on May 14 again left Blakeslee without any PSAP cars in order to make a pickup at Longview.²

In light of BNSF's intransigence, Union Pacific is currently working to modify its transportation plan to avoid significant disruptions. As explained above, this modified plan is introducing new inefficiencies and needless dislocations.

C. BNSF is Blatantly Violating the Trackage Rights Agreement

Longview is located on the BNSF-owned line between Vancouver, Washington and South Tacoma, Washington (the "Line"). Union Pacific operates over the Line pursuant to a trackage rights agreement from 1909, attached hereto as Exhibit 1 (the "Agreement").³ The Agreement provides Union Pacific with the equal joint possession and use of the Line. Ex. 1, § 1. BNSF has authority to direct movements over the Line, but must do so in an equal, just, and fair manner and may not unjustly discriminate against Union Pacific. Ex. 1, § 4. Union Pacific has the same rights and privileges to operate over the line as BNSF. *Id.*

Most relevant to this Petition, under Article III, Section 5 of the Agreement, when a dispute arises under the Agreement and is submitted to arbitration, the parties must continue to transact business as they did *prior to the dispute arising*. Union Pacific began performing the switching operation again, following BNSF's construction, in November 2017, and had performed the operation for decades prior to BNSF's construction project. Union Pacific

² This entirely unnecessary pattern of inefficient resource use, strained capacity, and deleterious service impacts on LVSU and Union Pacific's customers at Longview has continued to and including the date of this Petition.

³ The Agreement was entered into by BNSF's predecessor, Northern Pacific Railway Company, and Union Pacific's predecessor, Oregon & Washington Railroad Company. There is no dispute that the Agreement governs Union Pacific's use of the line or that Union Pacific has common carrier operating authority over the line.

demanding arbitration of this dispute on May 11, 2018 after BNSF informed Union Pacific that it would no longer allow the operation to take place.⁴ The unambiguous terms of the Agreement allow Union Pacific to continue performing the switching operation until the arbitration is resolved.

II. ARGUMENT

Union Pacific has *de facto* authority from the Board under 49 U.S.C. § 10901 to operate over the Line, and Union Pacific has common carrier rights and obligations over the Line under 49 U.S.C. § 10101.⁵ BNSF's actions are interfering with Union Pacific's ability to utilize fully its operating rights over the Line and to carry out its common carrier obligations, thus implicating the Board's authority to resolve the dispute.⁶ Union Pacific is only seeking, however, *limited* relief from the Board in deference to the contractual jurisdiction of the arbitral panel to rule on the merits.

A majority of the Federal Courts of Appeals have held that injunctions may be issued by a district court to maintain the *status quo* pending arbitration, without invading the province of the arbitral panel's merits jurisdiction. Union Pacific brought this matter to the Board because the subject matter of this dispute falls squarely within the Board's jurisdiction. Moreover, the Board's authority to issue injunctions in aid of its jurisdiction is coterminous with the Article III

⁴ Union Pacific's original arbitration demand contained a clerical error and a corrected demand was sent on May 12, 2018.

⁵ Because the Agreement predates the Transportation Act of 1920, no regulatory authority was necessary for Union Pacific's predecessor to obtain common carrier operating authority.

⁶ The Board has discretion regarding whether to issue a declaratory order. The Board has authority to issue a declaratory order to "terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e). *See also* 49 U.S.C. § 721(a). This dispute falls within the Board's jurisdiction as it involves transportation by a rail carrier. 49 U.S.C. § 10501(a)(1).

courts.⁷ Nor does issuing the requested preliminary injunction run afoul of the Board's stated preference to avoid involving itself in contract disputes. This is so because the Board need not interpret the Agreement involved in this dispute in order to issue the limited, provisional relief requested here. In fact, the Board need not and should not interpret the Agreement at all. That adjudicative task falls within the purview of the arbitral panel. The Board need only find that BNSF's unilateral actions are causing immediate, irreparable harm and injuries otherwise not redressable at the conclusion of the arbitration process, leaving the merits for another day and another forum.

We request here only issuance of an order by the Board (i) preserving the *status quo* (ii) until the arbitration process has concluded. Such tailored relief, finite in both scope and duration, will prevent BNSF from further interfering with Union Pacific's operations and service to its customers, while the parties arbitrate their dispute to a lawful and just conclusion. Board action is necessary because there is no procedure under the Agreement for Union Pacific to obtain the swift but temporary relief demanded by BNSF's conduct.

A. An Injunction is Required to Maintain the *Status Quo* and Protect Shippers

Under 49 U.S.C. § 1321(b)(4), the Board may issue an appropriate order, such as a preliminary injunction, when necessary to prevent irreparable harm. To obtain an injunction, Union Pacific must establish that (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be preliminarily enjoined, (2) it will suffer irreparable harm in the absence of a preliminary injunction, (3) other interested parties will not be substantially harmed by a preliminary injunction, and (4) the public interest supports the granting of the

⁷ See e.g., *Pejepscot Industrial Park, Inc., D/B/A Grimm Industries--Pet For Declaratory Order*, FD 33989, slip op. at 14 (STB served May 15, 2003) (acknowledging that Federal District Courts have concurrent jurisdiction with the Board over the common carrier issues).

preliminary injunction. *See, e.g., Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *N. Coast R.R. Auth. & Nw. Pac. R.R. v. Sonoma-Marín Area Rail Transit Dist.*, NOR 42148, slip op. at 3 (STB served Oct. 21, 2016); *Richard Best Transfer, Inc. V. Union Pacific*, NOR 42149, slip op. at 8 (STB served Dec. 22, 2016).

B. Union Pacific is Likely to Succeed on the Merits

The only issue Union Pacific is asking the Board to consider is whether BNSF is required to allow Union Pacific to continue performing the switching operation pending resolution of the arbitration process that has already been set in motion. In situations like this, it would be entirely appropriate for the Board to issue a decision on Union Pacific's injunction request without addressing the merits of the underlying dispute.⁸ If the Board decides, however, that it must address the limited merits-question of whether the Agreement forecloses immediate self-help by any party prior to conclusion of arbitration validly demanded, then there is no doubt that Union Pacific would prevail on that question. The language of Article III, Section 5 of the Agreement could not be more explicit:

until the arbitrators shall make their award upon any question submitted to them, the business, settlements and payments to be transacted and made under the terms of this agreement shall continue to be transacted and made in the manner and form existing prior to the arising of such question.

Union Pacific performed the switching operation for many, many years, with only a relatively brief hiatus to accommodate, in good faith, a BNSF construction project. Union Pacific resumed the switching operation as soon as possible after construction was complete. There is

⁸ *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 434-435 (2d Cir. 1993) ("a request for a *status quo* injunction pending arbitration does not require examination of the merits of the underlying disputes.").

absolutely no lawful basis for BNSF to prevent Union Pacific from continuing to perform the switching operation under review *while the parties arbitrate the ultimate outcome*. Because Union Pacific is virtually certain to prevail on the merits of whether the *status quo* must be maintained pending arbitration, this factor weighs heavily in favor of the Board's granting the limited injunctive relief requested here.

Even if the Board were to apply its traditional standard, an injunction is still appropriate because Union Pacific is likely to prevail on the entire merits of the underlying dispute. The ultimate issue to be decided in arbitration is whether BNSF may prohibit Union Pacific from performing the switching operation.

BNSF relies on its right to direct train movements over the Line under reasonable rules and regulations found in Article III, Section 4. However, the very next sentence requires all rules, regulations, and train schedules to be equal, just, and fair. And it prohibits such rules from discriminating against any user of the Line. BNSF's newly-created, unilateral rule that Union Pacific may not perform the switching operation is facially unreasonable, unjust, and unfair. On top of that, because Union Pacific is the only user of the Line affected by the rule, the rule discriminates against Union Pacific.

BNSF's apparent basis for its unilateral prohibition is that the switching operation consumes too much track capacity. As we have explained, and as demonstrated in the evidence supporting this Petition, this argument is completely unsupported by the facts. Without a factual basis for the prohibition, which marks a significant and abrupt departure from the parties' long-standing practice under the Agreement, the rule is simply arbitrary, self-serving, and malicious.

BNSF will doubtless contend that its new rule is not discriminatory because BNSF does not itself currently perform switching operations on the main line at Longview Junction.⁹ Therefore, this argument goes, it should be free to impose unilaterally a rule that precludes Union Pacific from performing such operations. The Board should not tarry long with that argument. BNSF recently chose to restructure its operations in a way that does not require switching events on the main line at Longview Junction. After BNSF made this decision, which it undoubtedly made because BNSF saw a benefit to changing its operations, BNSF imposed the prohibition on Union Pacific without regard to the effect on Union Pacific or its customers. Under the Agreement, the mere fact that BNSF does not perform the same exact operation is not a sufficient reason to preclude Union Pacific from doing so. Unlike most trackage rights agreements, Union Pacific has extremely broad rights under the Agreement. Union Pacific has the same rights and privileges to operate over the Line as BNSF and is entitled to equal joint possession and use of the Line. Ex. 1, §§ 1, 4. BNSF cannot impair Union Pacific's rights by imposing an arbitrary operating restriction that only affects Union Pacific.

C. BNSF is Irreparably Harming Union Pacific and Shippers

⁹ It is important to stress that Union Pacific is *not* arguing that mainline switching operations should be allowed in all instances. Union Pacific is also *not* arguing that a trackage rights tenant should be allowed to dictate operations over a trackage rights line. Union Pacific is arguing a very narrow issue based on the specific and unique facts of this matter: under the Agreement, which grants Union Pacific much broader rights than typically granted to a trackage rights tenant, BNSF may not prohibit the switching operation because Union Pacific has performed the operation for many years and there is no adverse operational affect caused by Union Pacific's continued performance of the switching operation. Mainline switching operations may well be untenable, unreasonable, or unauthorized in other geographic locations and operational contexts.

As explained above, BNSF actions are already adversely impacting Union Pacific's operations, LVSF and shippers served by LVSF and PSAP. Union Pacific is being harmed in a variety of ways. We are being required to use more trains, locomotives, and crews to move the same amount of traffic. The Board is well aware of Union Pacific's recent challenges finding crew members to operate its trains. BNSF's actions has only served to exacerbate already severe human resource constraints by placing additional strain on our train crews just as we are beginning to see a sustained recovery in operations. BNSF may claim this is merely an economic injury, but that is not the case. If Union Pacific is unable to find sufficient train crews, it may have cascading effects across the region and the entire network, as we have seen recently. While the direct injury caused by such service disruptions might technically be measurable in dollars, and thus susceptible to redress in the form of legal damages, the indirect and secondary injuries for Union Pacific clearly rise to the level of irreparable injury.¹⁰

Moreover, if Union Pacific is unable to provide timely, reliable service to customers it is likely to lose those customers. We have already seen delays of up to 24 hours in customer car cycle times. We are diligently working to avoid significant impacts on customers. However such impacts are certain to arise if the current situation persists. Customers should not be forced to experience business interruptions due to BNSF's unilateral actions before the arbitral panel rules. An injunction is appropriate now given the already accumulating delays affecting numerous customers.

¹⁰ "Economic losses that are substantial and unredressable can qualify as irreparable injury." *Colorado Wheat Administrative Committee, et al. v. V and S Railway*, NOR 42140, slip op. at 10-11 (STB served May 7, 2015); *see also CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005) (finding irreparable injury where railroad threatened with reduced operational flexibility and efficiency).

Customer delays are even more worrisome because Union Pacific competes directly with BNSF for these customers' traffic. If these customers are driven to BNSF, or stop shipping rail, due to BNSF's unjustifiable actions, Union Pacific will be irreparably harmed by the loss of customer goodwill.¹¹ If shippers stop shipping rail, or ship less rail, then LVSW and PSAP will likewise be harmed.

Shippers are also being irreparably harmed. Given the very short time between BNSF's action and date of this Petition, and in the wake of Union Pacific's extraordinary efforts to try to shield customers from adverse effects, to the maximum possible extent, the full service impacts and enduring operational consequences for our customers at Longview over the coming days and weeks has naturally not yet been fully felt. However, the harm to shippers is inevitable and self-evident. That harm is so patently predictable and obviously certain that they should not have to await conclusion of the arbitration process for relief. For example, shippers served by LVSW experienced a significant service disruption on Saturday when LVSW was unable to perform its usual work due to BNSF's actions. Shippers served by LVSW and PSAP continue to experience longer transit times and less reliable rail service. The damages being inflicted on shippers should be given significant weight, because the shippers have no remedy against BNSF under the Agreement.

The harm being inflicted on numerous parties – including those extrinsic to the Agreement – is more than sufficient to support a lawful finding of irreparable harm. On that basis, the Board should enjoin BNSF's actions until the arbitration panel has had an opportunity to rule.

¹¹ See *BNSF Ry. Co. v. Tri-City & Olympia R.R. Co. LLC*, No. 09-5062, 2009 U.S. Dist. LEXIS 94920, 2009 WL 3149569, at *12-13 (E.D. Wash. Sept. 28, 2009) and *Gateway E. Ry. Co. v. Terminal R.R. Assoc. of St. Louis*, 35 F.3d 1134, 1140 (7th Cir. 1994) (finding irreparable harm where railroad threatened with loss of customer goodwill).

D. No One Will be Harmed by Maintaining the Status Quo

In sharp contrast to the litany of needless harm and irreparably injury that BNSF's unilateral action is causing Union Pacific, LVSF, and shippers, it is hard to imagine how any party will be harmed if the Board simply intervenes for the limited purpose of preserving the *status quo* by allowing UP to continue performing an operation it has performed without incident for many, many years until the arbitral panel rules. BNSF will likely repeat its incredible claim that the switching operation consumes too much main line capacity. However, as explained above, that claim does not stand up to the slightest scrutiny. It strains credulity that *increased* capacity combined with *fewer* switching operations is somehow, suddenly harming BNSF, or anyone else. Given the complete lack of harm that would follow, an injunction providing limited, temporary relief should be ordered.

E. The Public Interest Supports Granting an Injunction

The balance of hardships between Union Pacific, BNSF and shippers favors injunctive relief. Neither BNSF nor any other parties will be harmed by a preliminary injunction. By contrast, Union Pacific and shippers are being harmed and will continue being harmed if BNSF is allowed to continue its unreasonable restriction on Union Pacific's operations.

Granting an injunction will also further the Rail Transportation Policy by ensuring continuation of a sound rail transportation system with effective competition among rail carrier and with other modes, ensuring effective competition and coordination between rail carriers and other modes, and encouraging honest and efficient management of railroad. 49 U.S.C. § 10101(4), (5), and (9). Thus, all four factors strongly suggest that the Board should grant Union Pacific's request for a provisional injunction.

F. BNSF Must Respond Quickly to Avoid Further Harm

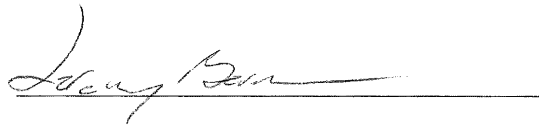
Union Pacific requests the Board require BNSF to reply to this Petition by Wednesday, May 23, 2018. While this is less time, by a handful of days, than the Board has provided other respondents, time is of the essence due to the twice-daily disruption that BNSF's actions are causing.¹² Union Pacific is not requesting a reply to BNSF's reply because the Board's rules typically prohibit such pleadings and another submission would only serve to delay an otherwise expeditious decision by the Board on these obviously compelling facts and uniquely time-sensitive circumstances. Union Pacific also requests the Board issue a decision on this Petition as soon as possible following BNSF's response.

III. CONCLUSION

For all of the foregoing reasons, Union Pacific requests the Board issue a declaratory order and preliminary injunction prohibiting BNSF from blocking Union Pacific's performance of main line switching operations at Longview Junction, in service to Union Pacific customers, pending the outcome of the arbitration process that has already been set in motion in this dispute. Union Pacific hereby stipulates that the Board's preliminary injunction can and should dissolve, on its own terms, on the same date the arbitral panel's ruling becomes final and non-reviewable.

¹² See e.g., *Central Valley Ag Grinding, Inc. and Central Valley Ag Transport Inc. v. Modesto and Empire Traction Company*, NOR 42159 (STB served May 10, 2018) (requiring response in 14 days).

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Jeremy Berman", is written over a horizontal line.

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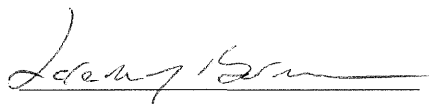
*Attorneys for Union Pacific
Railroad Company*

May 16, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May 2018, I caused a copy of the foregoing document to be served by electronic mail, on:

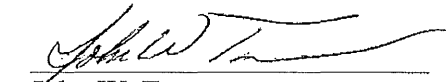
Tyler White
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A handwritten signature in dark ink, appearing to read "Jeremy Berman", written over a horizontal line.

Jeremy M. Berman

VERIFICATION

I, John W. Turner, AVP Network Integration and Scheduling for Union Pacific Railroad Company, declare under penalty of perjury that I have read the foregoing Petition for Preliminary Injunction of Union Pacific Railroad Company and that the facts and information set forth therein are true and correct. Further, I certify that I am qualified and authorized to file this Verification.


John W. Turner

SOUTH TACOMA-VANCOUVER-TRACKAGE

Exhibit 1

3489

CONTRACT made the first day of July A.D. 1909 between the NORTHER PACIFIC RAILWAY COMPANY a corporation under the laws of Wisconsin hereinafter called the "Pacific Company" and the OREGON & WASHINGTON RAILROAD COMPANY a corporation under the laws of Oregon hereinafter called the "Oregon Company."

In consideration of the mutual dependent promises stated in this contract the parties agree:

ARTICLE I.

Sec. 1. The Pacific Company grants to the Oregon Company the equal joint possession and use (in common with the Pacific Company and such other companies as it may admit) of all that part of the railway and appurtenant property of the Pacific Company, including telegraph and telephone lines, between the connection of the Pacific Company's track with the bridge approach near the north end of the bridge across the Columbia River owned by the Pacific Company and the Spokane, Portland & Seattle Railway Company at Vancouver, Washington, and a point of connection in South Tacoma, Washington, between said railway and the railway of the Oregon Company; the last named point of connection to be agreed on between the Chief Engineers of the parties; the railway and points of connection herein intended being for greater certainty shown on a map hereto attached marked "Exhibit A" and made a part hereof, identified by the signatures of the Chief Engineers of the parties. The Oregon Company by its own employes and equipment may do and transact over, upon and by means of said railway and appurtenances and all additions, improvements and betterments thereto all such business as is or hereafter may be carried on by a railway company and a common carrier, including mail and express, subject only to the terms and conditions hereinafter stated. The Oregon Company may string its telegraph or telephone wires upon the existing lines upon the right of way of the railroad herein described in so far as the Pacific Company has a legal right to grant that privilege, and it may erect its own poles and telegraph and telephone lines upon such right of way and connect such lines with its own or other telegraph or telephone lines.

Sec. 2. The Pacific Company with all reasonable and convenient expedition will expend the sum of two million five hundred thousand dollars in laying second track and in otherwise adding to, bettering and improving the said railway and its appurtenances.

Sec. 3. The Pacific Company will have the general control, management and administration of the said railway and appurtenances and will maintain and at all times keep the same in good condition and repair and suitable for the business of the Oregon Company. It will pay the taxes thereon and comply with all the regulations prescribed by law with respect thereto and will furnish water and other supplies incident to maintenance and operation of the property jointly used. It shall not be bound to furnish any fuel or other supplies, except water, for the trains or equipment of the Oregon Company, nor for the special or exclusive use in any other manner of the Oregon Company or the officers or employees thereof. The Pacific Company shall have unrestricted power to change, add to, better and repair the property as it may consider advisable, including the right to provide such additional main and other tracks as it shall deem necessary, not however so as by such changes, additions, betterments or repairs permanently to impair its usefulness to the Oregon Company. If the Oregon Company shall at any time deem the construction of a additional main track or tracks or other tracks necessary to the proper conduct of its business and the business of the other users of the property and the Pacific Company be unwilling to construct any such additional main or other track, then the Oregon Company shall have the right to submit the question of the reasonable necessity of such track to arbitration as hereinafter provided. Should the Pacific Company change the character of its motive power and use some form of power other than steam and for the purpose of such change add to the leased property, facilities of which the Oregon Company makes no use and obtains no benefit, or should the Oregon Company create its own roundhouses and coaling facilities, which it is given the right to do under reasonable conditions as to connections with the line, then the Oregon Company will not be required to pay any share of the interest charge or expense of maintenance and operation of the said facilities created by the Pacific Company, or to pay any share of the interest charge or expense of maintenance and operation of roundhouses and coaling facilities created by the Pacific Company subsequent to the date that the Oregon Company creates its own facilities unless

the Oregon Company should use such added facilities, in which case the Oregon Company will join in paying interest charge and other expenses on the basis hereinafter stated in this contract. In case the Oregon Company creates its own roundhouses and coaling facilities on the property of the Pacific Company, the Pacific Company shall have the right to purchase them on reasonable notice at a fair price for the benefit of all the users of the property, in which case all users of the property shall pay on the basis hereinafter stated their share of interest on cost and expenses of maintenance and operation of the facilities so purchased. Should the Oregon Company desire to use the special facilities created for the purpose of change in motive power, the Pacific Company will permit the use of such facilities on the basis of a pro rata share of interest at four and one-half per cent on their value based on the number of companies using such special facilities, and of maintenance and operation cost based on use.

Sec. 4. The Pacific Company will order and direct the movement of engines, cars and trains under such reasonable rules and regulations from time to time customary among railways as it may adopt. All rules, regulations and train schedules shall be equal, just and fair as between all parties using the property and shall not unjustly discriminate against either. All passenger trains shall be given preference over other trains, passenger trains to or from points beyond Portland or beyond Seattle shall have preference over local trains not going to or coming from beyond Portland or Seattle and the trains of each of the parties shall be given equal despatch according to their class.

The Oregon Company shall have in every respect the same rights and privileges in the transaction of its business that the Pacific Company or any other user of the property has as to its business, and any right or privilege at any time granted by the Pacific Company to any user of the property in respect to its business, and any right or privilege at any time granted by the Pacific Company to any user of the property in respect to its business shall be a right or privilege which the Oregon Company may at its option exercise in respect to its business.

Sec. 5. All agents and employees engaged upon the said railway by the Pacific Company shall do the business of the Oregon Company and of all other users of the property without discrimination. Such agents and employees shall not solicit business or recommend the routing thereof, but in all respects shall act with entire impartiality as between the railway companies using the property. All agents collecting or receiving money shall be in so far as concerns the business and revenues of the Oregon Company the agents and employees of that company and shall report and remit direct to it. The Oregon Company may bond them or require them to furnish bonds and the Pacific Company shall not be liable to the Oregon Company for their acts, neglects or defaults. Any joint employe shall be removed from service on the property on request in writing of the Oregon Company. Any employe engaged in the service of the Oregon Company upon or about trains, coal bunkers or roundhouses shall be withdrawn from service on the property on request in writing of the Pacific Company giving reasonable grounds for such withdrawal.

ARTICLE II.

Sec. 1. The Oregon Company will pay for the rights and privileges herein granted the sum of three hundred and twenty-five thousand dollars per annum in twelve equal monthly installments on the first day of the month for the preceding month and this rental will be increased by one third of four and one-half per cent per annum upon the actual cost to the Pacific Company of all improvements, betterments and additions to the property properly chargeable to capital account beyond those created by the aforesaid expenditure of two million five hundred thousand dollars. But the rentals herein agreed to be paid are based upon use of the property by the parties hereto and by the Great Northern Railway Company and if another railway company or other railway companies are admitted by the Pacific Company to run trains upon the said railway or any part thereof one-third of the rental payment of such tenant or tenants shall be credited to the Oregon Company.

Sec. 2. The Oregon Company will also pay such pro rata proportion of the cost actually incurred by the Pacific Company in the maintenance and operation of the property (which cost shall include insurance and taxes and a just sum to cover cost of superintendence and management) as the number of miles on said railway or any part thereof run by engines and cars in its trains bears to the whole number of miles

run by engines and cars in the trains of all the parties using the same or any part thereof; each engine and tender shall be counted as two cars. All movements of engines and cars shall be considered as "trains" within the meaning of this paragraph.

The Oregon Company shall not be charged on account of the maintenance or operation of any telegraph or telephone line not used in its business. The joint operating expenses shall be charged with a proportion of the expense of maintaining and operating any telegraph or telephone line used in the operation of the joint line equal to the proportion of wires so used to all the wires on the line.

Sec. 3. The Oregon Company will make all payments to the Treasurer of the Pacific Company at the city of Saint Paul, Minnesota, or the city of New York, as the Pacific Company may designate. At the option of the Pacific Company payments for rental shall be made in gold coin of the present standard. Bills for maintenance and operation shall be rendered monthly by the Pacific Company as soon as may be after the close of each month and shall be paid within thirty days thereafter. Payment of such bills shall not be delayed for errors which are not serious and important, but bills shall be paid as rendered notwithstanding any error of ordinary character likely to occur in railroad accounts, the necessary corrections to be made in subsequent bills.

Sec. 4. The books, records, vouchers and papers of the Pacific Company touching or material to the cost of improvements, betterments or additions to the property, or touching or material to the cost of maintenance or operation, at all times shall be freely open to the examination of the Oregon Company.

Sec. 5. Should the Oregon Company fail to make any payment when due which it is obligated to make by this contract or fail in any other respect to perform the agreement and such default continue for six months after notice in writing of intention to terminate the contract given by the Pacific Company to the Oregon Company, the Pacific Company may at its election declare this agreement terminated and may exclude the Oregon Company from all use of the property described herein; provided that failure to make any payment which is the subject of arbitration or litigation between the parties shall not pending such arbitration or litigation be deemed cause of forfeiture hereunder.

ARTICLE III.

Sec. 1. The Pacific Company shall be bound to use only reasonable and customary care, skill and diligence in maintaining and repairing the roadway, tracks, structures and appliances of and pertaining to the said railway and in managing and operating the same; and all employees of the Pacific Company (except enginemen and trainmen) employed in maintaining, repairing or operating the railway, or in despatching, ~~giving orders for~~ directing movement of trains, or in performing any other service for the common benefit of the railway companies using the property shall for the purposes of the contract be regarded while engaged in such work as joint employees of all the railway companies using the property. Enginemen and trainmen of any work train engaged in maintaining, repairing or adding to the property shall likewise be deemed joint employees. The Oregon Company shall not by reason of any defect in the property, or by reason of the failure or neglect of the Pacific Company to repair such defect, or by reason of the failure or neglect of any joint employee as herein defined, make against the Pacific Company any claim or demand for loss, damage or injury arising from such defect, neglect or failure; but should the Pacific Company fail to repair any defect within a reasonable time after being notified so to do by the Oregon Company, then the Oregon Company may make the necessary repairs at once, which will be paid by the Pacific Company and taken over in its bill for maintenance and operation.

Each railway company from time to time using the property will assume, bear, settle and pay all loss, cost, damage or injury which the property jointly used, its property or property in its custody, or which its employees or passengers may suffer while it is running its engines, cars or trains upon or over any part of the property, no matter how such loss, damage or injury may occur; provided however that in case of collision between the engines, cars or trains of any of the parties from time to time using the property, or in case of other accident caused by negligence of enginemen or trainmen or of other sole employees of either party, the party whose employee is at fault shall be responsible for and pay the entire loss caused thereby. If such collision or

other accident is caused by fault of the train employees of two or more companies using the property or by the fault of a joint employee, each party involved shall bear an equal share of all damage to the property jointly used and all the damage to its own property or property in its custody, or which its employees or passengers may suffer in consequence thereof. Loss and damage caused by the negligence of joint employees not covered by some other provision of this contract shall be charged to operating expenses and divided as herein elsewhere provided.

Except as hereinbefore provided each railway company from time to time using the property will assume and pay all loss or damage which its engines, cars or trains may do to third persons or to property of third persons, and each indemnifies the other against all claims and demands for any loss or damage which it herein agrees itself to bear.

If any injury shall occur to persons or property by the operation of trains in such a way that it cannot be determined what company's trains caused the injury, the compensation, if any is made to the injured party, shall be apportioned as other operating expenses under this contract.

Neither party shall under any circumstances have any cause of action against the other for loss or damage of any kind caused by or resulting from interruption or delay to its business.

In case a suit shall be commenced against any company using the property for damages for which another user is ultimately liable, the party sued may give notice to the other party of such suit and thereupon the company so notified shall assume the defense of the suit and save the company sued harmless.

The provisions of this subdivision shall be binding, not only as between the parties hereto, but as between them and all railway companies from time to time using the property, and the Pacific Company will cause to be inserted in every contract for use of the property or any part thereof provisions covering the matters treated in this subdivision identical in substance with the provisions in this subdivision stated and such contracts shall be construed as if each one were signed by all the railway companies at any time running trains over the railway or any part thereof. Failing to cause such provisions to be inserted in the contract with any railway company hereafter admitted to use the property, the Pacific Company will assume such obligations as such other company would have assumed had such provisions been inserted in its contract.

The parties will settle as between themselves any claim for loss or damage according to the terms of this contract notwithstanding any judgment or decree of a court or other tribunal in a proceeding brought by third parties.

Sec. 2. If any train of the Oregon Company shall be wrecked while running upon the tracks covered by this contract, the wreck shall be picked up at once and removed by the Pacific Company, and the Oregon Company (except as herein otherwise provided) shall bear the whole cost of such service.

Sec. 3. The Pacific Company will maintain at all stations facilities adequate and suitable for the business of all of the users of the property. Failing so to do the Oregon Company may create its own station facilities under reasonable conditions as to connections with the leased premises. The Pacific Company shall have the right to purchase at a fair price such facilities when built on its property, in which case the facilities will be for the benefit of all users of the property and the price paid therefor added to the basis of rental like other improvements, betterments and additions.

Sec. 4. Branch lines of any user of the property shall be allowed to make connections with the railway at suitable and convenient points. Industry spurs are to be created when necessary and the cost thereof shall be added as a basis of rental as hereinbefore provided in case of improvements, betterments and additions, but if any user of the property objects to the creation of any such spur it shall not be charged on account of the cost or the maintenance thereof and shall not use the same, but it may at any later day elect to use and from that time on shall be charged rental for its proportion of the cost including interest at four and one-half per cent per annum to that date and for the future maintenance thereof.

Sec. 5. If at any time a question shall arise touching the construction of this contract, or concerning the business or manner of transacting the business to be carried on under its provisions, or concerning the observance or performance of

any of its covenants, upon which question the parties cannot agree, such question shall be submitted to the arbitrament of three disinterested persons familiar with such business and experienced in railway management. The party demanding such reference shall give to the other party notice of such demand stating specifically the question to be submitted for decision and nominating a person who has the required qualifications to act as one referee. If at the expiration of thirty days from the receipt of such notice the party receiving it has not notified the party demanding the reference of its nomination of a second referee having like qualifications, the party making the demand may make such selection. The first and second referees chosen shall select a third and when the board is complete the referees shall fix a day and place for the hearing of which the parties shall be severally notified. If the referees chosen shall be unable to agree upon a third referee such third referee may be appointed upon ten days' notice upon motion of either party by a judge of any court of the United States within the State of Washington. After hearing the testimony and arguments which may be submitted by each party, the referees, if they unanimously agree upon an award, shall state it in writing, which when delivered to both parties shall be binding and conclusive upon each, and each party hereby expressly agrees to be bound conclusively thereby. If they cannot agree unanimously they shall forthwith select two additional referees having like qualifications. If the two additional referees cannot be agreed upon they may be appointed by any judge hereinbefore in this section referred to. To the board thus constituted shall be submitted a statement touching the facts as to which there is a unanimous agreement between the three referees first selected and the testimony as to matters remaining in dispute. The award of a majority of the five referees shall be in writing, and when delivered to the parties shall be as final and conclusive as an award by the first chosen referees would have been. Immediately after any award each party will make such changes in the conduct of its business, or such payments or restitution as the case may be, as are in and by such award required of it to be made. But if the question at issue affects the use of the property by more than two railway companies such notice of a demand for arbitration shall be given to each company interested and each shall have a right and be obligated to name an arbitrator having the qualifications before stated. Should any company fail within thirty days after receipt of such notice to name its arbitrator those who shall be named as arbitrators shall select one for the company so failing, and if they cannot agree he may be appointed on ten days' notice by any judge hereinbefore in this section referred to. The referees so chosen, if an even number, shall select three, if an odd number two additional arbitrators having the qualifications before stated. If they fail the additional arbitrators may on motion of any one of the companies be appointed by a judge as and in the manner before stated. After hearing the parties the board so constituted shall make an award by majority vote which shall be final and conclusive as between all the railway companies using the property. In order to insure settlements in such cases which bind all the companies using the property, the Pacific Company will cause to be inserted in every contract admitting any other railway company clauses for arbitration similar to those contained herein and such arbitration clauses shall be constructed as if signed by all railway companies using the property.

The books and papers of both parties as far as they relate to any matter submitted to arbitration shall be open to the examination of the arbitrators, and the party against whom the award is made shall pay all the fees and expenses of the arbitration; and until the arbitrators shall make their award upon any question submitted to them, the business, settlements and payments to be transacted and made under the terms of this agreement shall continue to be transacted and made in the manner and form existing prior to the arising of such question.

If either party shall refuse to keep and perform any award, the adverse party may enforce the same by apt proceedings in any court of law or equity.

Sec. 6. This contract shall take effect when the two million five hundred thousand dollars hereinbefore referred to are expended and rentals shall accrue from that time and shall continue during the term whether the Oregon Company uses the property or not; or the contract may be put in effect at any prior day by the election of the Oregon Company and thirty days' notice thereof to the Pacific Company; it shall

continue nine hundred and ninety-nine years from the time it goes into effect. The Oregon Company shall have no right to admit any other railway company as a user of the property, except that the rights of the Oregon Company acquired hereunder shall be deemed appurtenant to and running with its railroad, and it may sell, assign, lease or mortgage as an entirety said rights in connection with and as a part of its railroad. The covenants and agreements herein contained shall bind the parties hereto, their successors, assigns and lessees and shall inure in favor of the successors, assigns and lessees of the parties for whose benefit made.

Sec. 7. Notices under this contract shall be given in writing to the President, Vice President or Secretary of the other company.

Sec. 8. In consideration of this contract being made by the Oregon Company for the benefit of the Union Pacific Railroad Company a corporation under the laws of Utah and the Southern Pacific Company a corporation under the laws of Kentucky the two last named companies jointly and severally guarantee the performance of this contract by the Oregon Company and execute this contract in expression of that obligation.

IN TESTIMONY WHEREOF the Northern Pacific Railway Company, the Oregon & Washington Railroad Company, the Union Pacific Railroad Company and the Southern Pacific Company have caused this instrument to be executed under their respective Presidents and Secretaries, or Vice-Presidents and Assistant Secretaries the day and year above written.

In Presence of as to
Northern Pacific Railway Company:

C. H. Bunn
Thomas Cooper

In Presence of as to Oregon
& Washington Railroad Company:

R. S. Lovett,
G. E. Downs

In Presence of, as to
Union Pacific Railroad Company

R. S. Lovett,
G. E. Downs.

In Presence of, As to
Southern Pacific Company:

R. S. Lovett
G. E. Downs.

NORTHERN PACIFIC RAILWAY COMPANY,

By Howard Elliott,
President.

Attest:

Geo. H. Earl,
Secretary.

OREGON & WASHINGTON RAILROAD COMPANY

By E. H. Harriman,
President.

Attest:

Alex Millar,
Assistant Secretary

UNION PACIFIC RAILROAD COMPANY

By E. H. Harriman,
President.

Attest:

Alex Millar,
Secretary

SOUTHERN PACIFIC COMPANY,

By E. H. Harriman,
President

Attest:

Alex Millar,
Secretary.