

PATTON BOGGS LLP
ATTORNEYS AT LAW



2550 M Street, NW
Washington, DC 20037-1350
202-457-6000

Facsimile 202-457-6315
www.pattonboggs.com

Scott N. Stone
202-457-6335
sstone@pattonboggs.com

204405

January 11, 2001

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, NW Suite 700
Washington, DC 20423-0001

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

Dear Secretary Williams:

Enclosed are an original and 25 copies of:

1. CMA-14, the Reply of the American Chemistry Council to BNSF-97, Petition for Clarification Regarding Costs of Accommodating BNSF Build-In/Build-Out Traffic.
2. CMA-15, the Reply of the American Chemistry Council to BNSF-98, Petition for Clarification Regarding Trackage Fee Adjustment

Also enclosed is a 3 1/2" diskette containing these filings in WordPerfect 5.x for Windows.

Please stamp the additional copy with the date of receipt and return with our messenger.

Sincerely,

Scott N. Stone

204405

CMA-15

BEFORE THE
SURFACE TRANSPORTATION BOARD

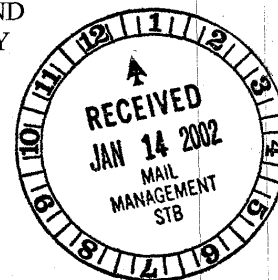
Finance Docket No. 32760

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 OF THE
AMERICAN CHEMISTRY COUNCIL
TO BNSF-98, PETITION FOR CLARIFICATION
REGARDING TRackage FEE ADJUSTMENT



The American Chemistry Council ("the Council")¹ respectfully submits this reply to
BNSF-98, which seeks clarification of whether the mechanism for adjusting trackage rights fees

¹ The American Chemistry Council (formerly the Chemical Manufacturers Association, or CMA) represents the leading companies engaged in the business of chemistry. Council members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. The Council is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a \$460 billion a year enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for 10 cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

paid by BNSF to UP should exclude the initial mark-up to capital assets occasioned by the UP's purchase of the SP at a substantial premium above book value.

The Board's instinct might be to examine previous cases in which the issue of a purchase premium has arisen in other contexts. But the Council submits that those other cases are not instructive in this instance. The issue here turns on the expectations of the parties regarding specific contractual provisions that were incorporated by the Board into its UP/SP merger conditions.

As BNSF recites in its petition (BNSF-98 at 4-5, 9-12), the BNSF Settlement Agreement contained agreed figures for trackage rights fees to be paid by BNSF to UP, most commonly 3.1 mills per gross ton mile. Those fees, negotiated by BNSF and UP, were originally to be adjusted by increases in the Rail Cost Adjustment Factor unadjusted for productivity (RCAF-U). That adjustment factor was changed, however, by Section 7 of the CMA Agreement, to escalate in accordance with actual, productivity-adjusted maintenance and operating costs. The point of this change was to ensure that the 3.1 mills per gross ton mile would not escalate above actual cost inflation over the 99-year term of the BNSF settlement agreement, as it might if it were escalated in accordance with the RCAF-U.

It was certainly not in CMA's (now the Council's) contemplation that the 3.1 mills per gross ton mile would be adjusted upward to reflect UP's writing up of assets owing to its purchase of SP at a price above book value. The Council recognizes that the literal language of Section 7 of the CMA Agreement, which adjusts the fee in accordance with "the difference in the two preceding years in UP/SP's system average URCS costs," could be read as justifying what UP has done, that is, reaching back to compare pre-merger asset values with post-merger asset values. But it was never the Council's intention that the escalation mechanism be a backdoor

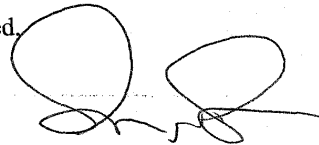
means, in effect, of billing BNSF for the change in book value resulting from the UP/SP corporate merger. As BNSF notes (BNSF-98 at 12-13), under section 9c of the original BNSF Settlement Agreement, UP committed to fund all capital expenditures needed to achieve the benefits of the merger. By billing BNSF for a portion of the costs of its acquisition of SP, UP violates the letter and the spirit of that commitment.

Moreover, the Council agrees with BNSF that it is wholly anomalous, when BNSF is deemed to be "stepping into the shoes of SP" and replicating the competition offered by SP pre-merger, for BNSF to have to bear the UP's costs of the merger premium.

CONCLUSION

For the foregoing reasons – to respect the intentions of the parties in crafting the adjustment mechanism, to hold UP to its promise to pay for merger related capital costs, and to permit BNSF to stand in the shoes of the SP without the need to bear a portion of UP's merger related expense – the Board should grant BNSF the clarification requested at page 16 of BNSF-98.

Respectfully submitted,



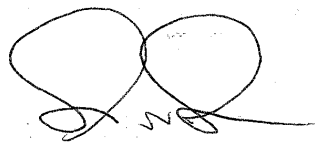
David F. Zoll
Thomas E. Schick
American Chemistry Council
Commonwealth Tower
1300 Wilson Boulevard
Arlington, VA 22209

Scott N. Stone
John L. Oberdorfer
Patton Boggs, LLP
2550 M Street, N.W.
Washington, D.C. 20037

Counsel for the American
Chemistry Council

CERTIFICATE OF SERVICE

This is to certify that I have, this 14th day of January, 2002, served copies of the foregoing filing by hand upon Washington counsel for the Burlington Northern Santa Fe and Union Pacific and by mail upon other parties of record.

A handwritten signature in black ink, appearing to read 'S. Stone', written over a horizontal line.

Scott N. Stone