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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 32760

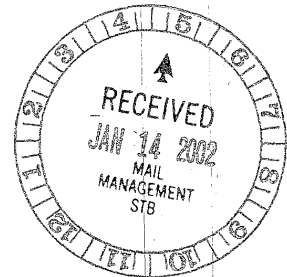
*Union Pacific Corporation, et al -- Control and Merger --
Southern Pacific Rail Corporation, et al*

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REPLY TO PETITION FOR CLARIFICATION

submitted on behalf of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE



THE NATIONAL INDUSTRIAL
TRANSPORTATION LEAGUE
1700 North Moore St.
Suite 1900
Arlington, Virginia 22209

By Its Attorneys

Nicholas J. DiMichael
Frederic L. Wood
Thompson Hine LLP
1920 N St. N.W., Suite 800
Washington, D.C. 20036
(202) 331-8800

Dated: January 14, 2002

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INTRODUCTION

In accordance with the provisions of the Board's Rules of Practice, 49 C.F.R. § 1104.13(a), this Reply to the Petition for Clarification filed on December 17, 2002, by BNSF (BNSF-97)¹ is submitted on behalf of The National Industrial Transportation League ("League"). The League supports the relief requested by BNSF. The relief sought by BNSF is necessary for the implementation of conditions specifically imposed by the Board to protect competition that was available between UP and SP prior to their merger.

BACKGROUND

In its principal decision in this proceeding, the Board imposed a condition that preserved the competitive option available to a chemical production facility at Seadrift, Texas, on the Gulf

¹ Abbreviations used in this reply are the same as those used in Decision No. 44 in Docket No. 32760, *Union Pacific Corp., et al. — Control and Merger — Southern Pacific Rail Corp., et al.* 1 S.T.B. 233, 557 (1996) ("UP/SP"), *aff'd*, *Western Coal Traffic League v. STB*, 169 F.3d 775 (D.C. Cir. 1999).

Coast.² The condition imposed related to a section of the so-called BNSF Agreement that granted BNSF trackage rights over a former SP branch line (the Port Lavaca branch) that would provide a connection, by means of a build-out or a build-in, for a competitive alternative to the UP service to the Seadrift facility.³ As discussed in *UP/SP*, 1 S.T.B. at 426 and 475, the preservation of this competitive option was expressly recognized by the applicants, who included in the BNSF agreement a specific grant to BNSF of trackage rights over the former SP Port Lavaca branch.⁴ Clearly, the contractual terms and operational and economic conditions for BNSF's use of the trackage rights will be an important element in determining if the condition will ensure the availability of this competitive build-out option

In addition to the specific condition addressing the Seadrift situation, the Board's conditions on the approval of the UP/SP merger also included a broad condition, based on the CMA agreement, which requires the applicants to preserve build-in/build-out options that existed prior to the merger. *UP/SP*, 1 S.T.B. at 420. To the extent that remedy is used, again, the terms and conditions for the use of any trackage rights necessary to reach the build-in or build-out are an important element in preserving competitive alternatives for rail shippers.

Recognizing the importance of trackage rights operations to preserving the competitive viability of build-in/build-out options, the BNSF agreement includes a specific provision that states that such rights "shall seek to minimize the operating inconvenience to UP, consistent with ensuring that BNSF can provide competitive service." BNSF Agreement, Section 8(l). Thus, UP has expressly agreed to a two-part standard for assessing the operational and economic terms and conditions for use by BNSF of trackage rights over its lines under the agreement: (1) minimizes operation inconvenience to UP, while (2) ensuring competitive service.

² At the time, the facility was owned and operated by Union Carbide Corporation, which is now a wholly-owned subsidiary of The Dow Chemical Company. BNSF-97 at 2, n. 3.

³ The Board has conditionally granted an exemption authorizing BNSF to construct and operate a line from the Seadrift facility to a point of connection with the Port Lavaca branch, subject to completion of the environmental review. Finance Docket No. 34003, *Burlington-Northern and Santa Fe Ry. Co. — Construction and Operation Exemption* (served June 19, 2001).

⁴ As the Board stated in *UP/SP*, 1 S.T.B. at 419, n. 177, and at 522, n. 277, it imposed all of the provisions of the BNSF agreement, as modified several times by the parties (including the CMA agreement).

The provisions of the BNSF agreement, as well as all of the other competitive conditions imposed by the Board, are to be interpreted and applied having in mind that their purpose was to "allow BNSF to replicate the competition that would otherwise be lost when SP is absorbed into UP." *UP/SP*, 1 S.T.B. at 419. As the Board recently stated in the UP/SP oversight proceeding, the contractual terms of the BNSF agreement should not "work to narrow the scope of the remedial conditions that we imposed to prevent ... competitive options from being lost." Decision No. 19, Finance Docket No. 32760 (Sub-No. 21) *Union Pacific Corp., et al. — Control and Merger — Southern Pacific Rail Corp., et al.* [General Oversight] (served Nov. 8, 2001) at 5.

Notwithstanding its contractual commitment, as well as the fundamental purpose of the conditions involved to preserve competition, UP has adopted a position that would require BNSF to prevent "any level of interference" with UP's operations over the trackage rights line. See UP letter dated September 24, 2001, Att. B to BNSF-97, at 2. The BNSF-97 petition sets out the detailed factual background for the current dispute.

UP is seeking to require BNSF to construct, at its expense, either a new connection at Placedo, Texas or a new passing siding on the Port Lavaca branch, or both, in order to prevent "any level of interference" with UP's operation on either the main line from Houston to Brownsville, or on the Port Lavaca branch. The BNSF petition seeks a determination by the Board that it should adopt a standard that should have the effect that BNSF would not be required to pay for or construct the improvements sought by UP. The same standard would also be applicable to the terms and conditions for other trackage rights operations by BNSF over UP in connection with a build-in or build-out to serve an existing UP customer.

THE BOARD SHOULD GRANT THE RELIEF REQUESTED BY BNSF

In the League's view, it is very clear that, under the condition imposed by the Board, BNSF should not have to construct the additional connections or sidings requested by UP. BNSF has articulated a two-part standard that comports with both the terms of the BNSF

agreement and the Board's decisions. See BNSF-97 at 8. Under that two-part standard, BNSF would not have to construct additional facilities on a trackage rights line used to provide competitive service under the Board's conditions unless:

BNSF's operations would unreasonably and materially interfere with UP's operations and whether proposed construction remedies for such interference would be consistent with BNSF's ability to provide competitive service.

In light of the underlying purpose of the conditions at issue to replicate the competition that existed between UP and SP prior to their merger, it is essential that the Board resolve all doubtful issues in favor of providing competition between BNSF and UP whenever and wherever possible. It is worth repeating what the Board clearly stated:

[W]e are imposing a number of broad-based conditions that augment the BNSF agreement to help ensure that the BNSF trackage rights will allow BNSF to *replicate the competition* that would otherwise be lost when SP is absorbed into UP.

UP/SP, 1 S.T.B. at 419 (emphasis added). As the Board said in Decision No. 86, interpreting another broad-based condition (the "new facilities" condition), "Our condition was intended to mitigate a general loss of competition due to the fact that shippers would have fewer two-railroad siting options by creating new options to replicate those that were lost." UP/SP, Decision 86 (served July 12, 1999) at 5. Similarly, both the broad and the specific conditions protecting build-out/build-in competition were intended to provide new options to replace those that were lost as a result of the merger. The Board should not adopt or permit any interpretation of those conditions, or the BNSF agreement itself, that limits the scope of those new options so that they are less effective than the options that were lost.

Under the first part of the test, a factual determination would have to be made about the degree, of interference, if any, with UP's operations.⁵ Second, as BNSF has shown with regard to the Seadrift situation, the competitive option that was lost as a result of the merger would not have had to bear the costs of the improvements ought by UP. Therefore, BNSF, under the

⁵ In the event of disagreement between BNSF and UP, the issue would have to be resolved by arbitration under the BNSF agreement.

second part of the two part test, should not have to bear those costs, either, even if they might otherwise be necessary to prevent interference with UP's operations. In the pre-merger situation, SP would have adjusted its operations in order to accommodate the new movements to and from the Seadrift facility. UP can be expected to do no less, as contemplated by the BNSF agreement.

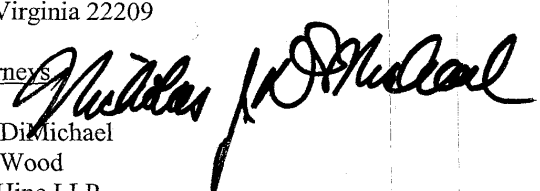
CONCLUSION

For all of the foregoing reasons, the League urges the Board to grant the relief requested in BNSF's petition for clarification by adopting the two-part test for determining when BNSF will be required make improvements to UP trackage rights lines in order to serve a new build-in or build-out.

Respectfully submitted,

THE NATIONAL INDUSTRIAL
TRANSPORTATION LEAGUE
1700 NORTH MOORE ST., SUITE 1900
Arlington, Virginia 22209

By Its Attorneys


Nicholas J. DiMichael
Frederic L. Wood
Thompson Hine LLP
1920 N St. N.W., Suite 800
Washington, D.C. 20036
(202) 331-8800

Dated: January 14, 2002

Certificate of Service

I hereby certify that I have on this 14th day of January 2002 served a copy of the foregoing Reply on all parties of record, in accordance with the Board's Rules of Practice, and have hand-served a copy of the foregoing on counsel for BNSF and Applicants.

