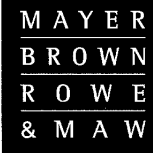


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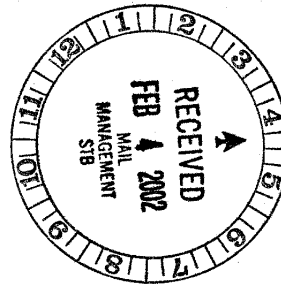
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February 4, 2002

VIA HAND DELIVERY

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

Re: Finance Docket No: 32760, Union Pacific Corporation, et al. --
Control and Merger -- Southern Pacific Rail Corporation, et al.

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are the original and twenty-five (25) copies of the Reply of The Burlington Northern and Santa Fe Railway Company to UP's Motion to Dismiss Petition for Clarification of the Trackage Rights Fee Adjustment Mechanism (BNSF-99). Also enclosed is a disk with the text of the pleading in Word Perfect 9 format.

I would appreciate it if you would date-stamp the enclosed extra copies and return them to the messenger for our files.

Sincerely,

Erika Z. Jones/als

Erika Z. Jones

Enclosures

cc: All Parties of Record

BNSF-99

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

BNSF'S REPLY TO UP'S MOTION TO DISMISS
PETITION FOR CLARIFICATION OF THE
TRACKAGE RIGHTS FEE ADJUSTMENT MECHANISM

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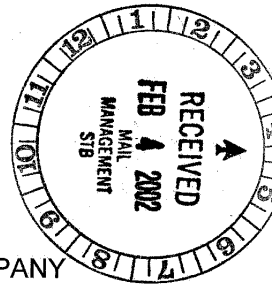
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February 4, 2002



BEFORE THE
SURFACE TRANSPORTATION BOARD

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UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY
AND MISSOURI PACIFIC RAILROAD COMPANY

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BNSF'S REPLY TO UP'S MOTION TO DISMISS
PETITION FOR CLARIFICATION OF THE
TRACKAGE RIGHTS FEE ADJUSTMENT MECHANISM

The Burlington Northern and Santa Fe Railway Company ("BNSF") submits this Reply to "UP's Motion to Dismiss BNSF's Petition for Clarification of the Trackage Rights Fee Adjustment Provision" (UP/SP-392) ("Motion"). In its Petition for Clarification (BNSF-98), BNSF requested a clarification from the Surface Transportation Board ("Board") as to whether the base to be used for the annual adjustment of trackage rights fees under Section 12 of the BNSF Settlement Agreement should include the purchase premium that UP paid to acquire SP and certain merger-related capital expenditures that were expressly to be funded solely by UP under the terms of the Settlement Agreement. BNSF filed its Petition with the Board, notwithstanding the fact that UP has brought a claim in arbitration, because the issue is one of first impression which raises significant policy issues as to the purpose and intention of the Board's trackage rights

condition – a key condition to the Board's approval of the UP/SP merger, and it is important that other parties to the UP/SP merger proceeding be afforded the opportunity to submit their views on the issue.¹ Resolution of the issue in the pending private arbitration would not afford them that opportunity. Indeed, a number of parties have submitted replies to BNSF's Petition which provide their views on the issue and which advocate that the Board should resolve the issue.²

UP's Motion seeks to deny these parties the opportunity to have their views heard by the Board. Specifically, UP argues that the Petition for Clarification should be dismissed because (i) the BNSF Settlement Agreement requires arbitration of all disputes; (ii) BNSF invoked arbitration by filing a counter-request for arbitration and participating in the arbitration; and (iii) the dispute does not require Board action since BNSF is competing effectively. UP also argues that the Petition should be dismissed for failure to state a claim because BNSF failed to submit any evidentiary support for its assertions concerning the parties' intent.

As shown below, UP's Motion to Dismiss should be denied. The issue presented by BNSF's Petition is rooted in Section 7 of the CMA Agreement, and ACC, as the

¹ In total, five issues relating to the adjustment mechanism were originally raised in the arbitration. As UP has reported in its Motion, UP and BNSF have reached agreement as to three of the five issues. UP Motion at 3. In addition to the issue presented by BNSF's Petition, the parties continue to disagree concerning whether UP has correctly reflected in the adjustment of the mill rates the changes in the gross ton mile costs associated with its declining URCS unit costs involved in trackage rights operations, which issue remains to be arbitrated.

² As described further below, replies in support of BNSF's Petition were filed by the American Chemistry Council ("ACC"), the successor to the Chemical Manufacturers' Association, the National Industrial Transportation League ("NIT League"), Western Coal Traffic League ("WCTL"), TXU US Holdings Company (successor to TXU Electric Company ("TUE")), and Entergy Services, Inc. and Entergy Arkansas, Inc. ("Entergy"). Over 1100 shippers are collectively represented by these replies.

successor to CMA, is entitled to be a party to and have its views considered in the resolution of the issue – an opportunity that ACC would not have in the arbitration between UP and BNSF because it is not a party to that arbitration.³ Just as important, the intent and purpose of the Board itself in approving the change in the adjustment mechanism from one based on RCAF-U to one based on the difference in actual UP operating and maintenance costs are critical to the proper resolution of the issue. The Board's conditions were imposed as a part of its statutory responsibility to ensure that pre-merger competition is preserved and that the UP/SP merger was in the overall public interest, and the Board should not delegate to the private arbitration process its responsibility to ensure the proper implementation of its conditions.⁴ Finally, the Board's conditions were imposed to protect the interests of shippers, and, as the Board has often recognized, shippers have rights under the Board's conditions and may be heard when necessary to preserve those rights – but, like ACC, the shippers, who are not parties to the arbitration, would not be afforded a full opportunity (or, perhaps, any opportunity at all) to be heard in the UP-BNSF arbitration.

³ Although ACC might be permitted to be a witness in a UP-BNSF arbitration, that would not be a substitute for ACC's right to participate as a full party in an adjudication of the meaning and effect of key provisions of the CMA Agreement.

⁴ Although a decision in the arbitration could be appealed to the Board, the scope of the Board's review of such a decision might arguably be circumscribed – thus improperly limiting the Board's ability to make the kind of public interest decisions that it could make in the de novo proceeding sought by BNSF here and that, under its governing statutes, the Board alone is authorized to make. Moreover, even if the arbitrator's interpretation of the Board's intent in imposing the trackage right conditions were reviewed de novo, it would be wasteful for the Board to withhold its views on the public interest ramifications of the merger conditions until after the parties have litigated the issue in an arbitration.

BACKGROUND

As the Board recognized in Decision No. 44, the trackage rights granted to BNSF pursuant to the BNSF Settlement Agreement are critical to the Board's finding that the UP/SP merger was in the public interest. See Decision No. 44 at 108, 145, 180. The trackage rights are designed to remedy the competitive harm that would otherwise have resulted from the merger, and, without the grant of the trackage rights to BNSF that would enable BNSF to compete effectively with UP, pre-merger competition would not have been preserved.⁵

As the Board has also recognized, the operating terms and level of compensation for the trackage rights needed to be structured to enable BNSF to compete effectively with UP as to both rates and service and to achieve and maintain sufficient traffic density over the long term. See Decision No. 44 at 132-44. See also 49 U.S.C. § 11324(c) (1996) (Board is required to approve the operating terms and level of compensation for trackage rights imposed in a merger context). There was much debate during the UP/SP proceeding as to whether the structure of the trackage rights as set forth in the BNSF Settlement Agreement would in fact enable BNSF to do so. In the end, the Board, after having listened to and considered the views of all parties, modified the trackage rights in a number of specific ways so that BNSF's ability to provide competitive replacement service would be assured. In so doing, the Board recognized that BNSF's ability to provide such service to "2-to-1" shippers, as well as to

⁵ Indeed, the Board noted that the proposed alternative remedy of the divestiture of major portions of SP as suggested by various parties would have destroyed important efficiency benefits of the merger. Decision No. 44 at 107.

new facilities and transloads on the trackage rights lines and to build-in/build-out lines, depends on a properly-costed and adjusted level of trackage rights fees.

As relevant here, the Board approved a revision to the mechanism at issue in BNSF's Petition for Clarification which was to be used for the annual adjustment of the trackage rights fees. Specifically, the original BNSF Settlement Agreement had provided that the fees would be adjusted by reference to RCAF-U. However, various parties objected to the use of RCAF-U because it does not reflect productivity, and there was a fear that the failure to consider improvements in UP's productivity would result in trackage rights fee increases that would not accurately reflect changes in UP's actual costs. As stated by ACC,

[The adjustment factor] was changed . . . 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 RCAF-U.

CMA-15 at 2 (emphasis in original).

UP and BNSF agreed with CMA to revise the mechanism to provide that the annual adjustments would be based on changes in UP's actual operating and maintenance costs, and language to that effect was included as Section 7 of the CMA Agreement. The Board accepted the proposed revision and noted that the revised mechanism would reflect "costs more accurately." Decision No. 44 at 142 n.169. The Board most recently reaffirmed in Decision No. 21 in the UP/SP general oversight proceeding that "it is important that the trackage rights fee adjustment mechanism work as intended, so that any increases or decreases in UP's costs are properly reflected in

the agreed-upon adjustments to the trackage rights fee." Finance Docket No. 32760 (Sub-No. 21), Decision No. 21 (served Dec. 20, 2001) at 6-7.⁶

It is against this background of involvement by a number of parties and the Board itself in the debate as to how the trackage rights fees should be adjusted each year to ensure that BNSF is able to compete effectively over the entire 99-year term of the BNSF Settlement Agreement that BNSF sought Board resolution of the issue and UP has filed its Motion to Dismiss. It is apparent on the basis of such third-party and Board involvement alone that Board resolution of the issue presented by BNSF's Petition is warranted. In addition, none of the specific reasons advanced by UP in its Motion justify dismissal of the Petition.

ARGUMENT

I. The BNSF Settlement Agreement Does Not Require Arbitration of the Issue

UP's first basis for dismissing BNSF's Petition for Clarification is that the BNSF Settlement Agreement requires that the parties' dispute concerning the proper investment base to be used in the annual adjustment mechanism must be submitted to arbitration. UP's argument fails for several reasons.⁷

⁶ The Board also expressed in Decision No. 21 its preference for a private resolution of the parties' fee adjustment dispute, but, as discussed below, the Board has also recognized that, notwithstanding the arbitration clause of the BNSF Settlement Agreement, it should and will act to resolve issues as necessary to provide guidance to the parties and to arbitrators on issues with broad implications with respect to the implementation of the Board's merger conditions.

⁷ In addition to the reasons given in the text above, the arbitration provision of the Restated and Amended BNSF Settlement Agreement was revised to provide for arbitration "[e]xcept as otherwise provided by any decision of the STB". As explained in the text, the Board has indicated in various decisions that Board resolution of disputes is appropriate when it would provide guidance to the parties and arbitrators as to the intended scope of the Board's conditions.

First, the adjustment mechanism language in the BNSF Settlement Agreement comes from the CMA Agreement, and, as a party to the CMA Agreement, ACC has a right to participate in the resolution of the dispute concerning the language. ACC is not, however, a party to the pending arbitration which, while technically arising out of the BNSF Settlement Agreement, clearly centers on the language of Section 7 of the CMA Agreement. Further, there is no arbitration provision in the CMA Agreement.

Second, the Board imposed the BNSF Settlement Agreement as well as the CMA Agreement as part of its responsibility to ensure that the proposed UP/SP merger was consistent with the public interest. See Decision No. 44 at 98 ("The Act's single and essential standard of approval is that the [Board] find the [transaction] to be 'consistent with the public interest.'") (quoting Missouri-Kansas-Texas R. Co. v. United States, 632 F.2d 392, 395 (5th Cir. 1980)). That responsibility requires that the Board retain and exercise the authority to determine whether the conditions it imposes on a merger or other control transaction are being properly implemented so that the public interest purpose behind each condition – here the preservation of pre-merger competition – continues to be met. Requiring that this significant policy issue be resolved through the private arbitration process would not be consistent with the Board's responsibility, and the issue should be resolved in this proceeding.⁸

⁸ In this regard, the Board's predecessor, the Interstate Commerce Commission, clarified four issues relating to the compensation to be paid with respect to the trackage rights awarded to SP as a condition to the Commission's approval of the 1982 UP/MP/WP consolidation. See St. Louis Southwestern Ry. Co. – Trackage Rights Over Missouri Pac. R.R. – Kansas City to St. Louis, Finance Docket No. 30000 (Sub-No. 16), 8 I.C.C.2d 80 (1991). Interestingly, the Commission's decision was entered in response to a petition for clarification filed by UP.

The Board has previously recognized that it has a role to play in resolving issues such as the issue presented by BNSF's Petition. Thus, in Decision No. 86, the Board indicated that clarification of issues arising under the BNSF Settlement Agreement may be appropriate to "provide guidance to the parties and to arbitrators in interpreting the intended scope" of the conditions to the UP/SP merger. See Decision No. 86 at 4. Similarly, the Board has stated that "an administrative proceeding might be preferable for the resolution of general matters with broad implications with respect to implementation of our conditions." Id. at 6. These principles strongly support Board action at this juncture in order to provide guidance to the arbitrator(s) in advance of the litigation of this dispute in arbitration.⁹

Finally, it is not just UP and BNSF (or even UP, BNSF, and ACC) that have a stake in the dispute as to whether the annual adjustment to trackage rights fees should be based on the inclusion of the purchase premium and the solely UP-funded merger-related capital expenditures. Rather, the right to have the trackage rights fees adjusted in a manner consistent with changes in actual UP operating and maintenance costs was intended to protect shippers as well. As the Board recognized in Decision No. 44 and in

⁹ Thus, as indicated in note 4, above, even though the arbitration of this dispute might not preclude the Board from weighing in on the issue – through a ruling on an appeal from the arbitration decision – it would be far preferable for the Board to declare its authoritative views on the issue now, rather than wait until after the parties have incurred the time and expense in litigating the issue in arbitration. Moreover, as also discussed in note 4, above, the scope of review of an arbitration decision on the issue raised in BNSF's Petition may be subject to dispute. To the extent that the Board would accord any deference to an arbitration decision, the requirement that the matter first be arbitrated could, in effect, limit the Board's ability to make the public interest determination at issue here – thereby implicitly delegating to an arbitrator the Board's exclusive and plenary authority under its governing statutes to determine whether the public interest requires the imposition and/or modification of conditions on a railroad merger.

a number of decisions thereafter, the merger conditions were imposed by the Board to protect the public interest in preserving pre-merger competition, and, as beneficiaries of the conditions imposed, shippers have rights independent of any rights BNSF may have under the BNSF Settlement Agreement to have the conditions implemented in a manner which will effectively preserve that competition. See Decision No. 44 at 12 n.15 (shippers at points opened up to BNSF under the BNSF Agreement have rights under the Agreement); Decision No. 72 (served May 23, 1997) at 8 n.18 ("We wish to clarify that shippers have rights under the BNSF agreement because we have imposed the terms thereof as a condition to the merger."). The Board most recently reaffirmed the rights of shippers under the Board's merger conditions in its decision ending the UP/SP general oversight proceeding:

[W]e note that shippers have a right (independent of any rights and interests BNSF may have under the BNSF Agreement) to seek Board intervention to ensure that the conditions we imposed on the merger are implemented in a manner that effectively preserves per-merger competition. See, e.g., Union Pacific Corp.—Control & Merger—Southern Pacific Rail Corp., STB Finance Docket No. 32760, Decision No. 72 (STB served May 23, 1997) (Merger Dec. No. 72), slip op. at 8 n.18.

Finance Docket No. 32760 (Sub-No. 21), Decision No. 21 (served Dec. 20, 2001) at 6.

Because, however, shippers would not be afforded the opportunity to participate as parties to the arbitration – and, because of the streamlined nature of arbitration proceedings, might not be afforded an opportunity to participate in the arbitration at all – arbitration is not an appropriate vehicle for determining and vindicating their rights.¹⁰

¹⁰ In this regard, it is clear from the pleadings filed by the shippers in response to BNSF's Petition for Clarification that their comments on the purpose and intent of the trackage rights fee adjustment mechanism are relevant and should be considered in the resolution of the issue. For instance, ACC has advised the Board that it "was certainly

II. BNSF's Conduct in the Pending Arbitration Does Not Require Dismissal

UP also argues that the Board should dismiss BNSF's Petition because "BNSF and UP Have Already Invoked Arbitration." UP Motion at 5. This argument ignores critical facts and misstates the consistent position that BNSF has taken in the arbitration.

Contrary to UP's assertion (UP Motion at 5), BNSF did not "invoke" arbitration before it filed its Petition for Clarification. Rather, BNSF conformed to the expedited procedures provided by the American Arbitration Association's rules for the filing of answers and counterclaims and for the completion of other procedural preliminaries. In doing so, BNSF made clear that it was not conceding that arbitration was the appropriate method for resolving the issues raised by UP in its arbitration demand. Accordingly, in its November 1, 2001 letter setting forth its answer and counter-request,

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" and that "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." CMA-15 at 2-3. Similarly, NIT League has indicated that BNSF's Petition should be granted because, prior to the merger, SP would not have had to bear capital costs for merger-related improvements nor would SP's rates have been impacted by any merger-related acquisition premium. January 14, 2002 Letter from Nicholas J. DiMichael to Secretary Vernon A. Williams at 1-2. Likewise, WCTL expressed the view that it was its intent during the UP/SP merger proceeding that "purchase premium costs should not be included in the URCS-based cost formulations" it presented to the Board. WCTL-27 at 4. Finally, Entergy has asserted that it has "an interest in the resolution of" the issues presented by BNSF's Petition and has argued that allowing the purchase premium to be included in determining the amount of the annual adjustment of the trackage rights fee causes an improper double count since the purchase premium is effectively embedded in the 3.1 mills base. ESI-35 at 3-4. See also TUE-26 at 5 ("TUE believes that it is fundamentally unfair for UP to require BNSF (and BNSF's customers) to pay a share of the multi-billion dollar premiums UP paid to acquire SP.")

BNSF specifically reserved the right to submit any of the issues raised in the arbitration to the Board, including, in particular, the issue relating to the proper investment base:

BNSF reserves the right to submit any of these issues for resolution by the STB pursuant to the jurisdiction that it reserved to itself to "provide guidance to the parties and to arbitrators in interpreting the intended scope" of the conditions imposed on the merger of UP and SP. At this time, it appears that issue (1) above [the inclusion in the investment base used in the adjustment of the trackage rights charges of the purchase premium and certain merger-related expenditures which were to be funded solely by UP] fits within the STB's contemplation that "an administrative proceeding might be preferable for the resolution of general matters with broad implications with respect to implementation of our conditions."

Letter from Weston W. Marsh to Gregory M. Smith (Nov. 1, 2001) (Ex. B to UP Motion), at 3.

Thus, UP had full notice that BNSF might request that the Board adjudicate some or all of the issues raised in the arbitration, and, consequently, UP has not been (and does not even claim to have been) prejudiced by BNSF's request that the Board resolve the issues raised in BNSF's Petition. Further, as discussed above, the Board has the responsibility to ensure that the conditions it imposed on the UP/SP merger (including the revised adjustment mechanism) are being properly implemented and continue to serve the public interest. BNSF's filing of a counter-request and its related conduct in the arbitration cannot be read to negate that responsibility.

III. BNSF's Present Competitiveness Does Not Warrant Dismissal

UP's third basis for dismissal is that BNSF is competing vigorously and effectively with UP on the trackage rights lines. UP argues that BNSF's present competitiveness using the adjusted rate indicates that there is no need for Board action with respect to the trackage rights fees and that dismissal is justified.

The fact that BNSF has been relatively successful in establishing a competitive presence over the trackage rights lines has never been deemed by the Board as a basis for declining to hear a dispute about the UP/SP merger conditions. Moreover, the premise of UP's argument is misguided. BNSF's current ability to compete (despite being saddled with artificially inflated trackage rights fees) does not prove anything about BNSF's long-term competitive prospects. As the Board well knows, in the short-term, and over particular routes, a railroad may be competitive (based on its current ability to provide the particular combination of price, service, and route structure demanded by shippers) almost irrespective of the trackage rights fees it has to pay. Over the long-run, however, an unfavorable cost structure (resulting, for instance, from inflated trackage rights fees) can (and likely will) erode the railroad's ability to continue to offer competitive service.

Thus, the fact that BNSF has made competitive inroads in the face of the disability resulting from UP's inflated adjustments to the trackage rights fees does not establish that BNSF's competitiveness will survive the continuing effects of those inflated adjustments over the remainder of the 99-year term of the BNSF Settlement Agreement. As the Board noted in Decision No. 86, the conditions imposed by the Board were intended to be permanent solutions for both competitive and traffic density problems raised by the UP/SP merger. Decision No. 86 at 5. The adjustment mechanism should not be applied in a manner which will erode BNSF's continued ability to compete.

UP, however, claims that the "trackage right fees will not rise in the future because of the disputed costs." UP Motion at 7. According, to UP, "any disputed

'increase' occurred in the past" (ibid.) – presumably, on July 1, 1998, which was the effective date of the adjustment based on the 1996 URCS (which was the last year when no premium or disputed merger-related charges were included in UP's URCS costs) and the 1997 URCS (which was the year when several billions of dollars of such charges were included in the URCS costs).

This contention is false. UP conveniently ignores the fact that the adjustment that took effect on July 1, 1998, is permanently embedded in the trackage rights fees and would, if this dispute is resolved in UP's favor, inflate those fees for the remaining years of the 99-year term of the Settlement Agreement.¹¹ Thus, unless the Board acts now to ensure that the adjustment mechanism is being properly implemented in a manner consistent with the intent that BNSF's competitiveness not be affected by the changes in UP's actual maintenance and operating costs, BNSF's ability to compete in the future could well be adversely affected.¹²

¹¹ While BNSF does not have the information necessary to determine the exact amount by which the trackage rights fees would be increased by the inclusion of the purchase premium and the capital expenditures that UP was to solely fund, BNSF's preliminary estimates indicate that the trackage rights fees would be increased in the range of approximately 0.2 mills. When applied to the current annual BNSF trackage rights gross ton miles (approximately 13.5 billion GTM's), the total amount of increased fees BNSF (and its shippers) would pay is approximately \$2.7 million annually. As explained above, this increase would not be subject to correction and would amount to over a quarter of a billion dollars over the life of the BNSF Settlement Agreement.

¹² UP also asserts that Board action is not needed because the parties have the right to renegotiate the adjustment mechanism every five years, and UP notes that BNSF has already served a request for renegotiation. UP Motion at 7. However, any such renegotiated adjustment mechanism would be effective prospectively only, and thus the embedded increase in the GTM rate resulting from the inclusion of the purchase price and the solely UP-funded merger related capital expenditures in the investment base would not be subject to correction.

IV. BNSF's Petition Properly States a Claim

UP's final basis for dismissal is its claim that, by failing to include evidentiary support for its assertions concerning the parties' intent, BNSF's Petition is deficient and should be dismissed for failure to state a claim. However, there is nothing in the Board's rules or regulations which requires the submission of verified statements or other evidence in connection with a petition for clarification. The various parties have expressed their views as to the purpose and intent of the revised adjustment mechanism, and their positions are clear. More importantly, it is the Board's purpose and intent in imposing the conditions for the protection of the public interest which, in the end, should control how the adjustment mechanism is interpreted.

If, however, the Board believes that further argument or evidentiary submissions by the parties (including other interested parties in addition to UP, BNSF and ACC) would be helpful to the Board in resolving the issue, the Board could establish a procedural schedule pursuant to which such argument or evidence could be submitted.

CONCLUSION

As NIT League advised the Board, "[i]t is essential that the terms of the BNSF agreement, and the adjustment mechanism for the trackage rights fees that are a vital component of the competitive structure, not be interpreted and applied in such a manner that, over time, BNSF is exposed to cost increases that impair its ability to replicate the lost competition from SP." NIT League January 14, 2002 Letter at 2. However, UP's interpretation of the adjustment mechanism will, as set forth above, lead to increased trackage rights fees of upwards of a quarter of a billion dollars over the life of the BNSF Settlement Agreement.

Accordingly, BNSF respectfully requests that UP's Motion to Dismiss be denied and that the Board proceed to rule on the important policy issue presented by BNSF's Petition for Clarification or, if it deems it desirable, establish an appropriate procedural schedule for the submission of additional argument or evidence on the issue.

Respectfully submitted,

Erika Z. Jones/als

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Attorneys for The Burlington Northern and Santa Fe Railway Company

February 4, 2002

CERTIFICATE OF SERVICE

I do hereby certify that copies of BNSF'S Reply to UP's Motion to Dismiss
Petition for Clarification of the Trackage Rights Fee Adjustment Mechanism (BNSF-99)
are being served on all parties of record.

A handwritten signature in black ink, appearing to read "Adrian L. Steel, Jr.", written over a horizontal line.

Adrian L. Steel, Jr.