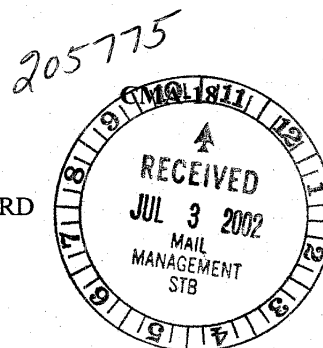


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BEFORE THE
SURFACE TRANSPORTATION BOARD



Finance Docket No. 32760

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

-- CONTROL AND MERGER --

SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC
TRANSPORTATION COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY, SPCSL CORPORATION AND THE DENVER AND
RIO GRANDE WESTERN RAILROAD COMPANY

AMERICAN CHEMISTRY COUNCIL'S
MOTION FOR LEAVE TO FILE REPLY

The American Chemistry Council ("the Council")¹ respectfully submits that UP/SP-397,
UP's Reply to BNSF's Response to Order to Show Cause, contains potentially misleading
arguments concerning the intent of the Council's predecessor, CMA, regarding the trackage

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 \$455 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.

rights fee escalator issue. UP ascribes to CMA positions CMA never took, most notably coining the term "CMA Method" to refer to an escalation methodology that CMA in its CMA Agreement with UP expressly did not adopt.

In order to ensure that the Board is not confused, the Council therefore requests leave to file the attached brief reply.

Respectfully submitted,

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

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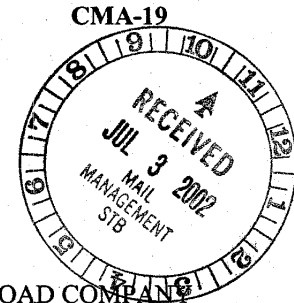
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AMERICAN CHEMISTRY COUNCIL'S
REPLY TO UP/SP-397

The American Chemistry Council ("the Council")² submitted evidence to the Board on May 22, 2002 in CMA-17 showing that the Council's predecessor, CMA, had negotiated with UP and had obtained agreement to a modified escalator formula for the trackage rights fees to be

² 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 \$455 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 the BNSF. The original escalator agreed between UP, SP and BNSF was based on 70% of year-to-year changes in the RCAF. The revised escalator adopted by UP and CMA in Paragraph 7 of the CMA Agreement provided that the trackage rights fees would "be adjusted upward or downward each year by the difference between the year in question and the preceding year in UP/SP's system average URCS costs for the categories of maintenance and operating costs covered by the fee." See CMA-17, Verified Statement of Thomas E. Schick at 4.

If there is anything that can fairly be characterized as the "CMA Method," the escalator formula in Paragraph 7 of the CMA Agreement was it, because this is the only escalator formula that CMA ever agreed to. What UP labels as the "CMA Method" was an escalator formula suggested earlier by one of CMA's witnesses, Mr. Crowley, which CMA did not adopt in the CMA Agreement.

The intention and effect of the escalator formula in Paragraph 7 of the CMA Agreement was to adjust the trackage rights fees beginning in the second post-merger year. Schick V.S., id. at 4. Because the first adjustment would have been based on a comparison of costs in the second post-merger year with costs in the first post-merger year, there never would have been a comparison of post-merger costs with pre-merger costs. Id.³

CMA never agreed to, and was not involved in negotiating, the changes subsequently made by UP, in its second supplemental agreement with BNSF, which UP now refers to as the "CMA Method." As the Council has pointed out, the Second Supplemental Agreement was filed

³ Hence the Council disagrees with UP's view (UP/SP-397 at 20) that the words "the year in question" in Section 7 of the CMA Agreement must mean the previous year. If the intention had been to base the adjustment on a comparison of the two prior years' costs, that is what the CMA Agreement would have said.

on the last business day before the oral argument in the UP/SP merger, after CMA had already filed a brief withdrawing its opposition to the merger.⁴

UP suggests that it “agreed” to adopt the escalator formula proposed by CMA’s witness Crowley. UP/SP-397 at 11. But CMA never asked UP to agree to this escalator. The CMA Agreement, as noted, did not contain this escalator. Although UP and BNSF subsequently agreed, in the Second Supplemental Agreement, to amend the agreement to incorporate the Crowley formula, CMA never agreed to this. Nor was CMA involved in the negotiations that resulted in the Second Supplemental Agreement.

In sum, it would erroneous to infer that UP adopted the “CMA Method” in any way at the behest of, or with the agreement of CMA. As far as the Council is concerned, the so-called “CMA Method,” as interpreted by UP, is invalid, both because it was adopted without consultation with CMA, and because, as now interpreted by UP, it would materially abrogate an important aspect of the CMA Agreement – that the escalator formula should be based only on a comparison of costs for post-merger years, rather than comparing pre-merger costs with post-merger costs. It would be unjust to construe the Second Supplemental Agreement as abrogating this aspect of the CMA Agreement, for two reasons. First, CMA was not involved in negotiating the Second Supplemental Agreement. Second, the Board in approving the UP/SP merger imposed the CMA Agreement (including Paragraph 7) as an additional condition separate from the UP/SP-BNSF Settlement Agreement.⁵

⁴ UP’s submission of testimony from Mr. Rebensdorf on April 29, 1996 stating UP’s unilateral intention or interpretation regarding the escalator formula (see quoted passage, UP/SP-397 at 12) had no effect, and could not have had any effect, in modifying the mutual agreement of UP and CMA in the CMA Agreement.

⁵ See Decision No. 89, 1 S.T.B. 233 at 419.

The best that can be said of the escalator formula that was adopted in the Second Supplemental Agreement is that, if it were applied in such a way as not to alter the underlying intent of the CMA Agreement to compare only post-merger years, it could be harmonized with CMA's intentions. Indeed, as Mr. Schick testifies, he was advised that the change in the escalator formula made in the Second Supplemental Agreement was intended to be only a technical, non-substantive change. CMA-17, Verified Statement of Thomas E. Schick at 6. BNSF has submitted evidence and argument concerning how the formula, with the proper adjustments, could carry out the intention of the CMA Agreement and not be distorted by inclusion of merger related cost write-ups and capital investments which UP repeatedly pledged to pay for. The Council concurs with and endorses that evidence and argument.

Respectfully submitted,



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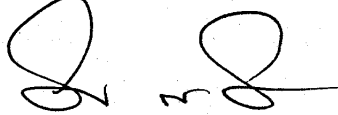
Counsel for the American
Chemistry Council

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dated: June 28, 2002

CERTIFICATE OF SERVICE

This is to certify that I have, this 28nd day of June, 2002, served copies of the foregoing filings by hand upon Washington counsel for the Burlington Northern Santa Fe and Union Pacific and by first class 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