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July 9, 2002

VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings
JUL 10 2002
Part of
Public Record

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

Dear Secretary Williams:

Union Pacific Railroad Company ("UP") offers the following brief comments on two replies to replies in the referenced proceeding. UP does not object to the acceptance of either CMA's "Reply to UP/SP-397" or BNSF's "Rebuttal to UP's Reply," both dated June 28, 2002, if the Board also accepts these UP comments.¹

CMA

CMA misleadingly accuses UP of "misleading" the Board. CMA-18 at 1. In substance, CMA argues that UP and BNSF amended the BNSF Settlement Agreement to embrace the method of adjusting trackage rights fees that CMA's own expert, Thomas Crowley, had proposed during the merger proceeding, but that the CMA Agreement called for a different method. We submit that CMA's new argument is not credible and must be rejected for the following reasons:

- CMA's eleventh-hour attempt to disavow the recommendation of its own expert, Mr. Crowley, contradicts CMA's sworn testimony earlier this year. In 1996, Mr. Crowley had recommended an adjustment that includes "a 1-year lag so that the 1997 adjustment would be based on the change in costs

¹ We refer to the American Chemistry Council (formerly the Chemical Manufacturers Association) by the acronym used throughout these proceedings, "CMA."

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between 1995 and 1996.” CMA-7, Crowley V.S. at 57. In a verified statement earlier this year, CMA told the Board that the CMA Agreement was “[b]ased on Mr. Crowley’s recommendations.” CMA-17, Schick V.S. at 3. CMA’s representation earlier this year was correct, and the Board should not allow it to assert the opposite in its final reply document.

- CMA advocates an adjustment mechanism that would be impossible to apply, as CMA’s Mr. Crowley recognized years ago. CMA argues that the language of the CMA Agreement requires comparisons each summer between current-year URCS costs and URCS costs for the prior year. As Mr. Crowley recognized, however, this is impossible because current-year URCS costs are not available until almost a year after the adjustment is performed. That is why BNSF and UP understood the CMA Agreement as employing Mr. Crowley’s method, which compared URCS costs for two prior years. See UP/SP-266, Second Supplemental Agreement, § 9; see also UP/SP-397, Rebensdorf V.S. at 6-7.
- CMA did not object when UP, eleven days after the CMA Agreement was signed, explained how the parties understood its adjustment provision. UP/SP-231, Rebensdorf R.V.S. at 10. CMA also never objected to the language that BNSF and UP adopted to implement the CMA Agreement. The Board cannot reasonably conclude that CMA, one of the most aggressive and active parties in the UP/SP merger proceeding, suddenly lost interest and ignored both UP testimony and an amendment to the BNSF Settlement Agreement that conflicted with the hard-won CMA Agreement. Yet that is CMA’s position today.
- CMA’s new position conflicts with a basic purpose of the CMA Agreement – a purpose that CMA reiterated earlier this year. As a CMA witness testified earlier this year, CMA wanted to ensure that the trackage rights fees would reflect “cost savings projected by UP/SP as one of the benefits of the merger.” CMA-17, Schick V.S. at 3. By advocating an adjustment mechanism based on post-merger costs, however, CMA would lose the benefit of cost reductions as two pre-merger railroads combined into one post-merger railroad. This would increase BNSF’s trackage rights fees.

UP’s arguments did not mislead the Board. CMA’s new arguments confirm that it is attempting to rewrite a history for which it was uniquely responsible.

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BNSF

The Board invited further submissions in this proceeding in order to allow BNSF and its allies an opportunity to provide evidence for BNSF's initial, unsupported claim that the railroads agreed to deduct certain costs from URCS costs when adjusting trackage rights fees. No party provided any such evidence. Instead BNSF claimed a different agreement, arguing that the parties intended to restrict the adjustment mechanism to post-merger URCS costs. Again, however, BNSF provided not a scintilla of contemporaneous evidence to support the newly alleged agreement.

In its latest filing, BNSF steps back from both of its prior theories. BNSF now says that it does not know how the parties agreed to adjust the trackage rights fees, but that it is UP's job to find a way to depart from both URCS system average costs and the express terms of the BNSF Settlement Agreement.

BNSF's latest filing thus confirms a dispositive conclusion: there is no evidence whatsoever that UP and BNSF ever discussed, mutually considered, or agreed to adjust trackage rights fees in any way other than as they expressly agreed in the plain language of the BNSF Settlement Agreement. In this proceeding, BNSF has suggested two different and mutually inconsistent theories for departing from the plain language, but it has never adduced a single scrap of paper from the UP/SP proceeding to support either, and it now appears to recognize that neither was workable. After months of briefing, BNSF cannot tell the Board the substance or the mechanics of the parties' supposed agreement to depart from the BNSF Settlement Agreement's plain language, much less support that agreement with evidence other than post-hoc rationalizations.

UP's Reply fully addresses each of the arguments in BNSF's newest filing, so we will not belabor them here. The Board called for evidence of agreement to depart from the plain language of the BNSF Settlement Agreement, but none has come before the Board.

Sincerely, ,



Michael L. Rosenthal

cc: All Parties of Record