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October 4, 2007

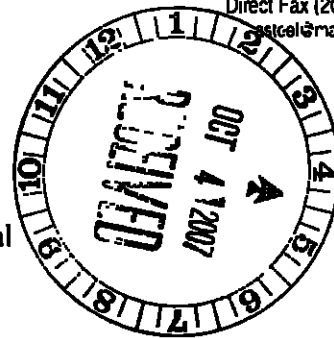
BY HAND-DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
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Re Finance Docket No. 32760, Union Pacific Corporation, et al
– Control and Merger – Southern Pacific Rail Corporation,
et al

220396



Dear Secretary Williams

Enclosed for filing in the above-captioned proceeding are the original and ten (10) copies of BNSF's Final Brief Opposing Union Pacific Railroad Company's Petition for Reformation of Agreement (BNSF-115).

Please note that we are filing a public version of the Brief as well as a highly confidential version which is being filed under seal.

I would appreciate it if you would date-stamp the enclosed extra copies and return them to the messenger for our files. Please let me know if you have any questions. Thank you for your assistance.

Sincerely yours,

Adrian L. Steel, Jr.

Enclosures

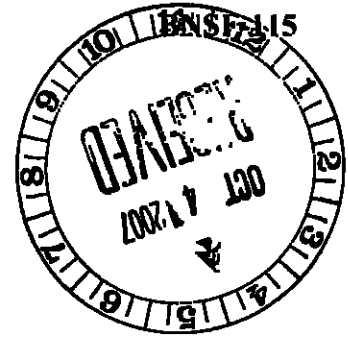
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BEFORE THE
SURFACE TRANSPORTATION BOARD



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 CORP, AND
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

**FINAL BRIEF OF
BNSF RAILWAY COMPANY OPPOSING
PETITION OF UNION PACIFIC RAILROAD COMPANY
FOR REFORMATION OF AGREEMENT**

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Dated October 4, 2007

TABLE OF CONTENTS

	Page
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	3
A UP, Not BNSF, Carries The Burden Of Proof	3
B The Evidence Demonstrates That UP Intended Revised Section 1(g) To Mean What It Says	5
C UP's Late Assertion Of "Unilateral Mistake" Cannot Support Reformation Of Section 1(g)	10
D UP's Gross Negligence, And The Harm That Would Result To BNSF's Shippers, Further Bar Reformation Here	15
E UP's Claims Regarding Harm To Passenger Traffic And Harm To Competition Are Disingenuous	16
CONCLUSION	18
VERIFIED STATEMENT OF ROLLIN D. BREDENBURG	

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

**FINAL BRIEF OF
BNSF RAILWAY COMPANY OPPOSING
PETITION OF UNION PACIFIC RAILROAD COMPANY
FOR REFORMATION OF AGREEMENT**

Pursuant to this Board's Decision served May 7, 2007, BNSF Railway Company ("BNSF") hereby submits its Final Brief in opposition to the Petition of Union Pacific Railroad Company ("UP") for Reformation of Agreement ("Petition"). BNSF's Brief is supported by the Verified Statement of Rollin D. Bredenberg, Vice President, Service Design & Performance, for BNSF. Mr. Bredenberg is responsible for the design of BNSF's train service, and he consulted with other BNSF officials during the negotiations that led to the adoption by BNSF and UP of Revised Section 1(g), as is discussed further below.

INTRODUCTION AND SUMMARY OF ARGUMENT

UP's Initial Brief is most noteworthy for what it lacks – namely, any evidence that the parties ever entered into an agreement to maintain the substantive provisions of Original Section 1(g) in Revised Section 1(g). As BNSF demonstrated in its Opening Brief, the law of mistake clearly places the burden on UP of showing the existence of such a pre-existing agreement, and

the law further requires that UP meet that burden by the heightened standard of “clear and convincing evidence.” UP has offered nothing to meet its heavy burden of proof. And it cannot, because in fact the parties never made any mistake.

In an attempt to compensate for evidence that simply does not exist, UP has raised several red herrings. First, it claims for the first time in its Initial Brief that, even if no *mutual* mistake occurred, then reformation of Revised Section 1(g) is still appropriate based on the principle of *unilateral* mistake. However, UP cites no law to support its position (indeed, UP’s entire Initial Brief cites not a single court case, statute, or regulation). This is not surprising, given that in fact the common law of contracts *prohibits* reformation of contractual provisions in situations such as the one at issue in this proceeding, in which *UP has acknowledged* that BNSF had no knowledge of a mistake and committed no fraud.

UP has tried to further distract the Board by repeatedly raising two completely extraneous themes: that BNSF’s non-Central Corridor/non-I-5 intermodal trains have interfered with the Capitol Corridor and Amtrak service on the Cal-P line, and that the BNSF trains have harmed UP’s ability to compete. Even if these themes did help UP meet its burden of proof (and they do not), UP is factually incorrect about each of them, and thus they provide no basis justifying Board action.

First, with regard to passenger trains, UP is wrong in asserting that BNSF is responsible for the delays of those trains. As BNSF described in its Opening Brief (and as UP has itself acknowledged),¹ BNSF on average runs *fewer* than the four trains per day that the parties anticipated in 1995 when they first agreed to Section 1(g). Indeed, UP has notched some of its

¹ See BNSF Opening Brief at 16 n 17. [REDACTED]

more "dismal" performance records at the very times that BNSF was running even fewer trains than usual. See BNSF Opening Brief at 35-36, [REDACTED]

[REDACTED]

And with regard to competition, UP again mischaracterizes the situation. As is discussed above, UP has understood since 1995 that BNSF would run at least four trains a day on the lines in question, and, as UP concedes, BNSF has in fact run on average fewer than three trains per day. Therefore, there is no basis to assert that BNSF is causing any unfair, or even unexpected, competition. Further, as is explained in more detail below, granting UP the relief it seeks would seriously reduce competition in rail carrier service to the Port of Oakland and its Oakland International Gateway ("OIG") facility.

In short, UP has tried to cloud this case by mixing in false claims of mutual mistake, unilateral mistake, harm to passenger service, and harm to competition. But the core problem is simple: UP made a clear and valid commitment to BNSF, and UP is trying to avoid its responsibility, apparently because UP has failed to keep a separate commitment to another trackage rights tenant. Unfortunately for UP, the law of contracts does not allow it to choose to honor another contract at BNSF's expense. If UP needs more capacity, it should build more capacity. In the meantime, UP must honor the clear contractual provision that it drafted and agreed to, and that the Board has previously approved. Far from UP's assertion that BNSF "has taken advantage" of the agreement, UP Initial Brief at 2, BNSF has simply honored the deal that UP drafted and that the parties agreed to. The Board should require UP to do the same.

ARGUMENT

A. UP, Not BNSF, Carries The Burden Of Proof

As BNSF described in its Opening Brief, UP bears the burden of proof in this case, and to carry that burden it must meet the extremely high standard of clear and convincing evidence.

See BNSF Opening Brief at 17-19. Without belaboring that analysis here, suffice to say that UP does not dispute this. See *id.* at 8, UP Petition at 15, 19, 20 (acknowledging that UP must carry the burden by clear and convincing evidence). Despite UP's rote recitation of the standard, UP's Initial Brief shows that it does not appreciate the significance of its heavy burden. Rather than offering concrete evidence of the existence of the required antecedent agreement, UP instead offers conjecture, and worse, tries to shift the burden to BNSF.

For instance, while precedent establishes that a plaintiff seeking reformation of a contract on the basis of a mistake must present proof of the "clearest and most satisfactory character," *Phil Sugar Estates Dev Co v Phil Islands*, 247 U.S. 385, 391 (1918) (Brandeis, J.) (internal citations omitted),² UP offers nothing but guesses. It asserts that it does not "believe" that BNSF sought to remove the intermodal routing restrictions from Section 1(g) (UP Initial Brief at 3), that Revised Section 1(g) does not accurately express the parties' alleged intent (*id.* at 4), that the parties allegedly never intended to allow BNSF to make use of routing that the contract clearly permits (*id.* at 5), and that UP "believes" BNSF misread the alternate versions of Revised Section 1(g) that UP wrote (*id.* at 11). But UP's subjective, unsupported conjecture about what the parties did or did not intend fails to satisfy UP's burden. In order to prevail, UP must dislodge the presumption that the contract's *language* embodies the parties' intent. See *Moore v Vandermast, Inc.*, 119 P.2d 129, 130-131 (Cal. 1941) ("In the absence of clear and convincing evidence to the contrary, a written instrument is presumed to express the true intent of the parties"), *Oakdale Mercantile Co v Baer*, 17 P.2d 779, 780 (Cal. Dist. Ct. App. 1932) ("every presumption favors the view that a written instrument, deliberately executed, expresses the true intent and meaning of the parties"). To do that, UP would need concrete and contemporaneous

² See also BNSF Opening Brief at 18-19.

evidence of the parties' intent to maintain unchanged the substance of Original Section 1(g). But no such evidence exists – it cannot, because the parties never entered into such an understanding. So UP offers nothing.

Instead, UP tries to turn the tables, by asserting that BNSF has a burden. *See, e.g.*, UP Initial Brief at 6 (stating “BNSF has produced no internal documentation evidencing, or even tending to suggest, that prior to 2004 it believed it had [the disputed trackage] rights”). Of course, this is a backwards understanding of the law. Despite UP's claims, all that BNSF needs to produce in this regard is the contractual language, which UP drafted and which the revised Settlement Agreement incorporated verbatim, that explicitly permits BNSF to act as it has.

B. The Evidence Demonstrates That UP Intended Revised Section 1(g) To Mean What It Says

Even if BNSF did need to satisfy a burden (which, as described above, it does not), BNSF has offered extensive evidence demonstrating that UP held the same understanding of Revised Section 1(g) as does BNSF, namely, that the parties intended the contract to mean what it says.

Briefly, UP itself drafted Revised Section 1(g), UP officials reviewed and approved of six different drafts of the Restated and Amended BNSF Settlement Agreement containing the provision, six different senior UP officials and lawyers approved of Revised Section 1(g), UP permitted over 1,000 BNSF non-Central Corridor/non-I-5 intermodal trains to run pursuant to Revised Section 1(g), UP programmed its computer system to accept these BNSF trains, UP billed BNSF for these trains (and accepted BNSF's money), UP failed to object for almost two years after BNSF began running non-Central Corridor/non-I-5 intermodal trains, and, before this litigation began, UP even admitted to BNSF that BNSF had the right to run such trains pursuant

to Revised Section 1(g) *See* BNSF Opening Brief at 26 ³ Further, UP did not protest on the basis of Section 1(g) when BNSF gave notice that it would increase its use of the two lines at issue here *See* BNSF Opening Brief at 29-30 ⁴ All of these actions taken by UP confirm that, when the parties negotiated and agreed to Revised Section 1(g), UP understood that the provision means what it says

The closest that UP comes to rebutting any of this evidence in its Initial Brief is a claim it makes about the parties' intent when they *began* negotiating the revision to Section 1(g) Specifically, UP notes that BNSF's 2000 proposal did not allow BNSF to run non-Central Corridor/non-I-5 intermodal trains on the Cal-P and Elvas-Stockton lines *See* UP Initial Brief at 10 UP's statement is absolutely true, and it is also absolutely beside the point This proceeding is not concerned with the parties' intent at some early stage of the negotiations Rather, what matters is the final intention that the parties had when they actually agreed to the terms of Revised Section 1(g) *See* 7 Joseph M Perillo, *Corbin on Contracts* § 28.45, at 302 (rev ed 2002) ("essential parts of the contract may have been assented to for the first time when the

³



⁴ The notice consisted of a formal written notice, verbal communications between BNSF's representative in UP's dispatching center and UP personnel, and electronic notice to UP's computer system BNSF Opening Brief at 29-30

written document was itself executed ") Therefore, all that matters is the parties' intent in 2002 as to Revised Section 1(g)

In response to UP's claim that BNSF did not believe prior to 2004 that BNSF had the right to operate non-Central Corridor/non-I-5 intermodal trains over the two UP lines (UP Initial Brief at 6), Mr Bredenberg's Verified Statement demonstrates that as early as 2001 BNSF saw the need to obtain the rights to run intermodal trains over the UP lines that Revised Section 1(g) ultimately granted According to Mr Bredenberg, he voiced to Peter J Rickershauser, BNSF's principal business negotiator in the renegotiation of the 1995 BNSF Settlement Agreement, in 2001 that BNSF should secure trackage rights for non-Central-Corridor/non-I-5 intermodal trains over the Cal-P and the Elvas-Stockton lines Mr Bredenberg subsequently learned that UP proposed language which provided for such rights and that UP's proposed language was included in Revised Section 1(g) V S Bredenberg at 5 ⁵

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁵ According to Mr Bredenberg, in 2001, "Mr Rickershauser and other BNSF officials and representatives were in the process of renegotiating the 1995 BNSF Settlement Agreement Mr Rickershauser kept me informed on the progress and details of what was being negotiated between BNSF and UP At that time, I was interested in the Section 1(g) issue, because I knew that the OIG would soon create an increased demand for BNSF intermodal trains coming from and going to the BNSF Southern Transcon route As my position required, I was thinking of how BNSF would accommodate that traffic As one possible alternative for routing such trains (meaning, non-Central Corridor/non-I-5 intermodal trains traveling to and from the OIG), I informed Mr Rickershauser that it would help BNSF to secure from UP the right to run these trains via trackage rights between Stockton and Elvas and Elvas and Oakland if the opportunity presented itself" See V S Bredenberg at 5 Further, Mr Rickershauser informed Mr Bredenberg when BNSF did in fact secure these rights, through Revised Section 1(g) *Id*

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

UP also offers other rebuttals to BNSF's evidence, but these rebuttals do not justify Board action. First, UP asserts that BNSF's delay of approximately two years before operating non-Central Corridor/non-I-5 intermodal trains over the two UP lines suggests that BNSF did not believe that it had the right to do so. The Settlement Agreement, however, grants BNSF the right to run non-Central-Corridor/non-I-5 intermodal trains on the Cal-P and Elvas-Stockton lines to use or not as it wished. As it turned out, BNSF had no need to use these trackage rights for such trains immediately after the parties agreed to Revised Section 1(g) because BNSF initially had little or no traffic at OIG. But as BNSF's shippers used OIG more, BNSF had an increased need to serve them. And business soon outpaced BNSF's ability to use its own slower, low-capacity line between Stockton and Richmond. When that occurred, BNSF decided to use the unrestricted trackage rights that it had secured from UP in 2002. There is no legal significance to the fact that BNSF had the ability to, but chose not to, make greater use of the contract's provisions sooner than it did.⁷ Indeed, when BNSF gave UP notice of plans to increase use of the lines, UP never protested on the basis of Revised Section 1(g) until 2006.

⁶ [REDACTED]

⁷ Significantly, review of BNSF's use of the trackage rights it obtained as a result of the UP/SP merger settlement agreements and conditions throughout the first five years following the UP/SP merger in 1996 show a similar pattern in corridor after corridor: initial service using UP-provided haulage transitioning to a low level of BNSF trackage rights operations as soon as practicable, followed in many instances by increasing trackage rights use as volumes built in

Second, UP asserts that BNSF produced no evidence that the parties engaged in “horse trading” that led to Revised Section 1(g). UP Initial Brief at 9. This argument completely ignores (as do the rest of UP’s pleadings) that UP, rather than BNSF, carries the burden of proof. Further, it is not true that there was no evidence of “horse trading.” As UP and BNSF both agree, the 2002 version of Revised Section 1(g) was one of dozens of changes that the parties agreed to following their experiences of some seven years under the 1995 BNSF Settlement Agreement. While this proceeding does not call for the parties to reconstruct the entire array of their bargaining history, the fact is that what became Revised Section 1(g) was one part of a much larger, more complex series of agreements between the parties. It would not be faithful to that negotiation for UP to now pluck out a single one of those bartered-for provisions. Put another way, the proof of the “horse trading” is the written agreement itself, with the presumption of legitimacy that accompanies it.

UP’s final attempt to rebut the overwhelming evidence that it intended the contract to mean what it says is a semantic ploy. Specifically, UP asserts that both parties jointly described Revised Section 1(g) to the STB by stating that it “restates” the terms of Original Section 1(g). See UP Initial Brief at 11. As BNSF indicated in its Opening Brief, this is a thin reed for UP to rely on. The fact is that the 2002 revised agreement is entitled the “Restated and Amended BNSF Settlement Agreement,” and both parties obviously understood that the revised agreement changed many substantive provisions as compared to the 1995 BNSF Settlement Agreement. In this context, even though the parties in one of three dozen summaries of changes shortened “restates and amends” to “restates,” there can be no doubt that the two phrasings were intended

response to shipper demand. In none of these instances has it ever been suggested that BNSF’s failure to commence immediate trackage rights operations on a merger-condition line created a legal question as to whether BNSF had the right to commence and use trackage rights when business conditions required.

to communicate the same intent – namely, that the parties had altered the substance of the identified provisions. In any case, as BNSF’s Opening Brief explains, there is no legal basis for substituting a description of Revised Section 1(g) for the clear language of the provision itself. See BNSF Opening Brief at 23 & n 21.

C. UP’s Late Assertion Of “Unilateral Mistake” Cannot Support Reformation Of Section 1(g)

Though UP’s Petition did not clearly raise it, UP now claims that a “unilateral” rather than a “mutual” mistake occurred with regard to Section 1(g). As is mentioned above, however, UP does not cite to any law in support of its argument, and the common law of unilateral mistake cannot support reformation here.

According to UP, “[i]t is irrelevant whether the elimination of the restrictions resulted from a mutual mistake or from the unilateral mistake of UP. It is irrelevant whether BNSF at the time knew or suspected that the eliminated wording was a mistake upon which it now seeks to capitalize.” UP Initial Brief at 4. UP is wrong.

Under the Restatement (Second) of Contracts, Section 153 (1981) governs “When Mistake of One Party Makes a Contract *Voidable*” (emphasis added). Immediately, it is apparent that UP’s claim of unilateral mistake is not appropriate here, because Section 153 offers only *avoidance* of a contract, but not the reformation that UP seeks. Such avoidance is not appropriate here, given that Revised Section 1(g) is part of the wider Restated and Amended BNSF Settlement Agreement, and also given that both Revised Section 1(g) and the wider settlement agreement are merger conditions that the Board imposed, and cannot simply void without bringing a cascade of other merger conditions into doubt.

Even if UP were seeking avoidance of the agreement, it still would not be entitled to such relief. Section 153 makes clear that a unilateral mistake exists only when the mistake “was made

as to a basic assumption.” that the mistake “has a material effect” on the agreement, and further that enforcement would be either (a) unconscionable, or (b) that the other party had reason to know of the mistake or caused the mistake. *None* of these conditions apply here.

First, there is no serious argument that BNSF’s routing of trains affects a “basic assumption” of Section 1(g). As BNSF has established, UP understood in 1995 that BNSF would run up to four trains per day on the two lines at issue here. And in fact, BNSF is running fewer than three trains per day on the lines. Therefore, BNSF is acting well within the terms of the basic assumption, as well as within the terms of Revised Section 1(g).

For the same reason, BNSF has already established that the alleged mistake is not material. *See* BNSF Opening Brief at 34. That is, given that BNSF is running fewer trains per day than the parties understood BNSF would run, it can hardly be “material” for purposes of UP’s capacity if the trains are not of the same character as UP now claims it originally expected (though BNSF’s trains are clearly of the character that the language of Revised Section 1(g) provides).

Again, for the same reason, there is nothing unconscionable about the current situation. BNSF is using *less* of UP’s capacity than the parties understood BNSF would, could, or is entitled by agreement to use. And BNSF would *still* prevail even if UP had managed to demonstrate unconscionability, because BNSF’s good-faith reliance on Revised Section 1(g) in any case would negate unconscionability. According to comment d to Section 153 of the Restatement (Second) of Contracts, if “the other party has relied on the contract in some substantial way, avoidance may leave that reliance uncompensated. In such a case, enforcement of the contract would not be unconscionable.” As BNSF demonstrated in its Opening Brief, BNSF has relied substantially on Revised Section 1(g). *See* BNSF Opening Brief at 40-41.

Most notably, BNSF structured its business on the assumptions that Revised Section 1(g) was valid and that BNSF could use its trackage rights on the two UP lines to build up its services to OIG. Also, the 2004 Memorandum of Understanding that BNSF entered into with UP, providing BNSF the right to run trains on UP's line from Bakersfield to Stockton in exchange for substantial consideration from BNSF, relied on the assumption that Revised Section 1(g) was valid. The reason that BNSF wanted such rights was to service its growing traffic to and from OIG. Therefore, BNSF intended when it entered into the MOU with UP that it would route its transcontinental intermodal trains on UP lines from Stockton to Elvas, and then on to OIG over the Cal-P line. V S Rickershauser at 8-9

Finally, UP has conceded that BNSF did not know of the alleged mistake at the time that it occurred. Specifically, as UP stated in its Petition, "UP does not believe that the elimination of the Central Corridor and/or I-5 Restrictions from the Restated and Amended Settlement Agreement resulted from any deliberate effort by BNSF to gain an advantage." UP Petition at 20. Therefore, UP is incorrect when it writes that it is "irrelevant" whether BNSF knew of or suspected the mistake at the time of the agreement. It is quite relevant – and UP's concession on this point damages its claim beyond repair. (The last remaining claim that UP could in theory make, namely, that BNSF *caused* the alleged mistake, is of course a non-starter, given UP's acknowledgement that it drafted the provision at issue.)

Beyond all this, UP would need to contend with the Restatement's caution that, "because mistakes are the exception rather than the rule, the trier of the facts should examine the evidence with particular care when a party attempts to avoid liability by proving mistake." Restatement (Second) of Contracts, § 153 cmt. a (1981).

UP may be seeking to dodge the Restatement's requirements by relying on California law. This is unclear, however, because UP does not cite to any law – from California or elsewhere – in its Initial Brief. Therefore, BNSF must speculate as to the basis for UP's legal arguments. Because UP's Petition cites to California Civil Code Section 3399, BNSF assumes here that UP might be relying on that provision in UP's Initial Brief, and therefore BNSF addresses that possibility.

If in fact UP is relying on California law in general, and on Section 3399 in particular, it still cannot make a successful claim of unilateral mistake. That provision, entitled "When contract may be revised," states in substance: "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as can be done without prejudice to rights acquired by third persons, in good faith and for value." Cal. Civ. Code § 3399. This provision seems to allow reformation for unilateral mistakes, where the Restatement does not. But UP still cannot satisfy the elements of this law.

Significantly, for a party to secure reformation under this provision, the party must show the existence of an antecedent agreement, whether the party is asserting unilateral or mutual mistake. Without such an antecedent agreement, it would not be possible to assess the "intention of the parties" as the statute requires. As the California Court of Appeals has held, for a court to reform a contract based on unilateral mistake, "[i]t must appear there was a mutual intention of the parties." *La Mancha Devel. Corp. v. Sheegog*, 78 Cal. App. 3d 9, 16-17 (1978). See also Cal. Civ. Code § 3400, which states "[f]or the purpose of revising a contract, it *must* be presumed that all the parties thereto intended to make an equitable and conscientious agreement."

(emphasis added) As BNSF demonstrated above and in its Opening Brief, LP has not carried its burden of demonstrating that the parties had entered into any antecedent agreement with regard to the substance of Revised Section 1(g)

Further, as does the Restatement, California Civil Code Section 3399 rebuts LP's assertion that it is "irrelevant" whether BNSF knew or suspected at the time the parties that agreed to Revised Section 1(g) that UP had allegedly made a mistake To the contrary, Section 3399 establishes this very question as a vital element According to the California statute, in order for a party seeking reformation on the basis of unilateral mistake to succeed, it must, *inter alia*, establish that "the other [party] at the time knew or suspected" that the first party was making a mistake *Id* As is discussed above, LP has effectively conceded that BNSF did not know or suspect at the time of the agreement that UP had made a mistake Accordingly, under the terms of Section 3399, LP has no valid claim to reformation

Finally, it is significant that both California's Supreme Court and the general common law with disfavor any claim for reformation sought by the party that itself drafted the provision in dispute *See Moore*, 119 P 2d at 131 (referring to the rule that party seeking reform bears the burden of presenting clear and convincing evidence, stating "[t]his is particularly true where, as here, the instrument was drafted by an attorney representing the party seeking to alter the terms of the written instrument"), Restatement (Second) of Contracts, §155 cmt b (1981) (stating that no mutual mistake exists where the party that drafted the provision at issue claims the existence of a mistake) (discussed in BNSF's Opening Brief at 38-39) Here, given LP's admission that it drafted the provision at issue in this proceeding, it cannot now seek relief on the basis that it made an alleged mistake when it wrote and agreed to the provision it now protests

D. UP's Gross Negligence, And The Harm That Would Result To BNSF's Shippers, Further Bar Reformation Here

Even aside from these fatal flaws in UP's arguments, California law and the common law more generally prohibit reformation here for another reason. As BNSF discussed in its Opening Brief, UP has engaged in a litany of actions that constitute gross negligence with regard to Revised Section 1(g).⁸ See *City of Santa Barbara v. Superior Ct. of Santa Barbara County*, No. S141643, 2007 WL 2027806 at *16 (Cal. July 16, 2007) (prohibiting reformation based on a mistake that constitutes gross negligence). Further, as both the Restatement and California law make clear, reformation is not appropriate when that action would prejudice innocent third parties. See Cal. Civ. Code § 3399 (prohibiting reformation where it would "prejudice rights acquired by third persons, in good faith and for value"), Restatement (Second) of Contracts § 155 (1981) (stating that courts do not reform contracts "to the extent that rights of third parties such as good faith purchasers for value will be unfairly affected"). Here, UP's attempt to evict BNSF trains from UP's lines would have a serious adverse affect on the many shippers who rely on BNSF to transport goods to and from OIG. See BNSF Opening Brief at 39-40.

⁸ As BNSF's Opening Brief at 36-39 details, UP engaged in a long series of grossly negligent actions, made all the worse given that UP is not merely a sophisticated company, but is the largest railroad company in the nation, with decades of experience negotiating trackage rights agreements. Briefly, UP's gross negligence consists of: UP *itself* drafted what it now claims is incorrect language, failed to catch the supposed error even though no fewer than six UP supervisors and attorneys approved of it, did not say anything to BNSF during the negotiations about the alleged error even when it reviewed at least six drafts of the Restated and Amended Settlement Agreement containing Revised Section 1(g), did not say anything about the alleged error to the STB when UP and BNSF submitted the Settlement Agreement to the Board, conceded to BNSF that UP was obliged to accept BNSF's non-Central Corridor/non-I-5 intermodal trains, did not object on the basis of Revised Section 1(g) when BNSF gave notice of its plans to increase usage of the lines, programmed its own computers to accept BNSF's trains, actually accepted over 1,000 such trains, billed BNSF for those trains and accepted payment, [REDACTED]

[REDACTED]

E. UP's Claims Regarding Harm To Passenger Traffic And Harm To Competition Are Disingenuous

Finally, UP tries to completely shift the topic of this proceeding away from the governing legal standards, and toward issues that have nothing to do with either unilateral or mutual mistake. Specifically, as described above, UP tries to assert that BNSF's reliance on the rights that Revised Section 1(g) grants to it are harming UP's ability to accommodate passenger trains and UP's ability to compete and that Board action is required to prevent further harm. UP Initial Brief at 2.

With regard to the passenger trains, BNSF's Opening Brief makes clear that BNSF is not causing either UP's or Amtrak's problems. In 1995, UP specifically acknowledged that BNSF would run four trains per day on the Cal-P and Elvas-Stockton lines, and in fact BNSF has run on average fewer than *three* trains per day on the lines. See BNSF Opening Brief at 16 n 17. What UP fails to acknowledge is the obvious fact that a train is a train, and takes up line capacity whether it contains grain cars, merchandise cars, or intermodal cars, or shipments from one corridor versus another.⁹ Given the 1995 understanding, UP's attempt to blame BNSF for its own inability to run the passenger trains on time is nothing more than an attempt to avoid owning up to its own shortcomings.

Further, UP's reliance on the Verified Statement of Eugene K. Skoropowski, UP Initial Brief at 3, 6, 7, is also misplaced. As Mr. Skoropowski clearly concedes, his entire opinion as expressed in his Verified Statement is based on information that UP itself provided. For

⁹ Indeed, UP's failure to recognize its prior acknowledgment that BNSF would run four trains per day highlights the fact that UP is using this proceeding to simply try to bar some of BNSF's trains from its lines because it overcommitted when it extended trackage rights to both BNSF and the Capitol Corridor passenger trains. The fact that UP now finds itself reaping the consequences of its bad business decisions does not give it the right to renege on its contractual commitment to BNSF.

instance, Mr. Skoropowski writes, “*I have been advised* that UP and BNSF inadvertently omitted the above-referenced traffic restriction.” See UP Petition at 39 (emphasis added). He continues, “I have *not* independently verified the accuracy of the foregoing statements of fact.” *Id.* (emphasis added). In other words, Mr. Skoropowski premised his Verified Statement on the facts as UP told them to him. But Mr. Skoropowski’s statement confirms that he has no *independent* factual knowledge from which to opine as to whether BNSF or UP has caused the problems with regard to the passenger trains. Therefore, UP has in no way shown that any problems it is experiencing with regard to the Capitol Corridor passenger trains result from any alleged abuse of UP’s rails or trackage rights on the part of BNSF. Far from UP’s claim that BNSF is misappropriating rail capacity that California helped to pay to upgrade, see UP Petition at 11, see also *id.* at 41 (V.S. Skoropowski), in fact, BNSF has not even made full use of the capacity that UP acknowledged in 1995 that BNSF would use.

The last refuge of UP is its claim that BNSF is harming UP’s ability to compete. UP Initial Brief at 1, 2, 4, 5. In fact, the remedy that UP seeks would drastically reduce competition for service to shippers using OIG because BNSF’s own line does not offer the competitive routing that BNSF needs to effectively service those shippers. Moreover, the fact that both BNSF and UP provide robust service to the Port of Oakland ensures a competitive market for rail services at the Port, and shippers thus receive the benefits of vigorous competition between the two rail carriers. However, if UP’s request is granted, shippers would lose one of the two competitive long-haul rail options they have for their international containerized traffic.¹⁰ In

¹⁰ Another adverse effect will occur if the Board grants UP’s request. Specifically, absent BNSF’s services, OIG would need to service its shippers with trucks, even though the point of building the Port in its current configuration was to rely on rail services in order to reduce the need for trucks.

other words. BNSF's use of Revised Section 1(g) does not reduce competition, but rather enhances it, despite UP's claims to the contrary

Lastly, with regard to competition, BNSF notes that the Board imposed the conditions on UP's merger with Southern Pacific Transportation Co ("SP") in order to ensure that the same level of competition would exist as if SP had continued to exist. Had SP not merged with UP, SP would have been able to compete vigorously with UP for traffic to and from the Port and OIG using the exact same lines over which BNSF now operates via trackage rights. Thus, to the extent the effect on competition is considered (which it should not be, because competition is not legally relevant to the claims of mistake that UP has raised in this proceeding), the Board should conclude that competition would in fact be harmed by the granting of UP's Petition.

CONCLUSION

For the reasons stated above in this Final Brief, and also for the reasons stated in BNSF's Opening Brief, BNSF respectfully requests that the Board deny UP's Petition to Reform Revised Section 1(g) in the Restated and Amended BNSF Settlement Agreement.

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Respectfully submitted,



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October 4, 2007

VERIFIED STATEMENT
OF
ROLLIN D BREDENBERG

My name is Rollin D Bredenberg. I am Vice President, Service Design & Performance, for BNSF Railway Company ("BNSF"). My business address is 2500 Lou Menk Drive, Fort Worth, Texas 76131. In this position, I have primary responsibility within BNSF for designing the routes over which BNSF trains travel, using lines owned by BNSF and other entities, including Union Pacific Railroad Company ("UP"). With regard to this proceeding before the Board, I note that I have been responsible for designing the routing of BNSF's transcontinental intermodal trains to and from the Port of Oakland and the Oakland International Gateway ("OIG").

I received a B.S. in Business Administration, with a transportation major, from Northwestern University in 1968. I attended an Advanced Management Program at Harvard Business School in 1982. I began my career in the railroad industry at Southern Pacific Transportation Company ("SP") where I spent 29 years in various management positions. I was Superintendent from 1980 to 1981 and Assistant General Manager in 1981 at Houston. I was also General Manager at Houston from 1982 to 1983 and again from 1987 to 1991. I also was General Manager, Western Lines, between 1983 and 1987. I joined The Atchison, Topeka and Santa Fe Railway Company in 1994 as Assistant Vice President, Intermodal Operations. From October 1995 to April 1997, I served as Vice President, Transportation, for BNSF. In that capacity, from September 1995 to April 1997, I was responsible for the planning, sequencing,

and implementation of the operating changes necessary to integrate the BN and Santa Fe operations, including route selections, line capacity decisions, and assignment of through train classification responsibilities to the major terminals. In April 1997, I was appointed Vice President, Operations, South, and was responsible for transportation operations from Kansas City to California, including Texas, Louisiana, Arkansas, Tennessee, Mississippi, and Alabama. In that capacity, I had extensive involvement in and knowledge about UP's implementation of the UP/SP merger and its subsequent service problems. I assumed my current position in January 1999.

I am submitting this Verified Statement in support of the Final Brief of BNSF Railway Company Opposing Petition of Union Pacific Railroad Company for Reformation of Agreement. I have personal knowledge of the issues I discuss in this Verified Statement.

It is my understanding that in this proceeding UP is claiming that BNSF did not believe prior to 2004 that it had the right to operate non-Central Corridor/non-I-5 intermodal trains over UP's Cal-P line between Elvas and Oakland and over the former SP line between Elvas and Stockton and that its delay in exercising that right supports that conclusion. UP is not correct in its assertions.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] As I further describe below, I had that knowledge of that right in part from conversations that I held earlier with Peter J. Rickershauser, BNSF's Vice President of Network Development, in 2001 when he was negotiating for BNSF over the provision that BNSF and UP ultimately agreed to and finalized as Revised Section 1(g)

[illegible]

[illegible]

[REDACTED]

[REDACTED]

Within months of when I wrote my e-mail, BNSF began to assemble full intermodal trains to operate on UP lines from Stockton to Elvas and Elvas to the OIG. BNSF did not need to operate trains over the two UP lines prior to that time because there was not sufficient demand or density to do so.

B. 2001 Conversations With Peter Rickershauser

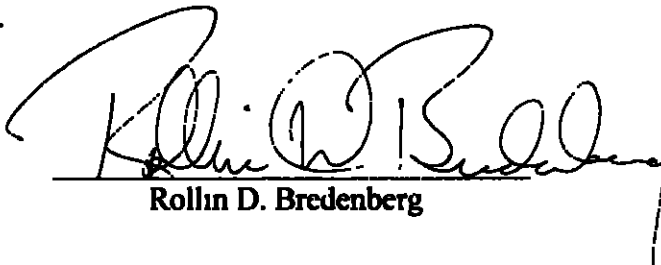
[REDACTED], I had knowledge of the terms of Revised Section 1(g), in part, because of communications that I had with Peter Rickershauser in May through June of 2001. During that time, Mr. Rickershauser and other BNSF officials and representatives were in the process of renegotiating the 1995 BNSF Settlement Agreement. See V S Rickershauser at 5. Mr. Rickershauser kept me informed on the progress and details of what was being negotiated between BNSF and UP. At that time, I was interested in the Section 1(g) issue because I knew that the OIG would soon create an increased demand for BNSF intermodal trains coming from and going to the BNSF Southern Transcon route. As my position required, I was thinking of how BNSF would accommodate that traffic. As one possible alternative for routing such trains (meaning, non-Central Corridor/non-I-5 intermodal trains traveling to and from the OIG), I informed Mr. Rickershauser that it would help BNSF to secure from UP the right to run these trains via trackage rights between Stockton and Elvas and Elvas and Oakland if the opportunity presented itself.

At some point in time after I communicated this thought to Mr. Rickershauser, Mr. Rickershauser advised me that UP had proposed language that accomplished what I was looking for. I subsequently learned that the parties included their agreement on this matter in Revised Section 1(g).

VERIFICATION

I, Rollin D. Bredenberg, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on October 3, 2007.


Rollin D. Bredenberg

**ATTACHMENT
REDACTED**

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of October 2007, a true and correct copy of the foregoing Final Brief of BNSF Railway Company Opposing Petition of Union Pacific Railroad Company for Reformation of Agreement is being served as follows

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