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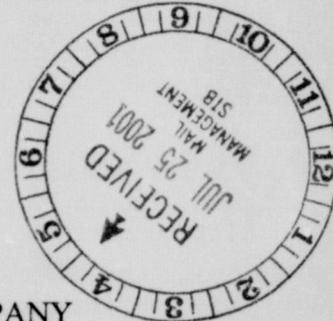
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UP/SP-387

BEFORE THE  
SURFACE TRANSPORTATION BOARD

Finance Docket No. 32760 (Sub-No. 21)

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 -- OVERSIGHT



**UNION PACIFIC'S OPPOSITION TO SUBSTANTIVE CHANGES TO  
THE BNSF SETTLEMENT AGREEMENT**

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**UNION PACIFIC'S OPPOSITION TO SUBSTANTIVE CHANGES  
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**INTRODUCTION**

UP opposes four BNSF proposals to make substantive changes to the 1995-1996 BNSF Settlement Agreement ("Agreement"), which the Board prescribed as a condition to the UP/SP merger. BNSF will present its proposals in a separate filing today.

BNSF and UP have successfully updated the BNSF Settlement Agreement to reflect technical changes and the Board's clarifying decisions. See UP/SP-386 and BNSF-92. Though challenging, this task was essentially ministerial. The parties achieved the goal of ensuring that the Agreement reflects the Board's condition on the UP/SP merger.

UP is unwilling, however, to alter the Board's condition by making major changes to BNSF's rights. BNSF's four proposals are not updates or conforming amendments, but instead would introduce substantive changes to the Agreement. BNSF wants to delete

substantive provisions of the Agreement and add new provisions, one of which the Board denied when it approved the merger.

The Board should reject BNSF's proposals. BNSF's proposals would constitute unlawful retroactive regulation by expanding the conditions on the UP/SP merger long after consummation. See Part A. These proposals also contravene the Board's policy favoring private settlement agreements and violate BNSF's promises in the Agreement. See Part B. The individual proposals are also unjustified:

1. BNSF wants to expand the definition of "2-to-1 Points" in a manner that the Board rejected when it approved the merger. See Part C.
2. BNSF seeks a new right to purchase tracks that UP or SP used as "team tracks," even though the Settlement Agreement requires BNSF to construct its own team tracks and other support facilities. See Part D.
3. BNSF wants to repeal certain operating restrictions that BNSF accepted in 1996 and that the Board imposed. See Part E.
4. BNSF proposes to broaden the Board's transload condition so that any shipper on over 4,000 miles of BNSF trackage rights could easily obtain access to BNSF service. See Part F.

BNSF and UP are jointly filing an updated BNSF Settlement Agreement, together with a red-lined version showing the many updates to which the railroads agreed. See UP/SP-386 and BNSF-92. In updating the BNSF Settlement Agreement, BNSF and UP made a number of technical changes and resolved several difficult questions. The resulting draft embodies the Agreement as the Board imposed it. Even after BNSF and UP filed their Oversight reports on July 2, they identified several minor updates and agreed on one major clarification: how to determine when a reopened shipping facility should be considered a "New Shipper Facility" and thus open to BNSF service. These cooperative efforts to update the BNSF

Settlement Agreement served the Board and our mutual customers well. But this technical process of updating the Agreement should not be expanded to make substantive changes to the Agreement as prescribed in 1996.

The parties ask the Board to resolve four disputed issues based on separate BNSF and UP comments today and further briefing to follow. We suggest that interested parties comment on these issues and on the updated Agreement by August 17, 2001. BNSF and UP will reply to each other and to comments from other parties by September 4, 2001.

### **DISCUSSION**

BNSF and UP agree that the BNSF Settlement Agreement as revised by the Board effectively replaced pre-merger competition between SP and UP. BNSF's Progress Report filed on July 2 glowingly describes BNSF's competition with UP. BNSF boasts that it exceeded its goal of creating a trackage rights operation "the size and scale of a new Class I railroad." BNSF-PR-20, p. 4.

Accordingly, BNSF does not need to expand its rights under the Agreement in order to provide effective competition against UP. In UP's view, the four disputes arise instead out of BNSF's desire to expand the BNSF Settlement Agreement. BNSF wants rights that it did not negotiate with UP and that the Board never imposed or considered necessary. In three of its four proposals, BNSF wants to add new terms to the Agreement. In the fourth, BNSF wants to strike provisions to which BNSF agreed in 1996.

A. BNSF's Proposals Would Impose Unlawful Retroactive Conditions on the UP/SP Merger

The Board lacks the power to grant BNSF's proposals. BNSF wants the Board to impose new burdens on the UP/SP merger five years after UP and SP consummated the merger. The Board cannot now impose any new burdens on the UP/SP merger. It can only modify or

replace conditions that failed to preserve competition. BNSF's Progress Report offers no basis for such a finding.

Any attempt to impose a new burden or condition on the UP/SP merger in 2001 would violate the rule against retroactive regulation. Applicants seeking merger authority have the right to know what conditions will apply to their merger before they decide whether to consummate it. Applicants must consent to conditions; they do so by carrying out their transaction. The ICC has long recognized that it cannot impose new conditions later:

If the carriers do not accept the conditions imposed by the Commission, they need not consummate the transaction. Now that the . . . transactions have already been consummated, the imposition of a trackage rights condition would lack the element of agreement.

Guilford Transportation Industries, Inc. - Control - Boston & Maine Corp., 5 I.C.C.2d 202, 206 (1988). UP and SP consummated their merger on the basis of the conditions the Board prescribed in Decision No. 44. The Board cannot impose new conditions on UP years after consummation. As the ICC held in Guilford, "The unfairness that would result from imposing a condition of which the consolidating carriers had no advance knowledge at the time of consummation is obvious." Id.<sup>1</sup>

The Board could modify a condition it imposed in Decision No. 44 if the condition failed to preserve competition. For four consecutive years, however, the Board has

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1 See also ICC v. Southern Ry., 380 F. Supp. 386, 399 n.26 (M.D. Ga. 1974), aff'd in part & vacated in part on other grounds, 543 F.2d 534 (5th Cir. 1976) (interpreting scope of conditions imposed on merger, court noted that "sight should not be lost of the fact that the DT&I conditions were imposed in each of the orders essentially with the consent of the Defendants without detailed exploration of their precise effect on the Defendants' operations. Under such circumstances, the Court must question the simple fairness of subjecting Defendants to obligations which certainly were not expressly considered at the times the conditions were imposed and which are, at best, not readily apparent from the language of the conditions themselves.").

reached the opposite conclusion. In 1997, 1998, 1999, and 2000, the Board concluded that its conditions have been entirely effective to ensure competition between UP and BNSF.<sup>2</sup>

Nothing in BNSF's comments suggests that the conditions have been ineffective in preserving competition. On the contrary, BNSF repeatedly boasts about its competitive successes using the Board's conditions. BNSF states that it "has been and continues to be an aggressive and effective competitor utilizing the rights it obtained pursuant to the BNSF Settlement Agreement and the conditions imposed by the Board." BNSF-PR-20, p. 2. BNSF provides "aggressive competitive service" and offers "a competitive alternative to the shippers to which BNSF gained access." *Id.* at 122-23. BNSF has exceeded its goal of "grow[ing] the traffic associated with its rights from zero carloadings and revenues to the size and scale of a new Class I railroad," *id.* at 4, and "extended the benefits of its network reach and its competitive products and services to more than 1,300 customers on the UP/SP lines," *id.* at 4-5.

BNSF expects to achieve even greater successes in the future. "BNSF anticipates the continued customer growth and commercial success of its UP/SP franchise through various new marketing and sales initiatives, new carload product development programs, and other ongoing efforts." *Id.* at 7.

Each of BNSF's proposals represents a request to impose new burdens on the UP/SP merger. In each case, BNSF wants to add or delete an express term of the BNSF Settlement Agreement. BNSF does not identify any failure of the Board's conditions that would justify these changes.

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<sup>2</sup> General Oversight Decision No. 10, 2 S.T.B. 703, 704-05 (1997); General Oversight Decision No. 13 served Dec. 21, 1998, pp. 8-9; General Oversight Decision No. 15 served Nov. 30, 1999; pp. 5-6; General Oversight Decision No. 16 served Dec. 15, 2000, p. 6.

First, BNSF wants to adopt a definition of "2-to-1 Points," a definition that the Board rejected. BNSF wants to define "2-to-1 Points" by using six-digit SPLC codes instead of by identifying locations with 2-to-1 shippers, as the parties agreed in the BNSF Settlement Agreement. The Board rejected this same proposal in its merger decision. Decision No. 44, 1 S.T.B. 233, 392-93 (1996). The Board imposed its transload and build-in/build-out conditions instead. Id. The Board cannot expand the primary condition it imposed on the UP/SP merger -- the BNSF Settlement Agreement -- without violating the applicants' right to decide whether to consummate their merger on the conditions stated by the Government.

Second, BNSF wants the Board to give BNSF a new right to purchase or lease tracks that UP or SP used as "team tracks" before the merger.<sup>3</sup> This right does not appear in the BNSF Settlement Agreement. On the contrary, BNSF agreed to construct its own support facilities such as team tracks. We will explain the unexpected practical difficulties this seemingly simple proposal would create. See Part C. For present purposes, though, we note only that BNSF's request does not arise out of any competitive failure. BNSF is competing effectively under the agreement as written by building its own team tracks. The new right it seeks would be a new condition on the merger.

Third, BNSF wants the Board to strike from the BNSF Settlement Agreement two operating limitations that BNSF accepted and the Board imposed. One provision limits BNSF's rights to use UP trackage rights from Arkansas to the St. Louis Gateway. The other provision limits BNSF's rights to use a short segment of overhead trackage rights in California -- rights UP

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<sup>3</sup> "Team tracks" are any tracks on which cars are placed for the public's use in loading or unloading freight using trucks. J. Beck, Rail Talk (1978). Decades ago shippers used wagons pulled by "teams" of horses.

granted as an accommodation to help BNSF avoid significant capital investments. BNSF cannot point to any failure of competition that justifies revoking these restrictions. BNSF simply wants more rights than it negotiated in 1995 and 1996. It wants new conditions on the merger.

Fourth, BNSF wants the Board to allow any shipper on a BNSF trackage rights line to construct a private "transload" facility and obtain BNSF service.<sup>4</sup> This would equate to "open access" on thousands of miles of UP lines and would directly conflict with the Board's statement that it will apply the transload condition "in a manner that would not result in direct BNSF access to what were UP's or SP's exclusively served shippers along the trackage rights lines." Decision No. 75, 2 S.T.B. 697, 702 (1997). BNSF's proposal would dramatically alter the competitive landscape throughout the West. This new condition cannot be imposed five years after the Board's merger decision.

The Board's new merger rules for Class I railroads could arguably lead to a different result in a future merger. In at least three instances, the Board's new rules warn applicants that the Board might impose new conditions on a transaction after consummation. It might impose new conditions to remedy an unexpected adverse impact of the merger, 49 C.F.R. § 1180.1(g), to correct an unreasonable failure to achieve a promised benefit, 49 C.F.R. § 1180.1(c)(1), or to address the effect of a "downstream" transaction, 49 C.F.R. § 1180.1(i). Under the new rules, however, applicants know that they risk additional conditions when they decide whether to consummate their transaction. As the Board held in promulgating its new

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<sup>4</sup> The parties agree that a transload is a facility requiring capital investment and constructed for the purpose of transferring products between rail cars and other transport modes.

merger rules, however, the new rules cannot lawfully be imposed on completed transactions such as the UP/SP merger.<sup>5</sup>

B. BNSF's Proposals Would Contravene the Board's Policy Favoring Settlements and BNSF's Promises in the BNSF Settlement Agreement

BNSF's attempt to make substantive revisions in the BNSF Settlement Agreement five years after the UP/SP merger strikes at the heart of private settlements in merger cases. A merged railroad must be able to rely on its settlement agreement partners to honor their agreements in the form imposed by the Board. A merged carrier should not be forced to fight a rear-guard action throughout the Oversight period against settlement partners' attempts to obtain additional competitive concessions. BNSF's proposals seek just such concessions.

If granted, BNSF's proposals for substantive revisions will undermine the Board's efforts to encourage settlements in merger cases. The Board has often stated its policy favoring private settlements. As the Board wrote in CN/IC, "It has been our practice to encourage settlement agreements in merger proceedings. . . . Such agreements are in the public interest." Finance Docket No. 33556, Canadian National Ry., et al. - Control - Illinois Central Corp., et al., Decision No. 37 served May 25, 1999, p. 25. This policy dates back to at least 1982. See UP-MP-WP, 366 I.C.C. 459, 601 (1982) ("We favor the negotiation of settlements by parties to a consolidation proceeding.") The Board's new rules for Class I mergers affirm this policy and reiterate the Board's willingness to "impose [settlement agreements] as conditions as appropriate." Ex Parte No. 582 (Sub-No. 1), Major Rail Consolidation Procedures, Decision served June 11, 2001, p. 52.

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<sup>5</sup> Ex Parte No. 582 (Sub. No. 1), Major Rail Consolidation Procedures. Decision served June 11, 2001, p. 45.

Were it to grant BNSF's proposals to modify the BNSF Settlement Agreement, the Board would discourage settlements. It would effectively announce that a settlement is never reliable or final. It would tell future merger applicants that they cannot count on a settlement agreement, because the settlement partner can return to the Board for round after round of concessions. UP recognized that it needed to make concessions to BNSF in its customers' interests during the service crisis of 1997 and 1998. Under normal conditions, however, anyone proposing a substantive change to a settlement agreement ought to bear an extraordinary burden of proving that the Board should alter the agreement. Otherwise, settlement agreements will not be worth obtaining.

BNSF's attempts to revise the BNSF Settlement Agreement are particularly troubling because BNSF agreed not to seek new concessions. In prescribing the Agreement, the Board imposed those promises on BNSF.

BNSF promised to support the agreement it negotiated with SP and UP. It not only promised to refrain from seeking other conditions but also to oppose any conditions proposed by other parties. BNSF promised in Section 14 of the Agreement to play no role in the merger proceeding other than "to support this Agreement, to protect the commercial value of the rights granted to BNSF by this Agreement, and to oppose requests for conditions by other parties." BNSF also promised that it would "not seek any additional conditions on the merger." Id. BNSF and UP committed "to cooperate with each other . . . to implement the provisions of this Agreement." Id.

BNSF's request to revise the definition of "2-to-1 Points" in a way the Board has already rejected violates BNSF's promises. BNSF promised to support the agreement it

negotiated and to oppose conditions other parties might suggest. It now advocates a definition that NITL sought and attacks the definition BNSF and UP negotiated.

Similarly, BNSF's requests to require UP to sell or lease former team tracks to BNSF and to remove operating restrictions that BNSF accepted violate BNSF's promise to implement the agreement as negotiated. The proposal to require UP to sell former team tracks is a request for a new condition. Removing the operating restrictions would also condition the merger by giving BNSF new operating rights. The impact would be physical: BNSF would run more trains on UP tracks as a result. BNSF's attempt to broaden access to solely-served UP shippers by expanding the Board's transload condition also violates BNSF's promise to support the deal it made and not to seek more competitive advantages through Board action.

The Board should hold BNSF to its promises.

C. The Board Rejected BNSF's Expanded Definition of "2-to-1 Points"

After five years of oversight, BNSF proposes to revise the definition of "2-to-1 Points." BNSF wants the Board to adopt a concept that the Board considered and rejected in Decision No. 44. BNSF thus ignores the Board's warning in this Oversight proceeding not to relitigate issues resolved in Decision No. 44:

It is not the purpose of this oversight proceeding to give the parties an opportunity to relitigate our merger decision, and in the absence of a competitive problem, it would not be appropriate for us to reopen the merger and impose additional conditions.

General Oversight Decision No. 10, 2 S.T.B. 703, 718 (1997). With no evidence of a competitive problem, BNSF wants to relitigate the merger.<sup>6</sup>

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<sup>6</sup> BNSF's argument is indistinguishable from one raised by KCS in this proceeding last year, to which the Board responded: "it is an extremely tardy claim that we committed material (continued...)"

John H. Rebensdorf, Vice President-Network and Service Planning, served as UP's principal negotiator of the BNSF Settlement Agreement. In his attached verified statement, he explains that UP negotiated the Agreement on the basis of a clear definition of "2-to-1 Points." UP defined "2-to-1 Points" as locations where at least one shipping facility enjoyed pre-merger access to both UP and SP and no other carrier.<sup>7</sup> BNSF and UP reached the Agreement on the basis of that concept. They presented that concept to the Board. See Rebensdorf V.S., p. 8. The Board understood it and adopted it. See Decision No. 44, 1 S.T.B. 233, 390 (1996). Applying that concept, UP believes that the parties have already identified all "2-to-1 Points." See UP/SP-385, p. 11.

BNSF proposes that the Agreement should now include a more expansive definition of "2-to-1 Points." BNSF would redefine "2-to-1 Points" as 6-digit SPLC locations<sup>8</sup> where SP and UP tracks were present, even though not a single shipper facility at those locations was served by both UP and SP before the merger. BNSF suggests that "2-to-1 Points" should be defined to include

all geographic locations (as defined by 6-digit SPLCs)  
served in any manner by both UP and SP before the merger  
. . . regardless of whether any shipper at the location was  
open to or served by both UP and SP pre-merger.

BNSF-PR-20, p. 111. BNSF thus wants to revoke the basic structure of the Agreement, which is to identify and provide competition for all 2-to-1 shippers.

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error" in Decision No. 44. As in that instance, the Board should "see no need to consider this issue further." General Oversight Decision No. 16 served Dec. 15, 2000, p. 12.

<sup>7</sup> This access could be via direct rail service, reciprocal switching, or joint facility.

<sup>8</sup> A 6-digit SPLC is the equivalent of a freight station.

The Board already rejected this proposal when NITL advanced it in the merger proceeding. See 1 S.T.B. at 392 n.133. The Board rejected it and other similar proposals based on SPLC codes because those geographic areas do not correspond to competitive conditions. In Decision No. 44, the Board noted that “broader geographic units increase the likelihood that points served by one railroad as 1-to-1 will be treated as 2-to-1, 3-to-2, or even 4-to-3.” Id. at 391. Wider geographic areas, including 6-digit SPLCs, are problematic because they “aggregate traffic that will experience various types of competitive problems that we think are readily susceptible to different types of remedies.” Id. at 392.

Instead of defining “2-to-1 Points” by using SPLC codes, the Board adopted its transload, new shipper facilities, and build-in/build-out conditions. It believed that those conditions would provide superior remedies. See id. at 392-93. As the Board stated,

[r]ather than redefining 2-to-1 Points as those within some arbitrary proximity to two rail carriers ... we have devised specific conditions directly addressing both the competitive problems that have been raised with [the agreements] and concerns about whether BNSF will have sufficient traffic to compete effectively.

Id. at 372 (footnote omitted).

Given the success of the Board’s conditions over the past five years, the Board should not revisit the definition of “2-to-1 Points.” BNSF does not explain why the Board should use 6-digit SPLCs to define “2-to-1 Points” after it rejected the proposal in 1996. This issue has been resolved and should not be relitigated.

D. BNSF’s New “Team Tracks” Condition Is Inconsistent with the Agreement and Would Interfere With UP Service

BNSF wants the Board to add a new provision to the BNSF Settlement Agreement requiring UP to sell team tracks that UP no longer uses as team tracks. BNSF-PR-20, p. 117. UP apparently would be required to give up these tracks even if UP is using them for

other purposes. UP/SP-386 and BNSF-92, Proposed Restated and Amended Agreement, pp. 35-36. BNSF asserts that purchasing these team tracks would replicate pre-merger competition because UP and SP competed using team tracks. BNSF-PR-20, p. 117. The parties agreed, however, to replicate this competition in another way.

The Agreement gives BNSF no right to use or acquire SP or UP team tracks. Instead, UP and BNSF agreed that BNSF would build its own rail-served facilities such as team tracks. See *Rebensdorf V.S.*, p. 9. Except in a few specified locations, BNSF did not receive the right to use UP or SP support facilities such as intermodal facilities, automotive facilities, and team tracks. Team tracks are the least expensive of these support facilities for BNSF to build. See id.

BNSF recognizes that it has the right and opportunity to construct its own team tracks. Section 9(h) of the Agreement guarantees that right. Indeed, BNSF and UP agreed to clarify this section to refer specifically to "team tracks" so that there can be no doubt of BNSF's ability to compete by constructing such tracks. UP/SP-386 and BNSF-92, Proposed Restated and Amended Agreement, p. 41.

BNSF's proposal would cause ongoing disputes between UP and BNSF over what constitutes a "team track." Team tracks often are almost impossible to identify. Many tracks are used only temporarily as team tracks. As John Rebensdorf explains, UP often uses maintenance tracks, yard tracks, and lead tracks to industries as temporary team tracks. *Rebensdorf V.S.*, p. 10. UP keeps no records of these uses. Indeed, UP has no list of tracks that it or SP once designated as team tracks. If BNSF's proposal were granted, the Board could be forced to referee disputes based on oral histories and speculation about how tracks were used in 1996.

BNSF's proposals would also confiscate tracks that UP needs for operating purposes. As Mr. Rebensdorf explains, UP uses tracks interchangeably as team tracks and for other purposes. UP needs most of the tracks that once were used as team tracks. BNSF should not be able to force UP to sell or lease tracks that UP is using for track-maintenance equipment or to serve its customers.

As a practical matter, UP is often willing to sell unused tracks of any type to BNSF. If BNSF were to make UP an offer to buy an unused track at a 2-to-1 location, UP would entertain the offer as it has in the past.

E. Operating Restrictions to Which BNSF Agreed Should Not Be Revoked

1. The St. Louis Gateway Agreement

BNSF wants the Board to strike two restrictions on BNSF's trackage rights from northeastern Arkansas to the St. Louis Gateway. UP granted supplemental St. Louis Gateway trackage rights to BNSF in the CMA Settlement Agreement. CMA had worried that BNSF might not be able to compete effectively for St. Louis Gateway traffic using trackage rights from Texas to Memphis and BNSF's own line from Memphis to St. Louis. See Map No. 1. It wanted BNSF to be able to use the same tracks UP would use to serve the St. Louis Gateway. UP agreed to make that concession.

BNSF, CMA, and UP agreed; however, that BNSF would use the trackage rights only to serve St. Louis Gateway traffic. They achieved this goal by imposing two restrictions on the St. Louis Gateway trackage rights. First, BNSF agreed that its trains would not enter or leave these trackage rights at intermediate points north of Bald Knob and Fair Oaks, Arkansas. Second, BNSF agreed that it would continue to use its own Memphis-St. Louis line to carry traffic that already used that line.

These restrictions made sense then, and they continue to make sense today.

CMA's competitive concern was limited to St. Louis Gateway traffic, and the new, restricted trackage rights between eastern Arkansas and East St. Louis solved the concern without giving BNSF additional rights. The restrictions also ensured that BNSF will use its own network of tracks rather than relying unnecessarily on UP's tracks.

The Board imposed the revised BNSF Settlement Agreement with the restrictions intact. See Decision No. 44, 1 S.T.B. at 419 (imposing as a condition the terms of the CMA Settlement Agreement). As a result, BNSF's trackage rights to East St. Louis can be used only for traffic moving between East St. Louis and points south of Bald Knob and Brinkley, Arkansas. See UP/SP-219, Attachment, p. 2. BNSF also may not move trains between its own lines and the UP trackage north of these two points. See UP/SP-266, Ex. A, § 5d, p. 12 (amending § 6c of the agreement). BNSF wants to remove these restrictions from the Agreement.

First, BNSF wants trains on BNSF's mainline between Memphis and Kansas City to enter and leave the UP trackage rights lines north of Bald Knob and Brinkley. See Map No. 1. BNSF argues that this will allow it to compete more effectively. See BNSF-PR-20, p. 116. Neither BNSF nor any other party argued in 1996 or in the years since that BNSF needs to use this interline route. BNSF wants to be a more effective competitor for traffic that has nothing to do with the St. Louis Gateway. BNSF can compete for this traffic using its own lines. Rebensdorf V.S. at 4.

Removing this restriction would modestly shorten BNSF's routes for certain traffic and save it some operating expenses, but that is not a reason to impose a new condition. The same would be true of dozens of other concessions UP might make to BNSF or BNSF might make to UP throughout the West. The Board should encourage railroads to negotiate such

efficiency-enhancing exchanges. It should not grant rights to one competitor at the expense of the other, unless there is evidence of a competitive failure.

Neither the UP/SP merger nor the restrictions to which BNSF agreed created a competitive failure.<sup>9</sup> Mileage differences between competing rail routes are not competitive failures. They are universal in the railroad industry. BNSF's Chicago-Bay Area route is hundreds of miles longer than UP's Chicago-Bay Area route, yet BNSF dominates the intermodal traffic in that corridor. BNSF's route between Kansas City and Memphis is considerably shorter than UP's routes, but that is not a failure of competition that justifies a concession to UP. Such modest mileage differences create no basis for Government intervention.

BNSF argues that the Board in Decision No. 44 gave BNSF unrestricted use of every trackage rights line. See BNSF-PR-20, pp. 115-116. BNSF cites no language in Decision 44 to support this expansive proposition. The Board imposed the CMA and BNSF Settlement Agreements as conditions in Decision No. 44. Both agreements include the restriction on the St. Louis Gateway trackage rights. See Decision No. 44, 1 S.T.B. at 419. The Board did not strike the restriction, even though the Board identified every respect in which it wanted to modify those agreements. The Board's silence about the operating restrictions should be construed as endorsement, not implied repeal.

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<sup>9</sup> The restrictions do not prevent competition. BNSF and Entergy Services recently persuaded the Board to allow Entergy to build out to BNSF's restricted trackage rights near Pine Bluff, Arkansas. Decision No. 88 served Mar. 21, 2000. Entergy asserted in July 1999 that the White Bluff build-out would result in "competitive rail transportation service" at "competitive rates." Finance Docket No. 33782, Petition for an Exemption from 49 U.S.C. § 10901 to Construct and Operate a Rail Line Between White Bluff and Pine Bluff, Arkansas (July 30, 1999), p. 4.

BNSF also argues that the Board's Decision No. 61 rejected limits on BNSF's trackage rights. See BNSF-PR-20, p. 115. In that decision, the Board found that BNSF could access new facilities along its trackage rights over UP's line between Houston and Valley Junction and over UP's line between Fair Oaks and Bald Knob. See Decision No. 61 served Nov. 20, 1996, pp. 5, 11. This decision said nothing about removing the express restrictions on entry and exit from the St. Louis Gateway trackage rights.

Second, BNSF wants to revoke the restriction on the St. Louis Gateway trackage rights that requires BNSF to use its own Memphis-St. Louis line for traffic BNSF handled that way before the merger. As Map No. 1 shows, BNSF operates its own mainline along the Mississippi River between those points and uses that line to handle traffic to and from Birmingham, Alabama, and points throughout the Southeast. BNSF agreed that it would limit its use of the St. Louis Gateway trackage rights to traffic that it carries over the trackage rights from points in Texas, Louisiana, and Arkansas south of Bald Knob and Brinkley. In other words, BNSF agreed to use the UP and SP lines only for merger-related traffic and its own line for other traffic.

BNSF offers no explanation for striking this restriction. There is no plausible theory under which removing this restriction would remedy a competitive failure caused by the merger, and BNSF points to no such failure. The traffic subject to the restriction moves exactly as it did before the merger.

UP suspects that BNSF's goal is to abandon part of its Mississippi River line in favor of using UP's tracks. This would confer a financial windfall on BNSF but to the detriment of shippers, particularly those located on the line segments BNSF would abandon. Moreover, UP's tracks are congested in places. UP invested millions of dollars after the merger to expand

capacity near Dexter, Missouri, to handle post-merger traffic. The Board should order BNSF to honor its agreement and use its own tracks.

2. The Elvas-Stockton Agreement

BNSF wants the Board to eliminate a unique restriction that affects only BNSF's trackage rights between Elvas (a rail junction in Sacramento) and Stockton, California. UP granted trackage rights on that segment as a special accommodation to BNSF, and BNSF expressly agreed to the unique restriction. Specifically, BNSF agreed that it would not serve local shippers on the line segment. That restriction appears in the BNSF Settlement Agreement, and the Board imposed it.

Understanding this restriction requires studying a map. BNSF acquired trackage rights on two routes between Nevada and Northern California. This area is shown in Map No. 2. The Agreement gave BNSF trackage rights on UP's Feather River Route between Weso (Winnemucca), Nevada, and Stockton, California. See UP/SP-22, p. 319. It also gave BNSF limited trackage rights to run certain trains on SP's Overland Route between Weso, Nevada, and Oakland, California. Id. The SP Overland Route crosses the UP Feather River Route to Stockton on a high overpass at Haggin Junction in Sacramento.

During the merger proceedings, BNSF decided that it wanted to operate intermodal trains between the Midwest and Stockton over SP's Overland Route to Sacramento and then over the UP Feather River Route to Stockton. See UP/SP-266, p. 6. This would have required BNSF trains to transit between the SP and UP routes at Haggin Junction. There was (and is) no connection in the southeast quadrant of this junction, making it necessary to construct one. A joint BNSF-UP inspection showed that the connection would be extremely expensive. Rebensdorf V.S. at 6 & Attach. 1. The connecting track would have descended through a baseball diamond and several homes, and it would have blocked C Street in Sacramento. The

track also would have intruded into an historic neighborhood in Sacramento known as Boulevard Park. Photographs at the end of this Opposition show these problems.

As an accommodation to BNSF, UP gave BNSF trackage rights to run trains on a SP line from Sacramento (Elvas Tower) to Stockton. This line runs parallel to the UP line over which BNSF already had trackage rights. See UP/SP-266, p. 6 (the Second Supplemental Agreement granted the trackage rights over the SP line because of the physical layout of the tracks at Haggin Junction); id., Ex. A, p. 2, § 1(a). Section 1(a) of the agreement therefore grants BNSF only overhead trackage rights on this SP line. Section 1(b) provides that BNSF can serve new shipper facilities "except the line between Elvas (Elvas Interlocking) and Stockton." UP/SP-266, Exhibit A, p. 2.

UP offered overhead trackage rights on the SP segment because those rights allowed BNSF to avoid an expensive connection at Sacramento. UP's accommodation saved BNSF significant capital costs and facilitated competition in the Central Corridor. BNSF should not seek to penalize UP for allowing BNSF to avoid a capital expense and an environmental fight with Sacramento.

BNSF claims that the Board silently repealed this restriction, the same claim BNSF makes regarding the St. Louis Gateway restriction. The Board did no such thing. BNSF, CMA, and UP always accorded unique treatment to the Elvas-Stockton segment. Even though they agreed in the CMA Settlement Agreement that BNSF would have access to all new shipper facilities on SP lines, they nevertheless specifically retained the unique prohibition on this one SP line segment. UP/SP-266, p. 3. When the Board later expanded the CMA agreement to include UP lines, it never indicated that it intended to reject this specific restriction on use of an SP line.

Notwithstanding the restriction, UP later granted BNSF access to two shippers on the Elvas-Stockton line during UP's service crisis of 1997-98. *Rebensdorf V.S.* at 7. UP granted this access because UP wanted to provide those customers with rail alternatives while UP's service was struggling. UP's efforts to improve service for shippers should not be held against UP.

The Board should reject BNSF's proposal to lift the restrictions on its overhead trackage rights over the Elvas-Stockton line. The Board approved the Agreement with this express limitation, and BNSF has offered no reason to modify the Agreement. The restriction does not harm competition, because new shippers in the Stockton-Sacramento corridor can use BNSF service on the parallel UP line only a few miles away. BNSF should accept the restriction to which it agreed and not attack UP for generosity.

F. BNSF's Definition of "New Transload Facilities" Conflicts With Board Decisions

BNSF proposes definitions of "Existing Transload Facilities" and "New Transload Facilities" that potentially would give BNSF access to every UP-served industry on more than 4,000 miles of trackage rights. BNSF's proposed definitions disregard the Board's instruction that its transload condition be applied "in a manner that would not result in direct BNSF access to what were UP's or SP's exclusively served shippers along the trackage rights lines." Decision No. 75, 2 S.T.B. 697, 702 (1997) (emphasis added).

Decision No. 44 does not define transload facilities, either existing or new. The Board imposed a transload condition without providing a detailed definition of transload facilities. Decision No. 44, 1 S.T.B. at 419-20. The Board's condition expanded a more limited transload condition developed by CMA, BNSF, and UP. As revised by the Board, the transload condition granted BNSF access to transload facilities at all "2-to-1 Points" at the time of the

merger (existing transloads) and to new transload facilities on lines where BNSF gained trackage rights.

The Board then partially clarified the meaning of new transload facilities in Decision No. 75, 2 S.T.B. 697 (1997), and General Oversight Decision No. 10, 2 S.T.B. 703 (1997). Providing only general principles, the Board explained that the purpose of this condition was "to continue and replicate the indirect competition that would otherwise be lost as SP is absorbed into UP." Decision No.75 at 699. The Board disavowed any "contrivance to obtain a competitive option that was not available to the shipper prior to the merger." *Id.* at 701. UP has complied with these decisions and will continue to do so.

BNSF wants to add new definitions of "Existing Transload Facilities" and "New Transload Facilities." UP sees no reason to add a definition of "Existing Transload Facilities." UP believes that the parties have identified all such facilities and that there is no reason to debate a definition of facilities we have already found.<sup>10</sup> BNSF is highly unlikely to identify any additional 1996 transload facilities at "2-to-1 Points" more than five years after the merger.

UP is willing to adopt a definition of "New Transload Facilities" that is consistent with the Board's decisions. UP is unwilling to adopt a BNSF definition that converts the Board's transload condition into a prescription for open access on more than 4,000 miles of BNSF trackage rights. BNSF's proposed definition would make it easy for every shipper to build its own "transload" adjacent to its current shipping facility and gain service by a second railroad. No shipper could have used so simple a device to obtain two-carrier service before the merger, so BNSF's definition cannot be competitively justified.

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<sup>10</sup> If the Board elects to define "Existing Transload Facilities," it should apply UP's definition for new facilities.

BNSF contends that it should gain access to any "legitimate transload facility," even if only one shipper owns and uses it. BNSF argues that a transload facility is "legitimate" if a shipper merely constructs improvements at the facility and incurs additional operating costs. BNSF-PR-20, p. 114. Any shipper on more than 4,000 miles of BNSF trackage rights could comply with these minimal requirements by building a transload facility adjacent to its existing plant.

Advocates of so-called "open access" will endorse this scheme, but the Board did not intend it. The Board refused to use its transload condition to achieve open access. As the Board stated in General Oversight Decision No. 10, 2 S.T.B. 703, 715 (1997), "It was not our intention to open up UP's and SP's existing exclusively served traffic to direct BNSF service through this condition."

UP proposes a definition of "New Transload Facilities" that complies with the Board's objective. Our definition differs from BNSF's in one key respect. BNSF's definition, contrary to General Oversight Decision No. 10, allows a single shipper to build a transload for its own products. UP/SP-386 and BNSF-92, Proposed Restated and Amended Agreement, p. 6. UP's proposal, by comparison, requires the operator of the transload facility to be someone other than the shipper.

If the Board concludes that a single shipper may construct and operate a transload facility for its own products, the Board should at least confine this right to locations where transloading competition might have existed before the merger. The Board can achieve this result easily. A shipper whose facility was served by SP would be required to build its transload facility on a line owned by UP before the merger or vice versa. Without that restriction, single-shipper transloads will violate Decision No. 75 by "giving BNSF direct rail access to shippers

that only received direct and exclusive rail from either UP or SP prior to the merger." 2 S.T.B. at 699.

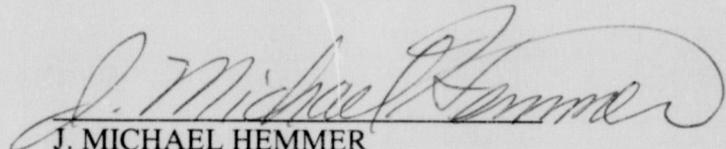
### **CONCLUSION**

BNSF and UP achieved their goal of updating the BNSF agreement to reflect technical amendments and Board interpretations. UP/SP-386 and BNSF-92. The Board should not allow BNSF to obtain new concessions and add new burdens to the UP/SP merger five years after consummation, especially in light of BNSF's extraordinary success in competing with UP. The updated BNSF Settlement Agreement without the BNSF proposals reflects the condition as the Board imposed it. The Board should deny BNSF's attempts to make additional changes for BNSF's competitive advantage.

Respectfully submitted,

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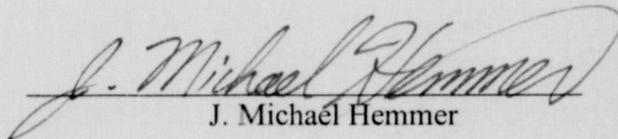
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*Attorneys for Union Pacific Corporation  
Union Pacific Railroad Company and  
Southern Pacific Rail Corporation*

July 25, 2001

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 25th day of July 2001 a copy of the foregoing "Union Pacific's Opposition to Substantive Changes to the BNSF Settlement Agreement" was mailed, postage prepaid, to all parties of record.

  
J. Michael Hemmer



VERIFIED STATEMENT

OF

JOHN H. REBENS DORF

My name is John Rebensdorf. I am Vice President-Network and Service Planning for Union Pacific Railroad Company ("UP"). I hold a Bachelor's Degree in Civil Engineering from the University of Nebraska and a Master's Degree in Business Administration from Harvard University. Before coming to UP, I was employed as a management consultant by Temple, Barker and Sloane. I have worked in the Mechanical Department of the Chicago, Burlington & Quincy Railroad and in the Operating and Engineering Department of the Chicago, Rock Island and Pacific Railroad. I joined UP in 1971 as Manager of Budget Research. I became Assistant Controller in 1976, Assistant Vice President-Planning and Analysis in 1980, Assistant Vice President-Finance in 1984, Vice President-Strategic Planning in 1987, and was appointed to my present position in 1988.

When UP and SP decided to merge, UP charged me with responsibility for negotiating an agreement that would preserve rail competition for all of our customers who had been served by UP and SP and no other railroad ("2-to-1" customers). I described this assignment in my verified statement in the UP/SP application, Volume 1 (UP/SP-22), pages 292-96. I led UP's efforts to reach agreement not only with BNSF, but also with KCS, Conrail and other interested parties. After a marathon three-day session in September 1995, we reached agreement with BNSF. I presented that agreement, as well as a supplemental agreement, as an attachment to my verified statement in UP/SP-22.

I offer this statement to discuss four understandings that BNSF is attempting to modify in the final year of the UP/SP Oversight proceeding. BNSF, SP, and UP agreed to all four of these understandings in 1995 and 1996. The BNSF Settlement Agreement reflects all four of these understandings accurately and faithfully. In my opinion, BNSF's attempt to revise these understandings years after it agreed to them would unfairly change the conditions on which UP and SP decided to consummate the merger.

#### **A. Fair Oaks/Bald Knob Agreement**

I understand that BNSF wants the Board to revoke two elements of the agreement among CMA, BNSF, and UP regarding extension of BNSF's trackage rights to East St. Louis. The Board imposed the BNSF Settlement Agreement with these express restrictions in 1996. BNSF has operated under these restrictions since then without difficulty.

Under the original agreement negotiated among BNSF, SP, and UP, BNSF was to use trackage rights between Houston and Memphis on the SP line. BNSF did not negotiate rights on the parallel UP line or trackage rights to East St. Louis. All three railroads assumed that BNSF would use its own ex-Frisco line along the Mississippi River between Memphis and St. Louis to serve the St. Louis Gateway.

The Chemical Manufacturers Association, along with several other parties, objected that BNSF might not be able to compete effectively against UP/SP unless it obtained trackage rights on UP/SP all the way to the St. Louis Gateway. CMA also argued that BNSF should be able to operate with the flow of UP's directional operations in the Missouri-Texas corridor. To do this, BNSF would need trackage rights on UP lines as well as on SP lines. Map No. 1 shows these routes.

In order to gain CMA's support for the UP/SP merger, the applicants negotiated the CMA Settlement Agreement in the spring of 1996. BNSF was also a party to this agreement. The CMA Settlement Agreement granted BNSF the additional rights CMA had sought. BNSF could operate its trains all the way to East St. Louis on the merged UP/SP. It also could operate trains on UP's lines as well as the SP lines from Houston through Arkansas to Missouri. BNSF also gained the right to use UP's line from Bald Knob, Arkansas, through Fair Oaks, Arkansas, to Memphis. The additional route gave BNSF the ability to participate in directional operations to and from the Memphis Gateway.

In giving BNSF access to the St. Louis Gateway and to UP's lines, CMA, BNSF, and UP negotiated two restrictions on BNSF's use of its new rights to the St. Louis Gateway. We negotiated these restrictions because BNSF would otherwise have obtained rights to use UP and SP lines that were not necessary to satisfy the only concern about competition, which was whether BNSF could compete for St. Louis Gateway traffic. BNSF has its own mainlines in Arkansas and Missouri, and it can use its own lines for all other traffic. Map No. 1 shows the BNSF routes. BNSF is now attempting to revoke the restrictions that it accepted in 1996.

The first restriction requires BNSF to continue to use its own line from Memphis to St. Louis. This restriction states that BNSF cannot use its trackage rights on UP and SP between Memphis and East St. Louis to carry any traffic other than traffic to or from Texas and Louisiana, areas where BNSF gained access to industries as a result of the UP/SP merger. This restriction requires BNSF to use its own line along the Mississippi River between Memphis and St. Louis to carry traffic to and from the Southeast on BNSF's lines from Birmingham, Alabama, and Pensacola, Florida through Memphis, Mississippi, and Alabama.

BNSF should be required to use its own line and not rely on UP's routes. The merger provides no reason for BNSF to be able to use UP lines for this traffic. Moreover, if the Board allows BNSF to rewrite the CMA Settlement Agreement so that it can operate its Memphis and Birmingham traffic on UP's lines, we anticipate that BNSF would abandon service over parts of its Mississippi River line. This will be a financial windfall for BNSF and likely will cause the few shippers on those segments to lose rail service.

BNSF, CMA, and the applicants agreed to a second restriction on BNSF's trackage rights to the St. Louis Gateway. They agreed that BNSF could not enter or exit the trackage rights over the UP and SP lines north of Bald Knob and Fair Oaks on the UP line to Memphis. This restriction served two purposes. First, it again required BNSF to use its own existing lines rather than using ours. Second, it restricted the trackage rights to East St. Louis to their sole purpose, which was to give BNSF a more direct route to East St. Louis. No one in the UP/SP proceeding ever suggested that BNSF needed a more direct route for traffic to and from any point other than St. Louis Gateway traffic. The restriction carries out this intent without imposing unnecessary BNSF operations on UP lines.

I understand that BNSF now claims that it will be more competitive if it can enter and exit the St. Louis trackage rights lines from its Kansas City - Memphis line at Hoxie, Arkansas, and Jonesboro, Arkansas. BNSF probably could save a few dollars by using our line instead of its own lines to Memphis. Similarly, BNSF could save money and be more competitive if it were granted unrestricted access to UP lines all over the western United States. UP could be more efficient if it enjoyed unrestricted access to BNSF lines all over the West as well. However, the UP/SP merger did not create a problem requiring any of these government-imposed trackage rights and rights of access.

Railroads should negotiate mutually beneficial exchanges of trackage rights, rather than asking the Government to impose one-sided concessions that favor one competitor. If BNSF wants to enter and exit UP and SP lines in northeast Arkansas, it should negotiate with UP and give UP efficiency-enhancing or commercially attractive rights in return. I strongly object to the Government helping UP's competitor compete against my company in a situation where the merger created no competitive problem. BNSF's routes were good enough for BNSF and CMA in 1996, and they are good enough today.

#### **B. Elvas-Stockton Agreement**

I understand that BNSF also wants to rescind an agreement that it reached with UP regarding restricted use of a rail line in California. I strongly object to BNSF's opportunistic behavior, because BNSF is attempting to expand rights that UP granted voluntarily to avoid construction by BNSF of an expensive and politically difficult connection.

BNSF, SP, and UP agreed to give BNSF trackage rights on two routes between Nevada and California at the west end of the Central Corridor. BNSF obtained trackage rights on UP's former Western Pacific line between Weso (near Winnemucca), Nevada, and Stockton California. The portion of this line between Stockton and Keddie is also a segment of BNSF's I-5 line between Canada and the Pacific Northwest and California and Arizona. BNSF also obtained rights for limited operations on the SP Overland Route between Weso and Oakland via Reno and Sacramento. The Central Pacific Railway built this line as the original transcontinental railroad in the late 1860's. BNSF may use the Overland Route only for intermodal and automotive trains and for one manifest train per day in each direction.

These two routes cross on the north side of Sacramento at a place called Haggin Junction. Under the terms of the BNSF Settlement Agreement, BNSF has the right to enter and

exit its trackage rights on the UP line between Weso and Stockton at Haggin Junction. Map No. 2 shows these routes and locations. BNSF wanted to be able to connect the two routes so that it could operate intermodal trains via Reno to and from Stockton.

When UP and BNSF personnel inspected Haggin Junction on April 15, 1996, they discovered that building the connection would be extremely expensive and would require closing a street in Sacramento. As the photographs attached to my statement show, the SP track is substantially elevated above the UP line in a densely developed area of Sacramento. In order to construct a connection from the SP line to the UP line, BNSF would have had to construct an expensive connection that would have cut through the Boulevard Park baseball diamond, required removal of several homes and businesses, and blocked C Street and possibly D Street in Sacramento. BNSF's Vice President Transportation wrote us that "construction of a connection would be cost prohibitive." Attachment 1. He also noted that the City of Sacramento probably would oppose the project because it would require closing C Street. He therefore asked UP to allow BNSF intermodal trains to operate via the existing connection to SP's route.

As an accommodation to BNSF, UP volunteered to give BNSF a second route between Sacramento and Stockton on the former SP line. We knew that the expense of constructing a connection at Haggin Junction would not be justified by the volume of traffic BNSF wanted to operate. This line branches south from the SP Overland Route at Elvas Tower in northeast Sacramento and parallels the UP line to Stockton. UP therefore saved BNSF millions of dollars in costs and political turmoil in Sacramento. Using the Elvas-Stockton route did not require BNSF to make any added investment.

UP was willing to extend this concession only on the clear understanding that BNSF would not gain access to new industries on the SP line. The BNSF Settlement Agreement

expressly contains this restriction. BNSF already had gained access to any new industries that might decide to locate on the UP line in the same corridor, so siting competition was preserved. BNSF never objected to this restriction and never tried to remove it until this summer.

UP voluntarily granted BNSF access to two industries on this route during the 1997-98 service crisis. UP could have resisted but chose not to because its service was not satisfactory at the time, and it wanted to satisfy these customers. UP should not be penalized for this accommodation, just as it should not be penalized for accommodating BNSF's desire to avoid constructing the Haggin Junction connection.

This agreed-upon restriction does not interfere with competition. Siting competition remains throughout the Stockton-Sacramento corridor because BNSF would gain access to any new industry that locates on the UP line. Shippers considering facilities in this corridor can bargain with BNSF and UP to obtain competitive concessions.

### **C. Definition of Two-to-One Points**

BNSF wants to revise the basic structure of the BNSF Settlement Agreement that it accepted in our negotiations in 1995. It wants to redefine "2-to-1 Points" in a new way that would include additional points. By including additional points as "2-to-1 Points," BNSF would gain access to any new industries that locate at those points, even though they may be remote from any line on which BNSF has trackage rights. BNSF would also gain the right to construct rail-owned facilities at those points, including freight yards, SIT facilities, and intermodal facilities, even if BNSF does not serve a single shipper facility at that location.

When we negotiated the BNSF Settlement Agreement, the parties agreed that a 2-to-1 Point would be a point at which any shipper is now or ever has been capable of being served by both UP and SP and no other railroad. This definition appears in the BNSF Settlement

Agreement. That definition was accepted by the Board and has been applied by the STB consistently over the past five years. If no shipper facility fits that definition, the point is not a "2-to-1 Point."

The UP/SP application and my verified statement in the application could not be clearer in explaining that our goal was to preserve service to every 2-to-1 customer not to some broader geographic area. My first sentence describing the negotiations states this goal: We wanted to "preserve rail competition for all customers who, prior to the announcement of the merger on August 4, 1995, were served by both UP and SP and no other railroad ('2-to-1' customers)." I then explained that we solicited interest from parties that "indicated an interest in making a proposal to preserve competitive alternatives for '2-to-1' customers." UP/SP-22, p. 292.

BNSF wants to change the concept five years after we agreed to it. BNSF now wants to redefine 2-to-1 Points as all locations, defined by a six-digit SPLC code, where both UP and SP operated. We did not use that concept in the agreement, and there is no reason to adopt it now.

This change would not give BNSF access to any shipper who enjoyed UP/SP competition before the merger. Every one of those shippers already has access to BNSF service. Its practical effect would be to expand the number of locations at which BNSF would gain access to new shipper facilities for as long as UP exists.

#### **D. BNSF Purchase of UP Team Tracks**

BNSF wants to amend the Settlement Agreement so that it can purchase any "team tracks" that UP may decide to abandon at 2-to-1 Points. A team track is nothing more than a rail-owned track on which the railroad parks a car for a shipper to load or unload. Nothing in the agreement gives BNSF the right to purchase such tracks. In fact, BNSF's request is inconsistent with a basic premise of the BNSF Settlement Agreement. BNSF does not need the right to buy UP's abandoned team tracks in order to compete effectively. And UP should not be compelled by the Board to make its property available to BNSF. Furthermore, the proposal would present practical problems.

BNSF's request would overturn a basic premise of our negotiations in 1995 and of the agreement as the Board prescribed it. The premise was this: BNSF gained access to shipper facilities at 2-to-1 locations, but it agreed to construct its own rail-owned facilities unless UP specifically agreed to provide them. Except in a few specified locations, BNSF was to construct its own automotive facilities and its own intermodal facilities. Section 9(g) gives it this right expressly. In fact, Section 9(g) gives BNSF the right to construct and use any support facilities it wishes, including team tracks.

BNSF does not need UP's former team tracks in order to compete. Team tracks are inexpensive to construct. They require only a switch, a small area of land, and a short segment of track. They are far less expensive than the intermodal and automotive facilities that BNSF agrees it must construct for itself.

Why does UP object to this request, if it will discontinue use of the team tracks anyway? It objects because identifying a former team track that existed in 1995 is extremely difficult and would lead to endless disputes between BNSF and UP, many of which the Board

might need to resolve. Almost any track can be a team track for a day or a week or a month. UP often uses maintenance tracks as team tracks. Sometimes it uses tracks in its yards and tracks that lead toward industries. Many tracks may have been used as team tracks at times no one can recall. UP maintains no records of which UP and SP tracks were once used as team tracks. If BNSF's proposal were adopted, UP might be required to research every change in use of a switching track or industrial track to determine whether it had once served as a team track. Often an answer could never be found.

BNSF's own experience confirms the problems with this proposal. UP has repeatedly invited BNSF to provide a list of former team tracks that it might want to use. BNSF agreed to do so, but it failed after several months. BNSF gave up without identifying a single team track. BNSF realized that it could not determine which UP or SP tracks had been team tracks either.

This BNSF request appears innocent enough, but down its path lies nothing but disputes. BNSF should build its own team tracks, wherever it needs them. UP has regularly considered BNSF's requests to buy or lease excess UP tracks. No Board order is needed to force us to consider these requests.

Apr. 19. 1996 6:22PM

ATTACHMENT 1

No. 5798

LA

APR

REC

BURLINGTON NORTHERN SANTA FE

*Part w/ Meyer file*

Rollin D. Bradenberg  
Vice President Transportation  
2800 Lou Mark Drive  
Fort Worth, Texas 78131  
(817) 234-1304

April 19, 1996

Mr. Art Shoener  
Executive Vice President - Operation  
Union Pacific Railroad Company  
Room 1206  
1416 Dodge Street  
Omaha, Nebraska 68179

ALS	TAC	FBK	SJM	HW
REA	APR 19 1996			ADN
CRG				RMC
JPG				JES
DAK	JFC	AMH	LVH	RSL

Dear Art:

This is in response to your letter of 4/10.

I am in agreement with your description of the status of our discussions on items 1, 3 and 4.

On Monday, April 15, I inspected the Haggin site with your merger team representatives, including Joe Ivanosich who represented the SP engineering department. Although a connection at Haggin may be technically feasible, it would not be practical to construct. Since the connection would involve the closing of C Street, it is doubtful that the city of Sacramento would approve the project since the city is on record as opposing any change of operation which would increase train traffic in Sacramento.

Our position in this matter is that the right to operate over Donner Pass is of insignificant value unless it provides a competitive route to the base of premium LTL operations in Northern California, specifically the Stockton - Lathrop area. If BNSF trains were forced to leave the SP at Sacramento and operate through the existing connection to the old WP alignment, any advantage gained by operating via Sparks would be lost. Construction of a connection would be cost prohibitive. BNSF continues to propose that intermodal trains destined Stockton which are operated via Donner Pass be operated on the SP route via Florin.

Sincerely,

*[Signature]*

Copies made for: John Riversdorf  
Paul Conley

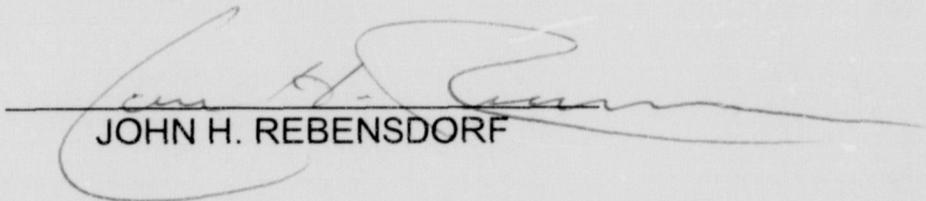
*for*

from Paul King  
4/22/96

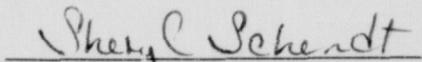
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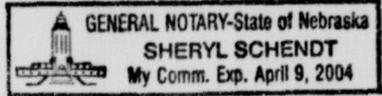
STATE OF NEBRASKA            )  
  )  
COUNTY OF DOUGLAS         )        SS

**JOHN H. REBENS DORF**, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof and that the same are true as stated.

  
\_\_\_\_\_  
JOHN H. REBENS DORF

Sworn to and subscribed before me this 20<sup>th</sup> day of July 2001.

  
\_\_\_\_\_  
Notary Public



My Commission expires 4/9/04

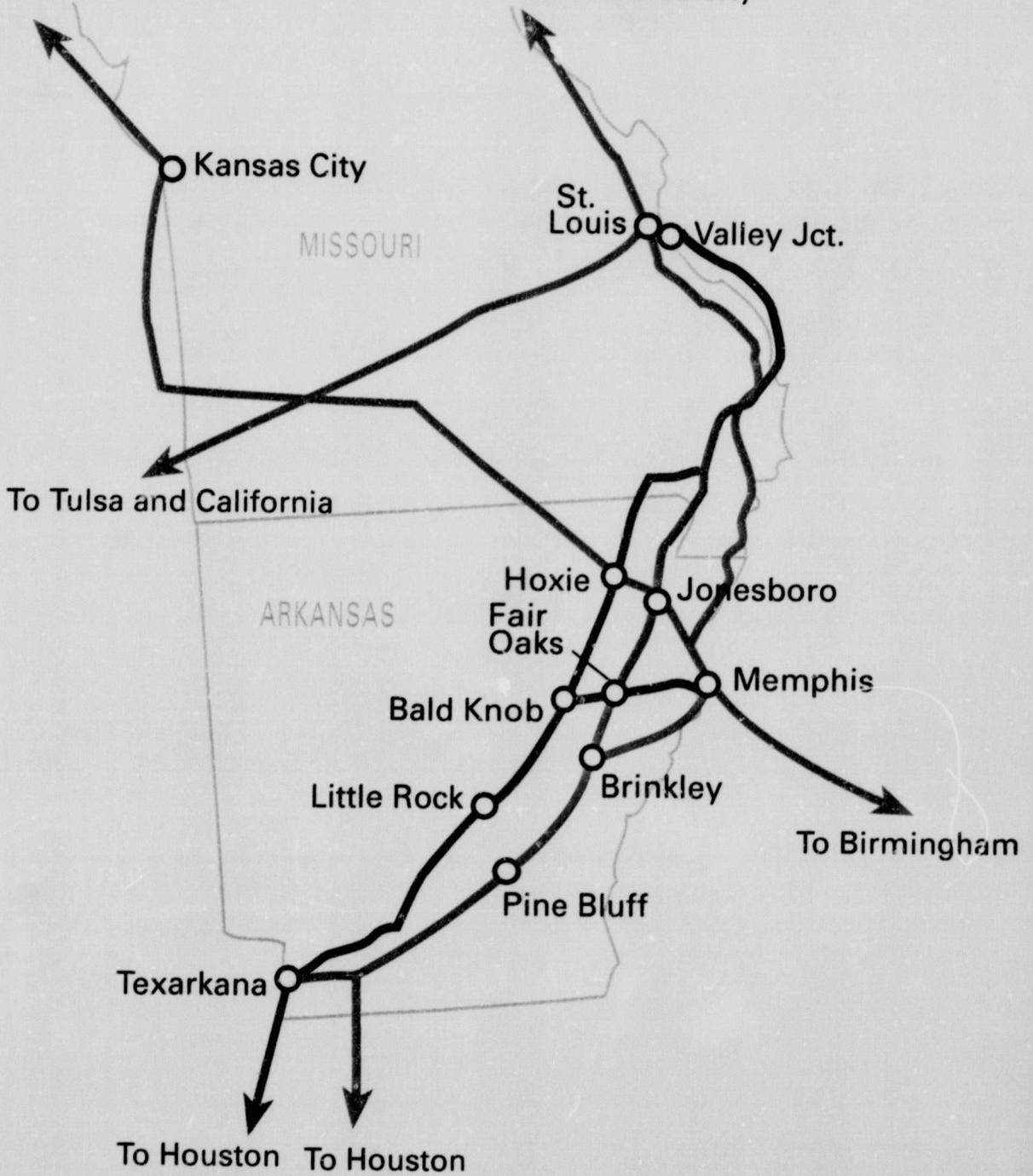


Map # 1

# Bald Knob/Fair Oaks Agreement

To Denver and the  
Pacific Northwest

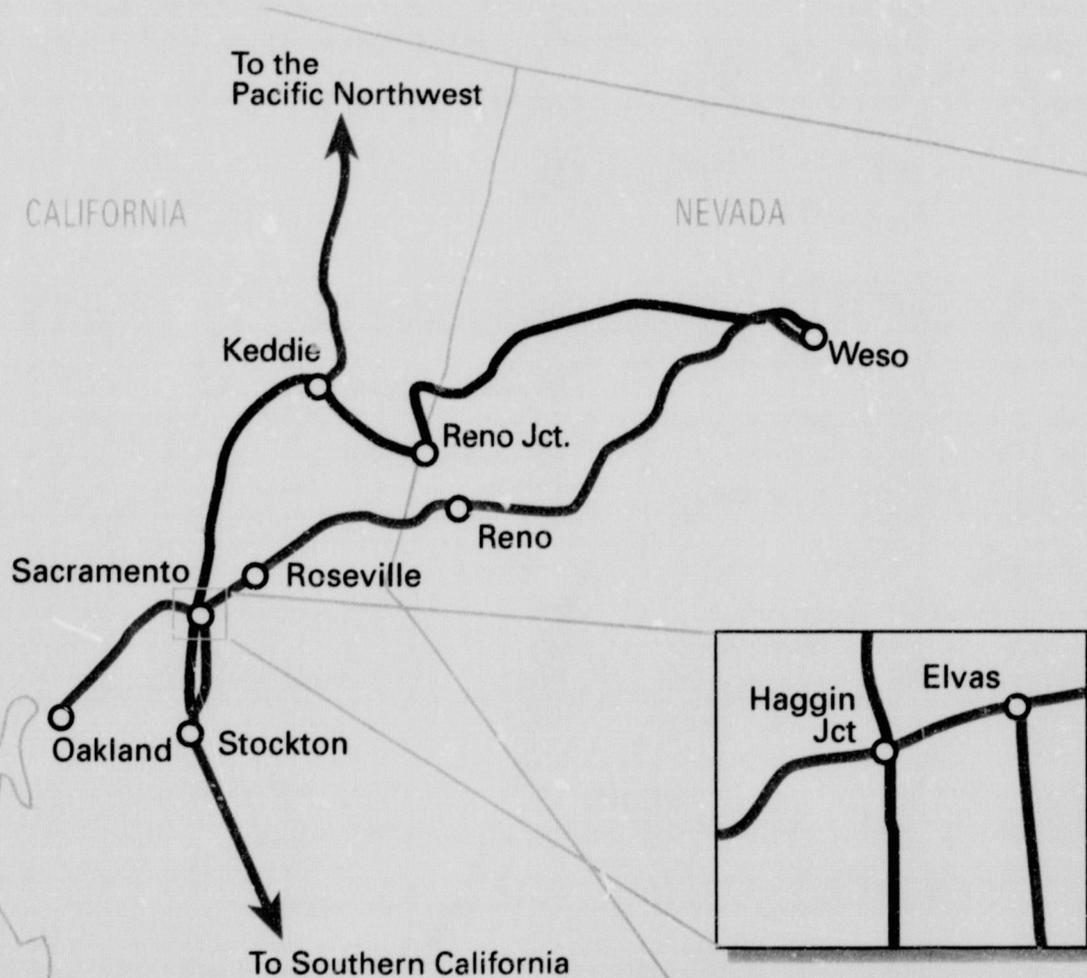
To Chicago, Twin Cities,  
and Kansas City



- UP (with BNSF trackage rights)
- - - SP (with BNSF trackage rights)
- ▨ BNSF

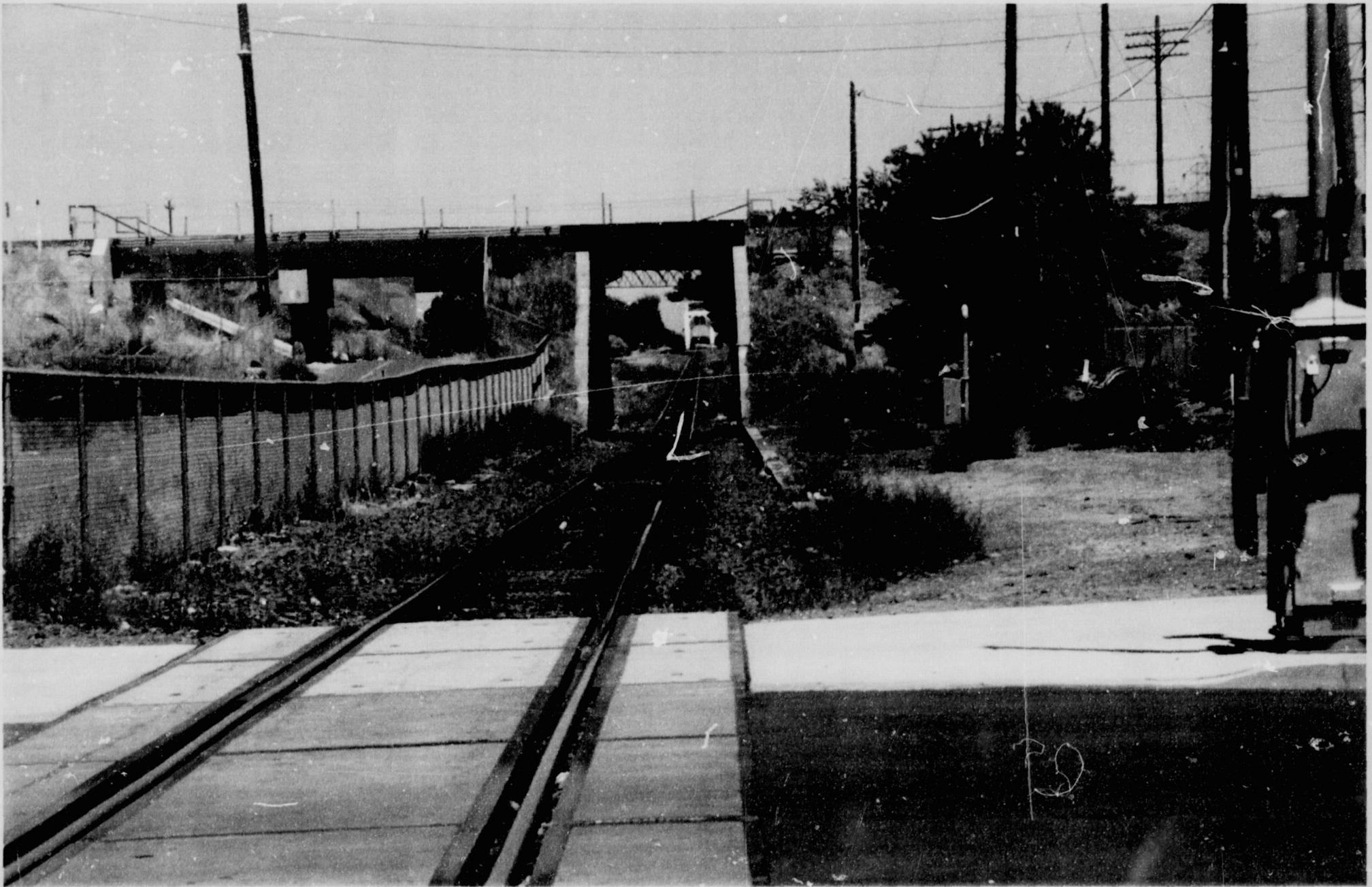
Map # 2

# Elvas/Stockton Agreement



- UP (with BNSF trackage rights)
- SP (with BNSF trackage rights)
- BNSF

Photographs



Photograph #1: Haggin Junction from C Street in Sacramento. The former SP Overland Route passes above UP's Feather River Route.



Photograph #2: Looking south on UP route from SP overpass at Haggin Junction.



Photograph #3: View from the former SP Overland Route toward southeast quadrant of Haggin Junction.  
A new connection would have descended through this area.



Photograph #4: Baseball diamond in Boulevard Park. A connection might have crossed home plate.