

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

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ORAL ARGUMENT

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IN THE MATTER OF: :
UNION PACIFIC CORPORATION, :
UNION PACIFIC RAILROAD COMPANY, Finance
and MISSOURI PACIFIC RAILROAD : Docket
COMPANY No. 32760
:
- 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. :
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Tuesday,

January 15, 2013

Surface Transportation Board
Suite 120
395 E Street, S.W.
Washington, D.C.

The above-entitled matter came on
for hearing, pursuant to notice, at 9:30 a.m.
BEFORE:

DANIEL R. ELLIOTT, III Chairman
ANN D. BEGEMAN Vice Chairperson
FRANCIS P. MULVEY Commissioner

APPEARANCES:

On Behalf of Union Pacific Railroad
Company:

MICHAEL L. ROSENTHAL, ESQ.
of: Covington & Burlington
1201 Pennsylvania Ave, NW
Washington, DC 20004-2401
(202) 662-5448

On Behalf of Burlington Northern
Railroad Company:

ADRIAN STEEL, JR., ESQ.
of: Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, DC 20006
[202] 263-3237

RICHARD E. WEICHER, ESQ.
Vice President and General Counsel
of: BNSF Railway Company
547 West Jackson, Suite 1509
Chicago, IL 60661-5717
(312) 850-5677

On Behalf of G3 Enterprises:

JOLENE A. YEE, ESQ.
of: Vinum Legal
23 Corporate Plaza Dr., Suite 150
Newport Beach, CA 92660
(949) 791-8321

P-R-O-C-E-E-D-I-N-G-S

(9:32 a.m.)

CHAIRMAN ELLIOTT: Good morning,
everyone, welcome. Today we'll hear oral
presentations involving a claim arising out of
the Union Pacific Southern Pacific merger in
Finance Docket Number 32760.

BNSF and G3 argue that UP must adhere
to representations that were made to Modesto and
Empire Traction Company, a Class 3 railroad, in
December 13th, 1995 letter addressing the
Switching District of Modesto, California.

UP argues that BNSF and G3 are not
entitled to this relief. Board Members will hear
presentations on behalf of BNFS, G3, and UP.

As we did not receive a notice from
Modesto and Empire Traction Company, that they
plan to appear, these will be the presentations
for today.

In an effort to move things along,
the Board Members will not be making opening
remarks this morning, but I wanted to cover a few

1 procedural matters before we begin.

2 We have asked each party to make a
3 short statement of its argument, but counsel
4 should be prepared to answer questions from the
5 Board at any time during your allotted time.

6 I assure you that we have read all of
7 your pleadings and there is no reason to repeat
8 every argument. Each side has been allotted a
9 total of 20 minutes.

10 BNSF and G3 have notified the Board
11 that the petitioners have divided their 20
12 allotted minutes as follows: On opening BNSF
13 will have 12 minutes and G3 will have five
14 minutes.

15 UP will next have 20 minutes to
16 respond. And petitioners have jointly reserved
17 three minutes for rebuttal. If you wish to make
18 a change to your reserved rebuttal time, please
19 advise us when you begin your opening
20 presentation.

21 Any party making a PowerPoint
22 presentation or using similar hard copy aids

1 using materials previously placed in the record,
2 should have provided these materials in hard
3 copy, eight-and-a-half by 11 size, to opposing
4 counsel and the Board. We will have any pages
5 used today and such presentations bound into the
6 transcript of this proceeding.

7 Speakers, please note that the timing
8 lights are in front of me. You will see a yellow
9 light when you have one minute remaining, and a
10 red light when your time has expired.

11 The yellow one minute light will be
12 accompanied by a single chime, and the red light,
13 signifying that your time has expired, will be
14 accompanied by two chimes.

15 Please, keep to the time you have
16 been allotted. When you see the red light and
17 hear the double chime, please, finish your
18 thought and take a seat.

19 In addition, just a reminder to
20 everyone to, please, turn off your cell phones.
21 We will now proceed with Counsel for BNSF.
22 Please, step up to the podium.

1 MR. WEICHER: Good morning. Thank
2 you, Chairman Elliott, Commissioner Mulvey, and
3 Vice Chairman Begeman. We appreciate the
4 opportunity to appear.

5 We are sharing our time with G3, so
6 I'll make a brief comment and then pass to her.
7 We'll try to make this efficient at the podium.

8 I am Richard Weicher, from BNSF.
9 Jolene Yee is with us, from G3, Adrian Steel for
10 Mayer Brown. I'll give a basic overview of our
11 position and we will still reserve three minutes
12 between us for rebuttal.

13 We believe that, in the Union Pacific
14 Southern Pacific merger, Union Pacific committed
15 to the public and the Board, and the Board
16 ordered, the preservation of two carrier rail
17 competition at all locations, where otherwise a
18 shipper facility would lose all of its pre-merger
19 competitive options, other than the merged Union
20 Pacific Southern Pacific Railroad.

21 This is embodied in a variety of
22 specific conditions for existing and future

1 facilities throughout the West in the Board's
2 decisions.

3 Inherent in this commitment, we
4 believe, is a commitment that UP could not take
5 action after the merger to eliminate access by
6 the non-Union Pacific carrier. Jolene Yee will
7 describe the specific situation we're dealing
8 with in Modesto, California.

9 MS. YEE: Good morning. My name is
10 Jolene Yee, I am Counsel for G3 Enterprises. I
11 am joined here today by G3 CEO, Mr. Robert
12 Lubeck, and its VP and General Manager of
13 Logistics Division, Ms. Patty Reeder.

14 We are here today to ask the STB to
15 enforce STB Decision 44, and related actions to
16 preserve competitive access, and to restore
17 reciprocal switching to the Rogers facility.

18 On Page 91 of STB Decision 44, the
19 Department of Labor had cautioned that preserving
20 competition in an already concentrated rail
21 industry is vital to businesses and communities.

22 And it urged the STB to carefully

1 review the impact on the merger, not only on the
2 rail industry, but also its employees and the
3 communities.

4 The STB did take action to preserve
5 competition in these communities. Prior to the
6 UP/SP merger, the Rogers facility enjoyed three
7 carrier service, and the benefits of competition
8 in pricing and in service.

9 Now, UP seeks to close the facility
10 to reciprocal switching, which eliminates, not
11 preserves, competition in the Modesto Switching
12 District in contravention to the Board's actions
13 and decisions.

14 The reality is that without STB
15 intervention, the G3 will lose its rights to
16 competitive rates and services at the Rogers
17 facility.

18 The negative impact is on G3, and its
19 major customers, and the Modesto community, which
20 greatly benefits from the growth and success of
21 the businesses that reside in it.

22 Termination of reciprocal switching

1 to the Rogers facility creates a monopoly. It
2 eliminates competitive rates and service levels
3 for G3 and its customers.

4 The letter you received from Cal
5 Freight demonstrates the effect of single service
6 to Rogers. UP increased Cal Freight's cost by
7 \$600 per car, as compared to BNSF's rates.

8 This increase puts Cal Freight at a
9 competitive disadvantage and negatively impacts
10 its ability to increase its business.

11 Termination of reciprocal switching
12 to the Rogers facility also severely hinders G3's
13 ability to support the strategic growth of its
14 primary customer, E & J Gallo Winery.

15 This year, 2013, 34 percent of G3's
16 boxcar shipments for Gallo must ship with BNSF,
17 because the cargo is bound for closed BNSF
18 destinations.

19 The inability to cost effectively
20 ship with BNSF from Rogers significantly
21 undermines the ability to manage Gallo's traffic
22 and support Gallo's growth over time.

1 Unless the Board requires UP to
2 restore reciprocal switching to Rogers, G3 cannot
3 support the strategic growth of Gallo using the
4 Rogers facility.

5 Gallo may determine that the Rogers
6 facility is thus unacceptable, and it's difficult
7 for us to see an acceptable alternative long-term
8 solution.

9 G3 relied on dual service to invest
10 millions of dollars in expanding the Rogers
11 facility. It recognized the long-term need for
12 warehouse space to handle Gallo's growing
13 logistics needs, and in 2001 began to explore
14 options where it could get comparable rates and
15 services to those who hadn't negotiated at the
16 Gallo facility, which is within a five mile
17 radius.

18 G3 specifically sought locations that
19 were proximate to the winery with dual service by
20 UP and BNSF, and it recognized that this would be
21 a competitive necessity for handling Gallo boxcar
22 shipments in the future.

1 It had initially planned to build a
2 warehouse on the M&ET line, on land that it
3 owned, but before construction, it found out that
4 the Rogers facility was for sale.

5 And it did some due diligence. G3
6 received confirmation from the seller, Proctor &
7 Gamble, that the facility was dual served.

8 It understood that the M&ET had
9 confirmed that the facility was dual served, as a
10 condition to the merger, and it generally
11 believed that the merger conditions protected
12 reciprocal switching to Rogers.

13 Now, everyone's probably asking
14 themselves, why didn't G3 confirm this with UP at
15 the time? Well, hindsight is 20/20, and it was a
16 miss.

17 In hindsight, perhaps, it would have
18 been prudent to confirm reciprocal switching with
19 UP. But, at the time, G3 had no immediate plans
20 to require boxcar service in the foreseeable
21 future, and it had done all the other pieces of
22 due diligence, confirming with P&G and the M&ET.

1 COMMISSIONER MULVEY: Now, Ms. Yee,
2 is it true, that before the incident that caused
3 this case to come before us, to begin with, G3
4 had not attempted to use reciprocal switching?

5 I mean, you bought the facility quite
6 a while ago, back in 2001, so between 2001 and
7 when the incident occurred, there was no prior
8 use of boxcar service, no need for reciprocal
9 switching before then?

10 MS. YEE: That is correct. Not by
11 G3. In fact, actually, we can pull up the map of
12 a G3 facility. In reliance in the belief that
13 the Rogers facility was dual served, it purchased
14 the facility in 2001 for \$11 Million Dollars.

15 This was a strategic purchase that
16 supported the long-term plan for the site to
17 handle winery growth, when the current Gallo site
18 reaches capacity, which is landlocked.

19 So over the next eight years, it
20 invested an additional \$29 Million, including
21 \$11.8 Million for Warehouse 3, which you can see
22 on the picture, which was constructed

1 specifically to accommodate boxcars.

2 The warehouse with the Number 1 on it
3 is the original Rogers facility. Everything else
4 was built around it, and you can see, that the
5 Buildings 3 and 5 were built curved,
6 specifically, to accommodate boxcar service.

7 The total investment in the Rogers
8 facility was \$40 Million Dollars. And they
9 increased the original size of Warehouse 1, which
10 is approximately 500,000 square feet, to a total
11 of a over two million square feet for the entire
12 facility.

13 After the expansion, the Rogers
14 facility seemed to be a perfect answer to meet
15 the long-term goal of having nearby dual service
16 to support its customers' growth.

17 There were a number of years, as
18 Commissioner Mulvey stated, before the business
19 of G3 and its customers justified rail service.

20 But, more recently, Gallo realized
21 that it was approaching its capacity limit, and
22 as you can see in the support letter from Gallo,

1 because Rogers is part of Gallo's strategic
2 growth plan to access competitive service, G3
3 contacted UP.

4 In March of 2011, G3 opened
5 discussions with UP, regarding the logistics of
6 actually operating reciprocal switching at the
7 site, and there was quite a lot of discussion
8 over a few month period.

9 And then, to G3's shock and surprise,
10 UP abruptly terminated those discussions and took
11 the action to remove the facility from the UP
12 circular in June of 2011, effective July of 2011,
13 and thereafter issued formal notice that it
14 closed the facility's reciprocal switch.

15 On Page 4 of STB Decision 21, the STB
16 noted in evaluating its decision on whether to
17 terminate merger oversight, UP had demonstrated
18 that, in fact, competition was enhanced, rates
19 either declined or stayed the same in every
20 single market, and other railroads had and were
21 continuing to effectively compete against UP. If
22 the Board's -

1 CHAIRMAN ELLIOTT: Ms. Yee.

2 MS. YEE: Yes?

3 CHAIRMAN ELLIOTT: A quick question
4 about kind of the overall picture. In the
5 Modesto Switching District, and I think that's
6 the point that we're talking about here, in
7 general.

8 MS. YEE: Yes.

9 CHAIRMAN ELLIOTT: At the time of, I
10 guess, 1995, when the decision was put out and
11 the agreement was made, putting aside the
12 argument of whether Proctor & Gamble was a two to
13 one facility, or a three to two facility, but
14 were there any other two to one facilities in the
15 Modesto Switching District that were served just
16 by UP and SP, that you're aware of?

17 MS. YEE: I am not personally aware
18 of. My colleagues may have more detail on that.

19 CHAIRMAN ELLIOTT: Do any of the -

20 VICE CHAIR BEGEMAN: If you could
21 refer to the map, on Page 4. It's unclear to me,
22 whether or not the orange line, is orange and

1 yellow. Was the Rogers facility served solely by
2 UP, or was it served by both UP and SP?

3 MR. WEICHER: As we understand it,
4 the M&ET had some facilities, which were open,
5 some were closed, but they were all three twos.

6 CHAIRMAN ELLIOTT: Mr. Weicher, I
7 don't think we can hear you.

8 MR. WEICHER: Oh, sorry.

9 VICE CHAIR BEGEMAN: Do you want to -

10 MR. WEICHER: We'll let UP correct
11 that there were some closed facilities, some open
12 facilities on M&ET, but they were all three to
13 twos in the vernacular of question. And we have
14 some maps coming up that will address that.

15 CHAIRMAN ELLIOTT: Okay.

16 VICE CHAIR BEGEMAN: So even though
17 the map just shows an orange line, which would be
18 UP at Rogers, you're saying that's not the
19 situation?

20 MR. WEICHER: That is.

21 VICE CHAIR BEGEMAN: So it was only
22 served by one carrier at pre-merger?

1 MR. WEICHER: Directly, yes. And
2 you'd be correct, if you misunderstand with
3 trackage.

4 CHAIRMAN ELLIOTT: And just, I want
5 to make sure, I'm not really as much interested
6 in just strictly the G3 facility, I just want to
7 know if there was anything in the Modesto
8 Switching District in 1995, that was served just
9 by UP and SP, whether directly or indirectly.
10 Does anyone, do your guests have any idea?

11 MS. YEE: He said that there were
12 other sites, at the time, that were just served
13 just by UP.

14 CHAIRMAN ELLIOTT: Yes, because the
15 way I look at it is, and maybe he can confirm
16 this when they get up, but the way I looked at it
17 was, you know, the reciprocal switching was
18 available to certain customers.

19 But, although, it wasn't mentioned,
20 it seemed that there were also closed customers
21 to that reciprocal switching that were just
22 served by UP and SP, but that wasn't addressed in

1 the, and Mr. Rosenthal's shaking his head, so
2 maybe that isn't, in fact, true.

3 But I think that's important when you
4 look at the Settlement Agreement, whether or not
5 that's the case. You may continue. I'm sorry.

6 MS. YEE: If the STB chooses not to
7 re-institute reciprocal switching to the Rogers
8 facility, then the Modesto Community served by
9 G3, and its customers will be denied the benefits
10 of the merger decision.

11 G3, therefore, urges the Board to
12 grant the joint petition reinstating competitive
13 assets to the Rogers facility, which was a
14 condition to the UP/SP Merger. Thank you.

15 CHAIRMAN ELLIOTT: Thank you.

16 MR. WEICHER: G3 and BNSF are sort of
17 yielding each other's times, so however you want
18 to use the clock. We won't go over the overall
19 limits --

20 CHAIRMAN ELLIOTT: Sure.

21 MR. WEICHER: -- for your questions,
22 if that's all right?

1 CHAIRMAN ELLIOTT: Where are we at
2 with time?

3 (Off microphone comment.)

4 CHAIRMAN ELLIOTT: Okay.

5 (Off microphone comments.)

6 CHAIRMAN ELLIOTT: Yes, I know that.
7 But there's still five minutes left.

8 CLERK: Except for BNSF, they've used
9 all their time.

10 CHAIRMAN ELLIOTT: Okay, but we still
11 have overall five minutes left?

12 CLERK: Yes.

13 CHAIRMAN ELLIOTT: Okay. Go ahead,
14 Mr. Weicher.

15 MR. WEICHER: I'll quickly go through
16 a couple of maps. That's the broad Union
17 Pacific/Southern Pacific, if you turn to the next
18 one, this is from the UP's Merger Application.

19 The blow-up shows in the territory
20 that can be reached, there's BNSF and UP coming
21 into the area of Stockton and Modesto.

22 The point of this, is with by cutting

1 off this facility from the M&ET, it's left only
2 with Union Pacific. If you turn to the next
3 slide, sort of what you were referring to before,
4 you have pre-merger access of three railroads to
5 the star, the Rogers facility.

6 The orange is Union Pacific, the
7 green in the middle is M&ET, BNSF is over on the
8 right, and SP was the yellow. And SP and BNSF
9 came in by reciprocal switching.

10 If you turn to the next slide, right
11 after the merger, M&ET still provides the link to
12 the outside world on those first snaps to the
13 BNSF and through reciprocal switching that can be
14 provided by Union Pacific to M&ET.

15 And if you turn to the next map,
16 where we are today, you have the world as closed,
17 and only UP, everything else is gone.

18 We believe, that the fact that the
19 Rogers facility was originally served directly by
20 only Union Pacific, and otherwise by reciprocal
21 switching, does not diminish, in any way, its
22 right to the access under the merger agreements.

1 There are many, many facilities in
2 the West that were served only directly by one or
3 the other carriers. But they're still entitled
4 to their alternatives.

5 We don't think this proceeding is
6 about the right to close an industry to
7 reciprocal switching, it's about preserving
8 merger condition to a facility.

9 We think these rights run with the
10 land not the name of the party, which is why it's
11 important that these not be devalued years later.
12 Going from a three to one destroys that
13 competitive alternative.

14 The fact that this isn't an imprinted
15 merger condition in the long decision, because of
16 the letters we'll come to in a moment, it
17 shouldn't diminish the value of this.

18 The Board encourages voluntary
19 settlements, that's been its policy, and it would
20 disturb that long-standing precedent of
21 encouraging voluntary settlements to erode this.

22 I will pass to Mr. Steel, to review

1 the representations, with however of our blended
2 time we have left, and, of course, I'll be here
3 for questions.

4 MR. STEEL: Thank you, Mr. Weicher.
5 I will just focus on a few points, since we're
6 running near our time. At the time, though, of
7 the post-merger, and the announcement of the
8 merger, and throughout the proceeding, UP made a
9 number of representations to the effect that the
10 existing competition will be preserved, in fact,
11 enhanced in a number of situations.

12 Mr. Davidson, then the Chairman of
13 UP, made that statement in his verified
14 statements and rebuttal verified statements, that
15 no shipper facilities would lose competition.

16 If you'll look at the Slide 7, these
17 are two, the next two slides are a couple of
18 those representations. The applicants emphasized
19 their intent to ensure that a second strong
20 railroad would compete at every location where UP
21 and SP provide the only rail competition.

22 That's our two to one situation. We

1 understand that. But, our point here is, that it
2 also applies to a three to one situation,
3 actually it wasn't needed in most cases for three
4 to two situations.

5 But if going from two to one is bad,
6 going from three to one to even, I won't say
7 worse, but it causes the same loss of access,
8 which we think is really the key here.

9 Were the merger conditions designed
10 to preserve the competition that, at least, that
11 existed at the time of the merger?

12 Modesto, the shippers that you've
13 talked about, Chairman, there were four or five,
14 seven of those, maybe, they were protected by the
15 MET's access. You take away MET's access, and
16 they all go to single service after the merger.
17 If you look at the next slide.

18 COMMISSIONER MULVEY: And MET wrote a
19 letter to UP, it said, expressing its concern
20 over the loss of competitive access, and UP
21 responded.

22 And they said in their response, that

1 they would not reduce competition at the Modesto
2 facility. But then, they were very, very careful
3 in the way they wrote it.

4 And they said, specifically, that
5 they would keep competitive access, as referenced
6 in Items 1233 of the switching tower, which names
7 their specific customers who are served.

8 And in the tower, you can see, that
9 it lists Proctor & Gamble and exists some
10 specific industries, which is not G3, G3 wasn't
11 there then.

12 So wasn't UP careful in the way it
13 constructed its response to MET, and saying that
14 look, we are not going to reduce competition for
15 existing customers, but new customers, like G3,
16 that could be another matter?

17 MR. STEEL: That's correct. But we
18 view the representations as sort of, it's called
19 alternative theory of why the joint petition
20 should be crafted.

21 And we have a time problem, I don't
22 think we used 17 minutes from where we were, so

1 if you don't mind, if we go on a little bit?

2 CHAIRMAN ELLIOTT: No problem.

3 MR. STEEL: The representations, you
4 can read them, we think they should be read more
5 broadly than UP thinks they should be read.

6 And our view is, read them how we
7 want to read them. If it doesn't support relief
8 on that basis, then that's so be it, but that's
9 an alternative.

10 What we think the concern here is,
11 that UP's action, post-merger action, is that it
12 took a facility, and if you'll look in the
13 settlement agreement, you'll see that shipper,
14 shippers we're talking about, are defined as
15 facilities, not shipper customers.

16 It's, shipper facilities shall mean
17 all existing or new shipper or receiver
18 facilities, not shippers, shipper facilities.

19 And a two to one shipper facility should mean all
20 shipper facilities, which we just defined, as the
21 facilities.

22 So the facility we're talking about

1 that had competition, in 1995 before the merger,
2 was the Rogers physical plant. That physical
3 plant is entitled to competition in perpetuity.

4 Up's action here cuts that off. The
5 other ones, actually, at Modesto are probably
6 also, but we're not arguing about those today.

7 If you look in the Board's Decision
8 44, as to, was the Board really worried about
9 this kind of thing I'm talking about, dropping
10 the competition of a facility down, Page 103, and
11 you probably don't have it, but I'll read it to
12 you, 103 footnote 97, when it talks about the
13 items it examined.

14 It examined whether all shippers,
15 whose direct access to rail service has gone from
16 two railroads to one. So, their looking at, to
17 make sure no shipper facility goes to one
18 exclusively served rail carrier. That's UP, of
19 course, here.

20 And this thing lasted for 99 years,
21 and beyond that. The agreement went so far and
22 focused on two to ones, because that was the big

1 issue.

2 The three to twos were actually
3 there, UP averred, Richard Peterson, Vice
4 President over marketing, I think, indicated that
5 applicants had carefully analyzed each one of the
6 26 cities and towns, where three to two traffic
7 originates, Modesto was one of those, and found
8 that in every case, combining UP and SP, would
9 yield much stronger competition. Well, that
10 statement's only true if the third carrier stays
11 present.

12 So even by their own, those
13 representations, not necessarily the letters, the
14 letters have their pluses and minuses, and you
15 can interpret those as you want, and, I think,
16 you're actually right, Commissioner, that they
17 did carefully craft that. With intent, I don't
18 know, but it was pretty carefully crafted.

19 But we say fine, they live up to the
20 representations, fine. That's not the issue.
21 The issue here is access to this facility in
22 perpetuity. And I think I made all my main

1 points. Quick questions?

2 CHAIRMAN ELLIOTT: Quick question,
3 regarding the two to one facility. And in the
4 agreement itself, it says two to one shipper
5 facility shall mean all shipper facilities that
6 were open to both UP and SP, whether via direct
7 service, or via reciprocal switching, joint
8 facility, or other arrangements, and no other
9 railroad when the 1995 Agreement was executed.

10 Based on that language, I mean, at
11 the end it says no other railroad, wouldn't you
12 think that BNSF would have a problem with that
13 language?

14 MR. STEEL: This facility was not a
15 two to one shipper facility. Modesto was not a
16 two to one point. If you had, if MET wasn't
17 present, then Modesto would have been just like
18 any other exhibit eight point. In fact, in that
19 situation, at a two to one point, it's just sort
20 of a corollary, a new shipper would have bought
21 the old facility. That can qualify, even a
22 closed facility, can be opened if it's actually a

1 new shipper at a two to one point. But here, I'm
2 only using this to show that shipper facilities
3 are the facility not the customer in the larger
4 merger conditions, not in the letter. I
5 understand that the letter has what it says.
6 We're not arguing. Is this two to one?

7 CHAIRMAN ELLIOTT: So you're saying
8 that the Modesto Switching District is not a two
9 to one point?

10 MR. STEEL: It's not identified as
11 two to one point.

12 CHAIRMAN ELLIOTT: Okay.

13 MR. STEEL: But it's not a two to one
14 situation, this is a shipping facility, which is,
15 we sort of indicated that's the relevant entity
16 or body that we're looking at, had competitive
17 service before the merger.

18 UP's taken post-merger action to
19 eliminate all that competitive service, and
20 that's what we think is wrong. Thank you. If
21 you have any other questions, we'd be glad to, I
22 apologize for running over a little bit, but I

1 was talking as fast as I can.

2 CHAIRMAN ELLIOTT: Thank you, very
3 much. We appreciate it.

4 MR. STEEL: Thank you.

5 MR. ROSENTHAL: Chairman Elliott, and
6 Vice Chairman Begeman, and Commissioner Mulvey,
7 I'd like to introduce, Lou Anne Rinn, UP's
8 Associate General Counsel, who's joining me at
9 counsel's table. We also have Gayla Thal, UP's
10 Vice President Law and General Counsel, and Elisa
11 Davies, an attorney in UP's legal department.

12 We're here today, because BN and G3
13 are hoping that you'll ignore what UP actually
14 said in its letter to MET, or that you'll impose
15 conditions on the UP/SP Merger 16 years after the
16 transaction that have nothing to do with any
17 merger-related harms.

18 And just last Friday, as it was
19 mentioned, two shippers made some last minute
20 filings supporting BN and G3, and we'll respond
21 to those untimely, unverified statements in
22 writing. We might need a protective order to

1 address some of the facts. But they don't change
2 the legal issue here.

3 CHAIRMAN ELLIOTT: I don't think it's
4 probably necessary for you to respond, unless you
5 really feel you need to. I don't think it got to
6 the substance. I understand the procedural --

7 MR. ROSENTHAL: Arguments were
8 mentioned, claims were made about rates and UP's
9 rates, and they're just not true, as far as we
10 can determine.

11 CHAIRMAN ELLIOTT: Sure.

12 MR. ROSENTHAL: And I'm not sure we
13 can address that without a protective order. And
14 I'm not sure whether -

15 CHAIRMAN ELLIOTT: Yes, I don't know
16 if it will come into play, with respect to the
17 decision.

18 MR. ROSENTHAL: Fair enough. But, I
19 mean, because the fact is, that UP never told G3,
20 never told MET that shippers like G3 would be
21 open to reciprocal switching after the merger.

22 The merger conditions don't require

1 UP to open shippers, like G3, to reciprocal
2 switching. And G3 didn't lose any competition at
3 Rogers, as a result of the merger. G3 didn't
4 even have a facility at Rogers before the merger.

5 It wasn't a two to one shipper, a
6 three to one shipper, a three to two shipper, or
7 whatever, it wasn't a shipper at Rogers before
8 the merger.

9 Now, G3 says it believed the
10 facility, if bought, would be open to reciprocal
11 switching, but UP's reciprocal switching circular
12 was very clear, and G3, as they say, never tried
13 to verify the facts with UP.

14 Now, if G3 relied on something that
15 somebody else said before they bought the
16 facility, that is in the clear language in UP's
17 circular, UP can't be responsible for that
18 oversight.

19 So BN and G3 are left making claims
20 about the intent of the merger conditions. That
21 there was some undocumented, never before
22 mentioned understanding that shippers like G3

1 would be treated as to two to one shippers. But
2 that's just nonsense.

3 VICE CHAIR BEGEMAN: Could you please
4 drill down on the Rogers facility and the Proctor
5 & Gamble facility, or facility versus shipper,
6 and pre-merger, I could even say post-merger. Why
7 was Proctor & Gamble listed on the reciprocal
8 switching list?

9 MR. ROSENTHAL: All right, pre-
10 merger, Proctor & Gamble's facility was served
11 directly by UP, and it was open to reciprocal
12 switching by SP and MET.

13 After the merger, because of what UP
14 said in its letter, the facility continued to be
15 open, served by UP, open to SP, our reciprocal
16 switching, well, open to MET by reciprocal
17 switching, because UP and SP had merged, but UP
18 had promised MET --

19 VICE CHAIR BEGEMAN: But only because
20 of the letter, not because of the agreement?

21 MR. ROSENTHAL: Because of the letter
22 that UP sent, UP promised MET that it would keep

1 the named facilities open. Proctor & Gamble
2 continued to be there. Proctor & Gamble
3 continued to be open to MET after the merger.
4 Proctor & Gamble was open to MET via reciprocal
5 switching until it moved away.

6 COMMISSIONER MULVEY: But there is
7 this issue of intent, and you alluded to it, and
8 in the merger approval decision, applicants,
9 which is UP/SP, claimed that they have a basic
10 purpose in entering into the BNSF agreement,
11 which was to preserve competition, competitive
12 rail service, for all 2-1 customers of UP and SP.

13 They indicate that to preserve
14 competition options for shippers, they identify
15 all 2-1 points, that is all points at which
16 service has been provided by UP and SP, but by no
17 other railroad. And then it goes into traffic
18 rights.

19 So that, you agreed with the intent,
20 the intent was to preserve competition at all 2-1
21 points, and the Board decided that 3-2 points
22 still provided for sufficient competition for the

1 Board to say well, that's fine, 3-2, but 2-1
2 cases, we want to preserve competition.

3 So was the intent, which UP/SP agreed
4 with, to preserve competition? Aren't the actions
5 that UP is taking right now, run counter to that
6 intent?

7 MR. ROSENTHAL: No, I don't see that,
8 the question --

9 COMMISSIONER MULVEY: An intent, by
10 the way, which you agreed with.

11 MR. ROSENTHAL: The question during
12 the merger was, what would be the impacts of the
13 merger? By combining UP and SP, would there be
14 any shippers that, before the merger had
15 competition, and after the merger wouldn't have
16 competition?

17 By combining UP and SP, Proctor &
18 Gamble didn't lose competition that it had before
19 the merger. Proctor & Gamble, because of UP's
20 representation, continued to have competition
21 after the merger, had competition, as long as it
22 was there.

1 Now, I think, Chairman Elliott, I
2 think you had asked about other shippers in that
3 area. If you go to our map exhibit, I think it's
4 4, and Slide 5, it's also Exhibit D to our
5 filing.

6 If you look at the map, in the Rogers
7 area, before the merger, there were a number of
8 shippers. Some of them were open, but some of
9 them were closed.

10 So even when SP was there, even
11 before the merger, there were shippers that were
12 open, there were shippers that were closed.

13 Why are some shippers open and some
14 shippers closed, because the decision to open or
15 close shippers depends on shippers' specific
16 circumstances.

17 That's why UP has a list that names
18 shippers, and that's why UP's tariff says we're
19 going to provide service only to the shippers
20 named in our tariff.

21 It's a shipper's specific decision.
22 It's not as though UP goes around and says some

1 large geographic area is going to be opened.
2 Every shipper in there is going to be open for
3 reciprocal switching.

4 UP's tariff limits it to a list of
5 shippers, as does BN's tariff, as does CSX's
6 tariff, as does Norfolk Southern's tariff. There
7 are other ways to do it, but it's not the way UP
8 did it.

9 CHAIRMAN ELLIOTT: I got a little
10 distracted at the beginning. And I think you
11 heard my question, you were shaking your head no.

12 I just want to make sure that in the
13 Modesto Switching District, that at the time, in
14 1995, the time of the merger, there were no other
15 two to ones in the Modesto Switching District
16 that were served by UP and SP alone, and that the
17 reciprocal switching rates for Modesto didn't
18 apply to?

19 MR. ROSENTHAL: There were no, none,
20 zero, two to one shippers in the Modesto area.
21 If you look in the UP/SP Merger Application, when
22 Mr. Peterson was describing areas that were

1 potentially effected by the merger, as they point
2 to, he talks about Modesto, and he talked about
3 it as a three to two location.

4 And then, frankly, if somebody had a
5 problem, and was looking into the future, these
6 issues were contested, they were raised during
7 the merger.

8 There were some three to two shippers
9 in certain circumstances that received
10 protections, because the third carrier didn't
11 provide adequate routings, but the Board
12 addressed all those non-two to one situations,
13 very specifically, and it explained its reasons.

14 And nobody came in and said, you
15 know, here's this other possibility that might
16 spring up years later, bought by some other
17 shipper that didn't lose competition, because
18 again, G3 wasn't at Rogers before the UP/SP
19 Merger. G3 didn't lose competition.

20 You know, in the merger, the Board
21 gave BN tremendous access to existing and new UP
22 shippers. New shippers locating at two to one

1 points, points where any customer was served by
2 UP and SP and no other railroad, could have built
3 a new facility and received UP and BN service.

4 CHAIRMAN ELLIOTT: Do you agree, that
5 in this situation, though, that the G3 facility
6 is a new shipper, under the definition of the
7 settlement agreement?

8 MR. ROSENTHAL: Yes. G3 is certainly
9 not Proctor & Gamble, and they're not claiming --

10 CHAIRMAN ELLIOTT: But --

11 MR. ROSENTHAL: -- to be Proctor &
12 Gamble. When they look at the tariff, they can't
13 sit there and say I see Proctor & Gamble, I think
14 that's me. You know, there's not even, you know,
15 there's no corporate connections, as far as I
16 know. They know they're not Proctor & Gamble.

17 CHAIRMAN ELLIOTT: I know, I --

18 MR. ROSENTHAL: But, no. Had they
19 come in in 2001, they could have chosen to locate
20 at a two to one point. There were 70 two to one
21 points, that were named in the merger.

22 And then, there were stretches of

1 track, where if you were located anywhere on them
2 you could have built a new facility and received
3 two carrier service.

4 The Board protected two carrier
5 service by saying that if a new shipper built a
6 facility anywhere along 4,000 miles of trackage
7 rights, that UP gave BN, they'd be open to
8 service.

9 And these issues keep arising. In
10 the past four years, UP has granted access to
11 shippers, about an average of 15 a year, when BN
12 comes in and says we want to serve the shipper.

13 So it's not as though UP is resisting
14 legitimate claims under the merger conditions.
15 This simply isn't a legitimate claim.

16 G3 wasn't at Rogers before the
17 merger. It's not covered by the letter. It's
18 not covered by the merger conditions. It's not a
19 two to one shipper. It's not an anything to
20 anything shipper. It just wasn't there at the
21 time of the merger. It didn't lose competition.

22 COMMISSIONER MULVEY: Would you say

1 then, that the only way for the Board to address
2 this, if it chose to address it, would be to
3 impose a new condition, which would mean,
4 therefore, reopening the entire UP/SP Merger, and
5 then say let's look at the conditions again?
6 There we might say well, we'll impose conditions
7 similar to the conditions that we imposed on the
8 new facilities locating on trackage right points,
9 but also anybody who acquires a facility in a
10 place like the Modesto Switching District.

11 MR. ROSENTHAL: I mean, it would be
12 an entirely new condition, so somebody would have
13 to come in showing, you know, new evidence,
14 changed circumstances, or material error in the
15 Board's decision, and they just haven't come
16 close to doing that. Because this is the type of
17 argument that could have been made during the
18 merger.

19 You know, these situations weren't
20 hidden, they were obvious. You could've looked
21 at the UP and SP tariffs, and found locations
22 where one carrier served a shipper directly, it

1 was open to the open carrier, and still others,
2 through reciprocal switching.

3 This wasn't just Modesto where this
4 occurs, it occurs at other places where there are
5 multiple carrier service, in New Orleans, Kansas
6 City, St. Louis.

7 So, yes, you've got somebody coming
8 in and saying we want a new condition. And
9 what's the end? You know, what does it mean? Is
10 it just one shipper, where there was a letter?
11 Is it everybody in these circumstances? And,
12 again, you know, what's the justification?

13 This was litigated extensively during
14 the UP/SP Merger. People had plenty of
15 opportunity, and there needs to be some finality.

16 COMMISSIONER MULVEY: Ms. Yee noted
17 that hindsight is always 20/20, but I will agree
18 with you, that I wasn't part of the Board then.
19 Although, it seems I've been here for a long
20 time, but this goes back to 1995.

21 And it certainly was litigated. It
22 certainly was analyzed and people just did not

1 catch everything. Perhaps I shouldn't say
2 "catch", but instead say that they didn't take
3 into account every possible contingency, so.

4 MR. ROSENTHAL: I mean, respectfully,
5 this isn't an issue of something that went un-
6 caught, though. I mean, as I mentioned before,
7 this is an area where if this issue had been
8 raised, I don't think there would have been any
9 conditions. P&G was open, you know, it was a
10 very big customer. Maybe that's the reason. It
11 was opened by a railroad that was UP's
12 predecessor, that was a small railroad. There
13 may have been particular reasons why P&G was
14 opened and other, again, other shippers on that
15 line weren't open, despite SP's presence. So I
16 think it's very hard to say that the fact that UP
17 and SP were in the area before the merger, had
18 anything to do with P&G being open. So I don't
19 even think this is a situation where it's
20 something that was uncaught or unaddressed. This
21 was an area that was addressed in the merger
22 application, Gallo was in Modesto, the merger

1 application actually talks about Gallo, and the
2 fact that SP was a very small part of the Modesto
3 business, the merger gave BN improved routes over
4 the central corridor that might have improved its
5 service to the Midwest, improving its service for
6 this type of business. And the Board looked at
7 three to two situations, looked at the parties'
8 evidence and concluded that this wasn't a
9 situation that required a competitive remedy.
10 And so now, you know, here we are after the
11 merger, where G3, you know, could've looked at
12 the tariff, but didn't. Could've asked UP, but
13 didn't. Hasn't actually used this facility for
14 12 years, despite saying that they bought this
15 for this, you know, plan. And, as you saw on the
16 map, you know, we're no longer talking just this
17 Proctor & Gamble facility, this original
18 facility, they've expanded the facility. They've
19 built new building. So whatever UP's deal was
20 with Proctor & Gamble that led UP to open Proctor
21 & Gamble, you know, would they have done the same
22 for Gallo with its plans to build this massive

1 distribution center, I don't think so.

2 The other issue is, you know, do they
3 need this access? They talk about Gallo and
4 traffic going to Gallo. But Gallo has four
5 distribution centers in the East, UP and BN can
6 both reach those using connections with Eastern
7 Railroads.

8 Gallo has distribution centers in
9 Fort Worth and in Kansas City, and those can be
10 served by BN and UP. The only facility that UP
11 can't reach is a closed facility on BN in
12 Chicago.

13 Now, I'm not a logistics expert, and
14 I don't need to tell them what they can shift
15 traffic around, or how they can serve them.

16 But, if the problem is a closed BN
17 facility in Chicago, maybe, the answer is that BN
18 should open its Chicago facility. I mean, you
19 know, if it's a commercial deal to be struck,
20 maybe there's a commercial deal to be struck.

21 But I don't see why, because
22 somebody, you know, perhaps, relied on somebody

1 that they shouldn't have, or didn't investigate,
2 UP is suddenly opening a facility that UP isn't -
3 -

4 COMMISSIONER MULVEY: The Board,
5 right now, is looking at the whole issue of
6 competition in the rail industry and we have an
7 ongoing proceeding on that.

8 One of the things being looked at is
9 reciprocal switching also the Canadian situation,
10 but with some changes reflecting the different
11 situation of the United States. So it's
12 something that's being looked at anyway.

13 Would you think that, maybe, that's
14 what we need to be doing here, is to have
15 reciprocal switching nation-wide, so we wind up
16 with fewer closed facilities, and give shippers
17 more competitive access?

18 MR. ROSENTHAL: No, I don't,
19 actually, don't think so. This probably isn't a
20 surprise to you, Commissioner Mulvey.

21 (Laughter.)

22 MR. ROSENTHAL: But the fact is, you

1 know, because of things like the UP/SP Merger,
2 where you have the ability to locate at two to
3 one points, and get service by BN and UP, or
4 locate anywhere on 4,000 miles of trackage rights
5 and get service, or locate in other areas that,
6 you know, apart from the merger offered
7 competitive service.

8 You've got the same thing in the
9 East, as a result of the Conrail transaction with
10 the shared asset areas. There are lots of places
11 that shippers, if they want to choose to locate
12 someplace and receive competitive service, they
13 can do that.

14 There may be reasons, probably are
15 reasons, why they choose to locate in other
16 spots. You know, I'm not going to speculate on
17 why G3 did what it did.

18 Maybe, it just was an oversight.
19 Maybe it's 20/20 hindsight, but again, that
20 shouldn't be UP's responsibility in a situation
21 like this.

22 VICE CHAIR BEGEMAN: Excuse me. Like

1 many of you, I was around during that UP/SP
2 Merger. When the Board announced its decision,
3 it advertised its decision, which was quite
4 controversial, as you know, at least among some,
5 that they were preserving competition.

6 And the agreement is part of the
7 reason. They also imposed some additional
8 conditions. So, now, 16 years later, how for
9 this facility has competition been preserved?

10 MR. ROSENTHAL: The Board preserved,
11 as part of its decision, competition for every
12 shipper, that before the merger --

13 VICE CHAIR BEGEMAN: For a moment in
14 time, is that what the Board's concern was, not
15 going forward?

16 MR. ROSENTHAL: Well, no. The Board
17 had a couple of concerns. The Board, in one they
18 preserved competition for every shipper that
19 before the merger had service by UP, SP, and no
20 other carrier.

21 So there was no customer that lost
22 rail competition, as a result of the merger. And

1 that preserved competition for every existing
2 customer.

3 For the future, what the Board said
4 is, we're concerned with the ability of people
5 who come in the future, to be able to locate
6 their facilities and still receive competitive
7 service.

8 And that's why the Board said at any
9 two to one point, a point that has at least one
10 two to one shipper, new shippers can locate their
11 facilities there and receive competition, along
12 the trackage rights line, the 4,000 miles of
13 trackage rights lines that BN obtained.

14 VICE CHAIR BEGEMAN: But in this
15 case, competition isn't going to be preserved?

16 MR. ROSENTHAL: Of course it is. G3
17 had no competition. There was no competition to
18 preserve.

19 VICE CHAIR BEGEMAN: But the location
20 did.

21 MR. ROSENTHAL: There's no, if you
22 want to go to Modesto and get competition, you

1 can go to Modesto and locate on MET. There's
2 competition in Modesto. You can rent facilities,
3 as much warehouse space, one of our slides in
4 there shows, as much as warehouse space --

5 VICE CHAIR BEGEMAN: The facility
6 that had competition no longer will 16 years
7 later, is that correct?

8 MR. ROSENTHAL: No, I don't think so.
9 P&G's facility had competition, as long as P&G
10 was there. Is there some spot of land, yes, but
11 that's not preserving competition.

12 That's not what UP talked about.
13 That's not what the conditions talked about, and
14 that's not what the Board was talking about.

15 The Board didn't say that at every
16 spot anywhere we're going to make sure there's
17 competition in the future. The Board said, we're
18 going to preserve competition and make sure that
19 no shipper loses the ability to reach another
20 railroad. No shipper that was served by UP and
21 SP and no other railroad will lose competition.

22 COMMISSIONER MULVEY: Yours --

1 MR. ROSENTHAL: And said, I'm sorry,
2 that we're going to preserve competition and
3 allow future shippers to locate there. Those
4 were the conditions, that's what the Board --

5 COMMISSIONER MULVEY: That's my
6 point, future shippers -- a shipper, for example,
7 who located on any of the miles where trackage
8 rights were imposed, to preserve 2-1 competition.
9 Why wouldn't you consider G3 as a new shipper and
10 take the Modesto District as an area that was
11 served 2-1. Now it's a new company coming in, as
12 opposed to continuing Proctor & Gamble service,
13 but, you know, it's almost basically the same as
14 if they would have torn down the facility and
15 built a new one, they would be in the same
16 position.

17 MR. ROSENTHAL: No, the reason is,
18 because Rogers in Modesto wasn't a two to one
19 location. The Board didn't say as a condition to
20 the merger that a shipper should be able to
21 locate anywhere they want on UP, and obtain two
22 carrier service.

1 They said in 1995, or 1996, in the
2 decision, that you can locate at two to one
3 points, or that you can locate on the trackage
4 rights lines.

5 And if G3, I don't know if they were
6 aware of the MET letter or not, but if they were,
7 they could've read it and saw that they couldn't
8 get competition from there.

9 If they read the Board's decision on
10 the merger, they wouldn't have thought they could
11 get competition by locating at Rogers.

12 And if they read UP's tariff, they
13 wouldn't have thought they could get competition
14 by locating at Rogers, because they're not named
15 in the tariff.

16 There is no reason why G3 should've
17 thought they can move there and obtain
18 competition, or service, from another railroad.

19 You know, UP can provide excellent
20 service there, either directly, using interline
21 rates, UP and BN rates, it doesn't have to be
22 done through reciprocal switching.

1 And if BN wants to serve these
2 shippers in a different way than interline rates,
3 then if it wants reciprocal switching, the answer
4 is to negotiate a commercial exchange for fair
5 value.

6 But that's not what they want to do.
7 They want you to have you give them something for
8 nothing. And you shouldn't do that, you should
9 deny the petition. Thank you.

10 CHAIRMAN ELLIOTT: One final
11 question, Mr. Rosenthal. I just was reviewing
12 the settlement language, which wasn't really
13 emphasized in the briefs; but in the definition
14 of two to one shipping facilities, which I read
15 earlier, it says all shipper facilities that were
16 open to both UP and SP, whether via direct
17 service or via reciprocal switching, joint
18 facility, or other arrangements, and no other
19 railroad, when the 1995 agreement was executed.

20 Now, when I read that language, I do
21 have some concern that there may be some
22 ambiguity, because it says open to both UP and SP

1 via direct or reciprocal.

2 And then, it addresses no other
3 railroad without referencing reciprocal, and
4 that's possible, to me, to read that no other
5 railroad means direct service. If you need to
6 get the --

7 MR. ROSENTHAL: No, there is, you
8 know, there's no ambiguity. The UP/SP two to one
9 definition, that the Board has in its merger
10 decision, I think you can find it on Page 252 of
11 the Board's report, in Oversight Decision 20, you
12 find it on the second or third page. It's very
13 clear, that it means things that were served by
14 UP and SP, and no other railroad.

15 And by talking about reciprocal
16 switching, what we were saying is, we're not
17 going to play games. We're not saying that it
18 has to be served by UP and SP directly, we mean
19 any way that it had two railroad competition by
20 UP and SP.

21 We're not going the play games there.
22 If SP could've gotten it through reciprocal

1 switching, we consider that open. But if there's
2 another railroad that's there, it's not a two to
3 one shipper. And, you know, I actually think
4 your reading perhaps helps us, but there's still
5 --

6 CHAIRMAN ELLIOTT: Well, if my
7 reading helped you, wouldn't the via direct
8 service or reciprocal switching be after no other
9 railroad?

10 MR. ROSENTHAL: No, I think the point
11 was very clear. And it's, again, if you go back
12 and you look at the merger decision and the
13 conditions that the Board imposed, the point was,
14 that no shipper was going to lose access.

15 And if somebody thought it was
16 different, the time to raise this would have been
17 16 years ago, or 15 years ago, or sometime before
18 that.

19 I mean, this isn't really, the first
20 time that BN has been in here arguing to expand
21 two to one conditions. The Board's been very
22 clear.

1 VICE CHAIR BEGEMAN: If this is about
2 the agreement and what the agreement meant, then
3 why hasn't Provision Number 15 kicked in
4 requiring arbitration?

5 MR. ROSENTHAL: We, you know, there's
6 been a history here of sometimes arbitrating
7 things, and then having the Board come in and
8 say, you know, this is important, we're going to
9 decide this.

10 VICE CHAIR BEGEMAN: I mean, it does
11 say shall be submitted for binding arbitration.

12 MR. ROSENTHAL: There, you know, if
13 you want to throw them out because they should
14 have arbitrated this, that's okay with me too.

15 (Laughter)

16 MR. STEEL: Mr. Rosenthal, you're
17 very charitable.

18 VICE CHAIR BEGEMAN: That wasn't
19 exactly the purpose of my question.

20 MR. ROSENTHAL: I'm sorry.

21 VICE CHAIR BEGEMAN: I would like the
22 other side to have an opportunity to answer it,

1 if they could.

2 MR. ROSENTHAL: I mean, you know,
3 they filed, the answer is, they filed at the
4 Board, we filed a response at the Board. You
5 know, perhaps, they should've gone through
6 arbitration.

7 I think there may be a protocol
8 between the companies involving issues involving
9 two to one, where we say, you know, go to the
10 Board or arbitrate.

11 CHAIRMAN ELLIOTT: There is a two to
12 one protocol, which, I trust, is both arbitration
13 and the Board. So not to make BNSF's
14 jurisdiction argument, but, maybe, Mr. Steel was
15 about to make that. Thank you, Mr. Rosenthal.

16 MR. STEEL: I was not about to make
17 it, but I will address it. A couple of things.
18 The two to one protocol is about the process to
19 actually identify what were the two to one
20 shippers after the merger.

21 So the merger happened, and there
22 were 70 odd, he said, two to one points. All the

1 shippers weren't identified. There's a protocol
2 for how you go about identifying which ones were
3 open to UP and SP and no other carriers.

4 So that's what the protocol was for.
5 It's largely no longer relevant, because all of
6 the two to one individual shipper facilities have
7 been identified.

8 On your point about arbitration, Vice
9 Chairman, Mr. Rosenthal is correct. When matters
10 have sort of broad implications, there's sort of
11 a protocol between us, that we'll just do them
12 here. In this particular case, G3 is also a
13 petitioner, and they clearly could have come here
14 without going to arbitration. So that's actually
15 the hook, if there were a jurisdictional issue,
16 since they're here, that probably obviates 15 --

17 VICE CHAIR BEGEMAN: But it does say
18 shall, and you signed it, I mean, how was it
19 optional?

20 MR. STEEL: Well, you will see that
21 the big episodes of these occurred from 1996 to
22 about the year 2000, and there were a number of

1 times when our friends at UP raised that issue,
2 and the Board said, we'll address the general
3 principles, and if you all need to debate how it
4 applies to a particular location, go arbitrate
5 that, but what we'll do is address the general
6 principles.

7 VICE CHAIR BEGEMAN: And we're not
8 talking about a location?

9 MR. STEEL: Wait, excuse me?

10 VICE CHAIR BEGEMAN: But we are
11 talking about a location.

12 MR. STEEL: We are talking about a
13 location here, but we have our friend the
14 shipper, who isn't bound by the arbitration
15 clause.

16 A couple of things, and I'll try and
17 limit them. First, on the shipping letters that
18 they complain about, that's standard practice
19 here, at the Board.

20 And people don't write in and go for
21 the protective orders. If they want to respond
22 to shippers letters, we have just as much right

1 to respond to the response to shippers letters.

2 I don't think we need the last word
3 about the shippers letters, but if they respond,
4 we may well respond to what they have to say.

5 But I think the shipper letter, everybody gets
6 shipper letters and shippers come in, I don't see
7 why we need that.

8 Second, a key point here is that if
9 G3, or if Proctor & Gamble had come the Board
10 back at the time of the merger, and said we've
11 got this concern that MET's access, making this a
12 three to two shipper, is conditioned on UP not
13 closing a reciprocal switch, I think the Board
14 would have been receptive to that.

15 Because what could UP have said, no,
16 we want to be able to close it and turn it into a
17 two to one point, where we can end up with only
18 UP/SP combined service. So that really can't
19 have been what happens.

20 The other thing is, if we don't
21 adhere to sort of the intent of the letters, and
22 what Mr. Beer was really trying to get across,

1 then a party who voluntarily settles an agreement
2 is going to end up here, as you say, Vice
3 Chairman, with no competition after this action.

4 Mr. Rosenthal spent a lot of time on
5 the letters and reciprocal switching and all
6 that, and as you heard me say before, that's
7 fine. We agree that there's a dispute there. We
8 don't think that we have to win that dispute to
9 get relief here.

10 As I mentioned earlier, the Board in
11 its Decision 44, clearly, indicated it was
12 focusing on the reduction of competition for all
13 shippers who receive pre-merger competition. Two
14 to ones were just sort of the big kahuna, is what
15 had to be addressed.

16 The three to twos we looked at,
17 everything they could do, as you know, Vice
18 Chairman, to preserve existing competition, they
19 did. The Board's new rules on mergers, not only
20 preserve all competitions, they require the
21 enhancement of competition.

22 So it makes no sense to us to say

1 that what we'll walk out of here today, as you
2 say, when we walk out of here today, and if they
3 prevail, a shipper facility, and note, that Mr.
4 Rosenthal said nothing about the provisions in
5 the agreement, that you said they signed, we
6 signed, they agreed, that the analysis was of
7 shipper facilities. It says that.

8 He's talking about one single named
9 corporate entity. We know P&G's gone. But for
10 99 years, did we think that they were going to
11 stay at this one facility?

12 It's about facilities. It's about
13 jobs. It's about economic growth. Why should we
14 have made G3 go build a new facility and spend
15 all the money, implicate all the environmental
16 issues when there's a facility that's capable of
17 being used that had competition before the
18 merger, and now UP just cuts that off.

19 That just doesn't make good public
20 policy sense to us. I don't think it would to
21 anybody else. G3, they may have had their faults
22 in their due diligence, but the bottom line was,

1 this was a competitively served facility that's
2 not. And so, I guess, the thought that I just
3 wanted to leave you with, it's not a new
4 condition, they can't be surprised that you would
5 say to them, you can't take a pre-merger
6 competitive location and turn it into a non-
7 competitive location. That can't be a condition
8 that they're talking about is a new condition.
9 If they're surprised about that, then they didn't
10 understand what the Board was doing in 1996.
11 But, I guess, I'll close with, and we'll answer
12 any questions, of course, but I'll close with, as
13 you leave today, I would part with Vice
14 Chairman's question, this facility, the relevant
15 facility is losing competition. He didn't say
16 otherwise. He can't say otherwise. It's gone
17 from three carrier service to two carrier
18 service, and now they make it one, and that's a
19 simple fact. It's about access. It's about
20 preserving competition, and what they've done
21 doesn't do that. Thank you, and we appreciate
22 your time.

1 CHAIRMAN ELLIOTT: Thank you, very
2 much. We'll take this matter under advisement.
3 And the meeting of the Board --

4 COMMISSIONER MULVEY: I have another
5 question for the UP. You claim that switching
6 districts do not define which customers are open
7 to reciprocal switching, and that the word
8 districts only relates to intra-terminal or
9 inter-terminal rates. This is Page 6 or 7 of
10 your pleading.

11 If that's all a switching district
12 is, then why would UP use such language in its
13 response to an explicit competitive concern,
14 expressed by MET in its letter that says UP has
15 no intention to diminish the current switching
16 district of Modesto, California, so what then is
17 a district?

18 MR. ROSENTHAL: I'm sorry, we didn't
19 really have a chance to get into the switching
20 district issue. When MET wrote UP about the
21 merger, they seemed to be expressing two
22 concerns.

1 Their letter wasn't entirely clear,
2 but UP's response was, one, they were talking
3 about, we thought, the switching district of
4 Modesto. And two, we thought they were talking
5 about shippers that were actually open for
6 reciprocal switching.

7 So UP made two commitments in return.
8 One, was that shippers that were currently listed
9 in the tariff as open, would remain open.

10 The second is, that we wouldn't
11 diminish the current switching district of
12 Modesto. The first one goes to this reciprocal
13 switching, can a railroad essentially treat a
14 customer as its customer, publish single line
15 rates to that customer, but have UP pickup and
16 drop off the cars. That's reciprocal switching.

17 The alternative is that somebody is
18 treated as a line haul carrier. UP would enter
19 into joint rates and joint routes with BN and the
20 traffic would interchange at some point that the
21 carriers agreed to.

22 That's the reciprocal switching

1 question. Traffic moves is just a question of
2 how, switching districts are something else.

3 A switching district determines
4 whether traffic originates and terminates in the
5 same district. And if it does, then a shipper
6 can use a carrier's published rates for inter-
7 terminal or intra-terminal switching.

8 So, In other words, if Rogers is in
9 the Modesto District, and somebody wanted to move
10 a train or a boxcar of wine from one facility to
11 the other, because they're in the same defined
12 switching district, they can go to UP's tariff,
13 which says that we'll perform an inter-terminal
14 switch, inter-terminal from one railroad to
15 another in the same district.

16 We'll do it for, you know, \$515, I
17 think, is the rate in UP's tariff. G3 confused
18 the matter. They suggest that whether G3 is open
19 or closed has some impact on the size of the
20 switching districts. It doesn't.

21 UP defines switching district in
22 terms of stations and groups of stations. And we

1 have an exhibit there. You don't have to pull it
2 up.

3 But it shows, I think it's Exhibit G.
4 It shows that Rogers is within the switching
5 district of Modesto, that's the way these things
6 are recorded.

7 So any shipper at the station of
8 Rogers, and G3 is in Rogers, would be part of
9 this Modesto Switching District. So switching
10 districts say I can move a car from an origin to
11 a destination in the same district, and it's
12 really entirely different from reciprocal
13 switching. If that helps. Thank you.

14 CHAIRMAN ELLIOTT: Now the meeting of
15 the Board is adjourned. Thank you, very much.

16 (Whereupon, the meeting in the above-
17 entitled matter was concluded at 10:34 a.m.)

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<hr/> <p style="text-align: center;">A</p> <hr/> <p>ability 9:10,13,21 47:2 49:4 50:19</p> <p>able 49:5 51:20 60:16</p> <p>above-entitled 1:21</p> <p>abruptly 14:10</p> <p>acceptable 10:7</p> <p>access 7:5,16 14:2 20:4,22 23:7,15 23:15,20 24:5 26:15 27:21 38:21 40:10 45:3 46:17 55:14 60:11 63:19</p> <p>accommodate 13:1 13:6</p> <p>accompanied 5:12 5:14</p> <p>account 43:3</p> <p>acquires 41:9</p> <p>action 7:5 8:4 14:11 25:11,11 26:4 29:18 61:3</p> <p>actions 7:15 8:12 35:4</p> <p>addition 5:19</p> <p>additional 12:20 48:7</p> <p>address 16:14 31:1 31:13 41:1,2 57:17 59:2,5</p> <p>addressed 17:22 38:12 43:21 61:15</p> <p>addresses 54:2</p> <p>addressing 3:11</p> <p>adequate 38:11</p> <p>adhere 3:8 60:21</p> <p>adjourned 67:15</p> <p>Adrian 2:9 6:9</p> <p>advertised 48:3</p> <p>advise 4:19</p> <p>advisement 64:2</p> <p>ago 12:6 55:17,17</p> <p>agree 39:4 42:17 61:7</p> <p>agreed 34:19 35:3 35:10 62:6 65:21</p>	<p>agreement 15:11 18:4 25:13 26:21 28:4,9 33:20 34:10 39:7 48:6 53:19 56:2,2 61:1 62:5</p> <p>agreements 20:22</p> <p>ahead 19:13</p> <p>aids 4:22</p> <p>allotted 4:5,8,12 5:16</p> <p>allow 51:3</p> <p>alluded 34:7</p> <p>alternative 10:7 21:13 24:19 25:9 65:17</p> <p>alternatives 21:4</p> <p>ambiguity 53:22 54:8</p> <p>AMERICA 1:1</p> <p>analysis 62:6</p> <p>analyzed 27:5 42:22</p> <p>ANN 1:24</p> <p>Anne 30:7</p> <p>announced 48:2</p> <p>announcement 22:7</p> <p>answer 4:4 13:14 45:17 53:3 56:22 57:3 63:11</p> <p>anybody 41:9 62:21</p> <p>anyway 46:12</p> <p>apart 47:6</p> <p>apologize 29:22</p> <p>appear 3:18 6:4</p> <p>APPEARANCES 2:1</p> <p>applicants 22:18 27:5 34:8</p> <p>application 19:18 37:21 43:22 44:1</p> <p>applies 23:2 59:4</p> <p>apply 37:18</p> <p>appreciate 6:3 30:3 63:21</p>	<p>approaching 13:21</p> <p>approval 34:8</p> <p>approximately 13:10</p> <p>arbitrate 57:10 59:4</p> <p>arbitrated 56:14</p> <p>arbitrating 56:6</p> <p>arbitration 56:4,11 57:6,12 58:8,14 59:14</p> <p>area 19:21 36:3,7 37:1,20 43:7,17 43:21 51:10</p> <p>areas 37:22 47:5,10</p> <p>argue 3:8</p> <p>argues 3:13</p> <p>arguing 26:6 29:6 55:20</p> <p>argument 1:4 4:3,8 15:12 41:17 57:14</p> <p>Arguments 31:7</p> <p>arising 3:5 40:9</p> <p>arrangements 28:8 53:18</p> <p>aside 15:11</p> <p>asked 4:2 36:2 44:12</p> <p>asking 11:13</p> <p>asset 47:10</p> <p>assets 18:13</p> <p>Associate 30:8</p> <p>assure 4:6</p> <p>attempted 12:4</p> <p>attorney 30:11</p> <p>available 17:18</p> <p>Ave 2:5</p> <p>Avenue 2:10</p> <p>average 40:11</p> <p>averred 27:3</p> <p>aware 15:16,17 52:6</p> <p>a.m 1:21 3:2 67:17</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>back 12:6 42:20 55:11 60:10</p>	<p>bad 23:5</p> <p>Based 28:10</p> <p>basic 6:10 34:9</p> <p>basically 51:13</p> <p>basis 25:8</p> <p>Beach 2:21</p> <p>Beer 60:22</p> <p>began 10:13</p> <p>Begeman 1:24 6:3 15:20 16:9,16,21 30:6 33:3,19 47:22 48:13 49:14 49:19 50:5 56:1 56:10,18,21 58:17 59:7,10</p> <p>beginning 37:10</p> <p>behalf 2:2,7,16 3:15</p> <p>belief 12:12</p> <p>believe 6:13 7:4 20:18</p> <p>believed 11:11 32:9</p> <p>benefits 8:7,20 18:9</p> <p>beyond 26:21</p> <p>big 26:22 43:10 58:21 61:14</p> <p>binding 56:11</p> <p>bit 25:1 29:22</p> <p>blended 22:1</p> <p>blow-up 19:19</p> <p>BN 30:12,20 32:19 38:21 39:3 40:7 40:11 44:3 45:5 45:10,11,16,17 47:3 49:13 52:21 53:1 55:20 65:19</p> <p>BNFS 3:15</p> <p>BNSF 2:13 3:8,13 4:10,12 5:21 6:8 9:16,17,20 10:20 18:16 19:8,20 20:7,8,13 28:12 34:10</p> <p>BNSF's 9:7 57:13</p> <p>BN's 37:5</p> <p>Board 1:2,17 3:14 3:21 4:5,10 5:4</p>	<p>6:15,15 10:1 18:11 21:18 26:8 34:21 35:1 38:11 38:20 40:4 41:1 42:18 44:6 46:4 48:2,10,16,17 49:3,8 50:14,15 50:17 51:4,19 54:9 55:13 56:7 57:4,4,10,13 59:2 59:19 60:9,13 61:10 63:10 64:3 67:15</p> <p>Board's 7:1 8:12 14:22 26:7 41:15 48:14 52:9 54:11 55:21 61:19</p> <p>body 29:16</p> <p>bottom 62:22</p> <p>bought 12:5 28:20 32:10,15 38:16 44:14</p> <p>bound 5:5 9:17 59:14</p> <p>boxcar 9:16 10:21 11:20 12:8 13:6 66:10</p> <p>boxcars 13:1</p> <p>brief 6:6</p> <p>briefs 53:13</p> <p>broad 19:16 58:10</p> <p>broadly 25:5</p> <p>Brown 2:9 6:10</p> <p>build 11:1 44:22 62:14</p> <p>building 44:19</p> <p>Buildings 13:5</p> <p>built 13:4,5 39:2 40:2,5 44:19 51:15</p> <p>Burlington 2:4,7</p> <p>business 9:10 13:18 44:3,6</p> <p>businesses 7:21 8:21</p> <hr/> <p style="text-align: center;">C</p> <hr/>
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C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Control and Merger: Union Pacific
and Southern Pacific Rail

Before: STB

Date: 01-15-13

Place: Washington, DC

was duly recorded and accurately transcribed under
my direction; further, that said transcript is a
true and accurate record of the proceedings.



Court Reporter

NEAL R. GROSS

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UNION PACIFIC'S ORAL ARGUMENT EXHIBITS

UNION PACIFIC/SOUTHERN PACIFIC MERGER

STB Finance Docket No. 32760

January 15, 2013

Reply Ex. B: Dec. 1995 Letter to MET

JIM SPATILLONE
DIRECTOR AND PRESIDENT
UNION PACIFIC RAILROAD COMPANY
3000 11TH STREET
DENVER, CO 80202
TEL: 303.462.1234
FAX: 303.462.1234

UNION PACIFIC RAILROAD COMPANY




Exhibit B, Page 1 of 4

December 13, 1995

Mr. James L. Beard
President
Modesto and Empire Traction Company
P O Box 3106
530 Eleventh Street
Modesto, CA 95353

Again, following a UP/SP merger, we have no intention of closing UP's present open customers as specifically named in Item 1663.

With regard to the industries currently served by UP and SP at Modesto, all the industries which are open to reciprocal switching are located on the UP, as provided in Item 1663 of Switching Tariff 8005-D, copy attached for your convenience. Again, following a UP/SP merger, we have no intention of closing UP's present open customers as specifically named in Item 1663.

Thank you for your letter. I hope we have addressed your concerns.

Sincerely,



CC: Dick Davidson - Bethlehem, PA

General Foods
Graystone Block
E. J. Lang
Procter & Gamble
Snowden Chemical
Statens Distribution
Varril Brothers
(DD-2174)

This last page of this supplement for evaluation of other reference materials.

Reciprocal switching will only be performed to or from corporations, firms or individuals listed herein, subject to restrictive provisions published in connection therewith.

		per car will be made for each thirty-four hours or fraction thereof that such cars are used. Charges at times for Tempco unit is paid in operation after receipt of instructions from shipper or consignee. This charge will be in addition to transportation charges, demurrage charges, at other terms specified by the shipper and the materials concerned commission or sales commissions for the sale by shipper or consignee.
34-C	CHARGE FOR CHARGE FOR	
36-C	EQUIPMENT AT BRACKET AND WELDING, ID	Use of Carrier's Equipment is here From Switching Cars. The cost of equipment is \$30.00 per car will be assessed for the use of equipment where the industry has available an extra to use its own power to accomplish an interplant switch movement from one track to another within the same plant or facility. (Exception to Section 1 of Rule 30 to UPRC)
40-C	CHANGE FOR PUNISHING PAPER COVER- ING ROOMS AND SIDES OF CARS	A charge of \$53.00 per car will be assessed when this company supplies the material for covering the floors or sides of cars with paper, when such cars are furnished for loading freight on which this company has no claim. This charge shall be assessed when this company supplies both the material and labor for covering the floors or sides of cars with paper, when such cars are furnished for loading freight on which this company performs a line haul service. (See Exceptions 1 and 2 below). This company will not supply material or labor for covering the floors or sides of cars with paper when the material and labor supplied by the carrier is used for covering the floors or sides of cars with paper. EXCEPTION 1. Import freight moving from Pacific Coast Port under rates named in Tariff ICC TCRP# 3000-series, supplements thereto or successive issues thereof, will be governed by the provision of that tariff. EXCEPTION 2. When cars are furnished for loading steel or Case Sugar, carloads on which this company has no claim, the charge will be assessed when this company supplies the material or labor for both) for covering the floors or sides of cars, or for protection of loading against damage, with paper or cardboard. b) The cost not to exceed \$1.87 per car will be paid to the shipper, when shipper furnishes and the rates thereunder target passed across delivery of car, secured with metal straps.

Some basic range of the supplement for explanation of other reference marks.

UP Rec. Switch. Circ. (current)

UP Reciprocal Switching Circular

UP Reciprocal Switching Circular Page 5

Effective January 1, 2001 all reciprocal switching items and charges published in UP Tariff 8005-E were cancelled in their entirety and replaced by this new circular. Remaining active provisions of UP Tariff 8005-E were transferred to UP Accessorial Tariff 6004 or cancelled, account obsolete.

On June 1, 2001, former CHTT reciprocal switch charges and roster of open industries were transferred to this circular from former CHTT Tariff 8001-J. Remaining active provisions of CHTT Tariff 8001-J were transferred to UP Accessorial Tariff 6004 or cancelled, account obsolete. Former CHTT industries are now referred to as UP industries.

GENERAL RULES AND REGULATIONS

STATIONS LISTS AND CONDITIONS

This circular is governed by OP&SL 6000-series as follows:
When a station is abandoned as of a date specified in the above named tariff, the switch charges for such station, as published in this circular, are inapplicable on and after that date.

UP will provide reciprocal switching only to or from UP customers specifically listed in this circular.

INTERMEDIATE SWITCHING

A switching movement between interchange tracks of one carrier to interchange tracks of another carrier.

INTRA-TERMINAL SWITCHING

A switching movement of traffic originating at and destined to points located on the tracks of this company within the switching limits of one station or industrial switching district.

LINE-HAUL

Movement between stations that are not located within the switching limits of the same station.

RECIPROCAL SWITCHING

An arrangement between carriers where the carrier physically serving the industry performs switching service for loading or unloading on behalf of the other carrier on shipments having an immediately preceding or following line-haul movement via the other carrier. UP will provide reciprocal switching only to or from UP customers specifically listed in this circular. Line-haul shipments to or from UP customers not listed must move in UP line-haul service.

TEAM TRACK

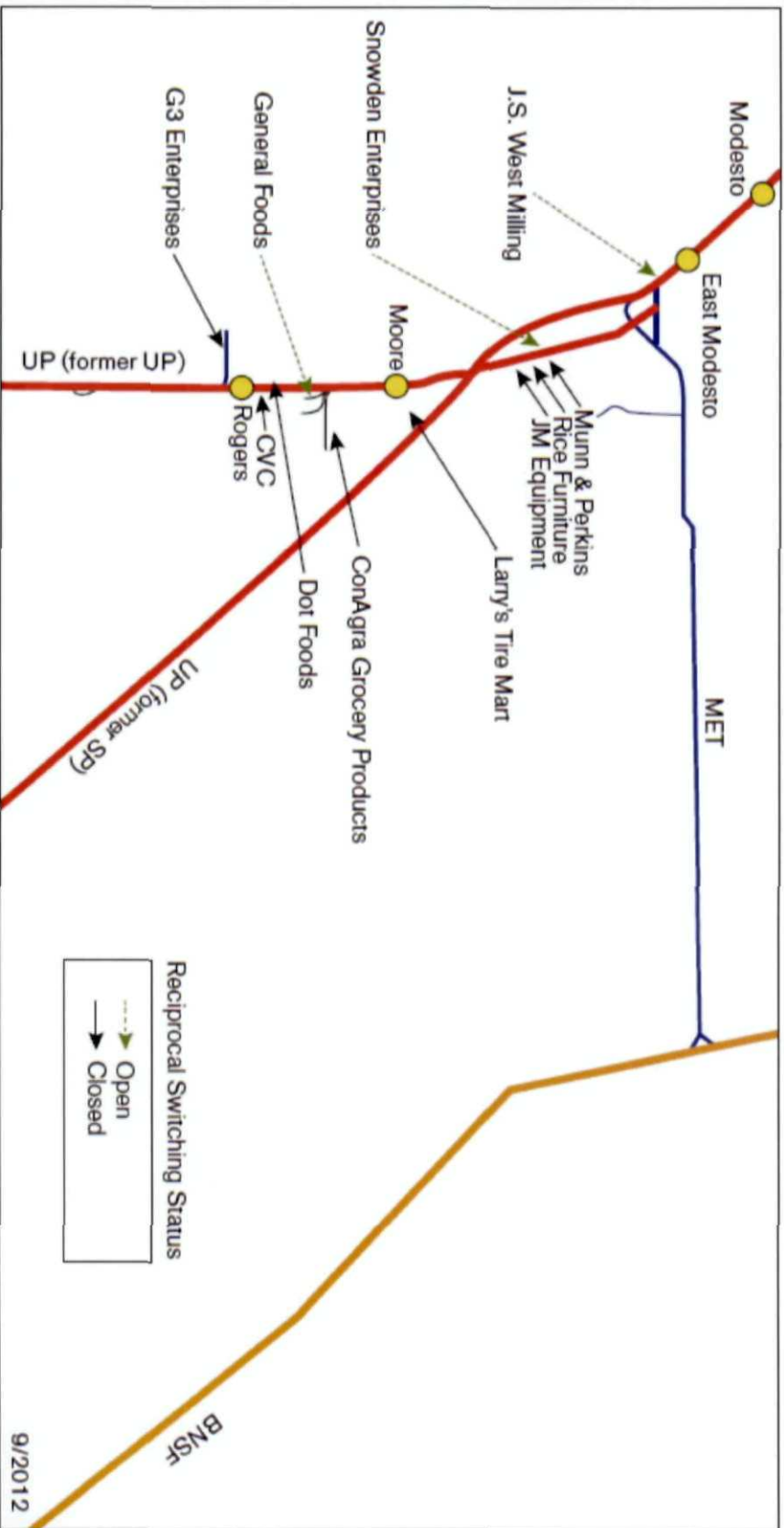
A track or tracks assigned by UP for use of the general public. All team tracks are closed to reciprocal switching.

By Interstate Marketing, STOR 1380
Union Pacific Railroad Company, 1400 Douglas Street, Omaha, NE 68119

SOURCE: www.uprr.com/customers/shortline/attachments/current_uprsc.pdf

Reply Ex. D: Map (current)

Modesto-area Rail Lines



Reply Ex. H: BNSF 8005-C (current)

BNSF Switching Book 8005-C

Exhibit H, Page 2 of 2

Item 55 - Absorbed and Non-Absorbed Rates Identical
Reciprocal switching charges provided in this tariff apply whether or not absorbed in whole or in part by connecting line(s)

Item 60 - Interstate Application of This Book

This tariff is also applicable on interstate traffic in the following states, except where expressly provided to the contrary in connection with particular items or rates.

ALABAMA	IDaho	LOUISIANA	NEBRASKA	OREGON	UTAH
ARIZONA	ILLINOIS	MINNESOTA	NEVADA	SOUTH DAKOTA	WASHINGTON
ARKANSAS	INDIANA	MISSISSIPPI	NEW MEXICO	TENNESSEE	WISCONSIN
CALIFORNIA	KANSAS	MISSOURI	NORTH DAKOTA	TEXAS	WYOMING
FLORIDA	KENTUCKY	MONTANA	OKLAHOMA	UTAH	

Item 65 - Application of Reciprocal Switching Charges
Reciprocal switching charges in this tariff apply only to industries listed herein

Item 70 - Charges for Switching Privately Owned Railway Passenger Cars

The BNSF will switch privately owned railway passenger cars, at a charge of \$700.00 per car

Reciprocal switching charges in this tariff apply only to industries listed herein.

Switching charges named herein (unless otherwise specified) will apply for the handling of loaded cars one direction and empty cars in the reverse direction. If cars are moved empty, they will be charged as if they are loaded. Switching of empty cars loaded will not be considered as offloading one way movement of empty cars. If cars are loaded in both directions, the applicable charge will be assessed for each loaded movement.

DEFINITIONS

- (a) Intra-Plant Switching - A switching movement of cars, loaded or empty, from one track to another track or between two points on the same track, within the same plant or industry without leaving the tracks of the same plant or industry.
- (b) Intra-Terminal Switching - A switching movement (other than intra-plant switching) from one track to another track of the same carrier, within the switching limits of one station or industrial switching district.
- (c) Inter-Terminal Switching - A switching movement from a track of one carrier to a track of another carrier when both tracks and movement are within the switching limits of the same station or industrial switching district.
- (d) Reciprocal Switching - A switching movement from a plant or industry located on the BNSF to the point of interchange with connecting carriers or vice versa on line-haul traffic.
- (e) Intermediate Switching - A switching movement of cars from the interchange tracks of one connecting carrier to the interchange tracks of another connecting carrier within the switching limits of the same station on which the switch carrier neither originates nor terminates the shipment nor receives a line-haul.

Reply Ex. I: NS 8001-A (current)

NS 8001 - A
Exhibit I, Page 2 of 2

ORIGINAL PAGE 14

SECTION I
RULES AND OTHER COVERING PROVISIONS
GENERAL RULES AND DEFINITIONS

ITEM 1090 (continued)

DEFINITION OF TERMS USED IN CONNECTION WITH
CHARGES NAMED HEREIN

RECIPROCAL SWITCHING:

An arrangement between carriers serving the same station or switching district where the carrier physically serving the industry performs switching service for loading or unloading on behalf of the other carrier on shipments having an immediately preceding or following line-haul movement via the other carrier. NS will provide reciprocal switching only to or from NS customers specifically listed in Section 5 of this tariff. Line-haul shipments to or from NS customers not listed in Section 5 must move in NS line-haul service.

ITEM TRACK:

NS will provide reciprocal switching only to or from NS customers specifically listed in Section 5 of this tariff. Line-haul shipments to or from NS customers not listed in Section 5 must move in NS line-haul service.

ITEM 1110

NON-APPLICATION OF RATES ON SCRAP AUTOMOBILE BODIES

Charges provided in this tariff will not apply on Scrap Automobile Bodies, crushed flat, loose or in bundles, loaded on flat cars.

ITEM 1120

SWITCHING CHARGE ON RAILROAD COMPANY MATERIAL

Railroad company material moving via owner line on non-revenue billing between industrial siding served by NS and interchange tracks with connecting line will be subject to the intra-terminal switching charge published in Section 7 of this tariff.

ISSUED FEBRUARY 1, 2000

EFFECTIVE MARCH 1, 2000

ISSUED BY
D. D. Fisher, Director Marketing Services
NORFOLK SOUTHERN RAILWAY COMPANY, 110 Franklin Road, S. E. Roanoke, VA 24062-0047



ORIGINAL PAGE III-C-2

RECIPROCAL SWITCHING RULES AND CHARGES

APPLICATION OF RECIPROCAL SWITCHING CHARGES - ITEM 3110

- A. Receptacle switching will only be performed on movements specifically stripped from or consigned to the mailer's list in Section 10 or as otherwise provided in this Section.
- B. Charges for CSXT Receptacle Switching charges are the responsibility of the line-haul carrier handling the loaded car from or to the stations at which the movement of switch occurs.

NON-APPLICATION OF RECIPROCAL SWITCHING CHARGES - ITEM 3119

A. Traffic handled on bi-level or tri-level cars (Provisions will apply from TDS auto ramp, Portsmouth, VA)

- II. Federal Reserve assets and liabilities are equal**

(Locomotives, Moving on Own Wheels, provided in the Industrial Switching Section.)

- C. Import to or from Puerto Rico (1 item) (1 tick)
- D. Outbound shipments of Railroad company Materials, moving via foreign line railroad in non-revenue haulage service.
- E. Revenue shipments of rejected Automobile Parts, moving with non-revenue empty shipping containers or devices (boxes, crates, bins, etc.) returning reverse route used on the loaded movement.

CHANGING NAMES OF INDUSTRIES - ITEM 3120

where change is made in ownership or name of liability listed herein served by GST, switching charges specified herein will apply until the new name is published; provided there is no change in location or general character of business engaged in.

DEFINITION OF THE TERM "JOINT TERMINAL" - ITEM 3150

change for reciprocal switching service on cars transported or to be transported by the other railroad in live-haul revenue service

¹ The term "reciprocal switching" means the mutual

- The following are examples of situations involving the selection or location of a unit or units for receiving or conveying a mail movement over another railroad, form or to a private or assigned station on the switching railroad, or from the point of interchange with the connecting railroad at the switching station, and the movement of the empty car in the reverse direction.
- When the interchange between CSST and a connecting railroad is effected by an intermediate railroad, changes assessed by the intermediate railroad will be in addition to the charges assessed by CSST.

ISSUED JANUARY 10, 2008

EFFECTIVE FEBRUARY 1, 2008

CSA TRANSPORTATION
Marketing Services
6737 Southpoint Drive South
Jacksonville, FL 32216

Comparison of Switching Language UPRR MET

UP Reciprocal Switching Circular

Effective January 1, 2001 all reciprocal switching terms and charges published in UP tariff 8005-E were rescinded and replaced by the new circular. Remaining active provisions of UP tariff 8005-E were transferred to UP Accessorial tariff 8004 or cancelled, account obsolete.

On June 1, 2001, former CHTT reciprocal switch charges and rates of open industries were transferred to this circular from former CHTT tariff 8001-J. Remaining active provisions of CHTT tariff 8001-J were transferred to UP Accessorial tariff 8004 or cancelled, account obsolete. Former CHTT industries are now referred to as UP industries.

GENERAL RULES AND REGULATIONS

STATIONS LISTS AND CONDITIONS

This circular is governed by CPSS, 6000-series, and other rules. When a station is abandoned, its name is specified in the above named tariff. The switch charges for such stations are provided by the circular, and therefore do not appear after that date.

DEFINITION

INDUST

A track or property

INTERC

Interchange

INTTA

Interchange

INTTA

Interchange

INTTA

Interchange

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Interchange

Switching charges shown in this tariff apply to the physical locations or plant sites and are not affected by name changes or ownership changes of the occupants or property.

UP will provide reciprocal switching only to or from UP customers specifically listed in this circular.

SOURCE: www.metr.com/files/MET%20Tariff%2080000%20June2009.pdf

Reply Ex. G: OPSL Modesto Switching District (current)

CALIFORNIA												SUPPLEMENT 17 TO OFFICIAL RAILROAD STATION LIST OPSL 6009 AG													
CHANGES																									
UNITED STATES																									
STATION		COUNTY		RULE 260		RR		OPSL		FSAC		SPLC		TYPE		NATIONAL RATE BASIS				SWITCH LIMIT CITY				RATE ZIP	
CALIFORNIA																									
EAST MODESTO		STANISLAUS		EMDST		UP		18698		18698		875851		OR		MODESTO, CA				MODESTO, CA		95350			
ROGERS		STANISLAUS				UP		18694		70041		875947		OR						MODESTO, CA		95380			
PENNSYLVANIA																									
WESTLAND		WASHINGTON				WE		12005		12005		219638		OR		WESTLAND, PA						15340			
CANADA																									
STATION		RULE 260		RR		OPSL		FSAC		SPLC		TYPE		NATIONAL RATE BASIS				SWITCH LIMIT CITY				RATE ZIP			
QUEBEC																									
MONTREAL				CN		33170		33170		030000		R								H1N3P1					
MONTREAL MONTER INT		MOTRM		CN		33309		33309		030805		OR						MONTREAL, PQ		H4C1E4					
MONTREAL RACINE TER				CN		33382		33382		030318		OR						MONTREAL, PQ		H8K2W4					
ST MATHIEU				CPRS		554		2215		028757		OR								J0L2H0					

Reply Ex. E: 2001 UP Rec. Switch. Circ.

Exhibit E, Page 2 of 3
UP Reciprocal Switching Circular Original Page 8

UP Reciprocal Switching Circular

GENERAL RULES AND REGULATIONS

STATIONS LISTS AND CONDITIONS
This circular is governed by OPSL 6000-series as follows:
When a station is abandoned as of a date specified in the above named tariff, the switch changes for such station, as published in this circular, are inapplicable on and after that date.

REVISION NUMBERS
Repeating the page and showing a revised page number will amend this circular. Revision numbers will be used in consecutive numerical order beginning with the "First Revised Page". A revised page cancels any revised or original page, which bears the same page number.

DEFINITION OF TERMS USED IN CONNECTION WITH CHARGES NAMED HEREIN
INDUSTRIAL TRACKS
A track serving a particular industry, whether located upon the property of UP or upon property owned or leased by the industry.

UP will provide reciprocal switching only to or from UP customers specifically listed in this circular.

LINE-HAUL
Movement between stations that are not located within the switching limits of the same station.

RECIPROCAL SWITCHING
An arrangement between carriers where the carrier physically serving the industry performs switching service for loading or unloading on behalf of the other carrier on shipments having an immediately preceding or following line-haul movement via the other carrier. UP will provide reciprocal switching only to or from UP customers specifically listed in this circular. Line-haul shipments to or from UP customers not listed must move in UP line-haul service.

TEAM TRACK
A track or tracks assigned by UP for use of the general public. All team tracks are closed to reciprocal switching.

Issued December 1, 2000
By Interstate Marketing, Room 1110
Union Pacific Railroad Company, 1418 Dodge Street, Omaha, NE 68179

Effective January 1, 2001

Reply Ex. E: 2001 UP Rec. Switch. Circ.

Exhibit E, Page 3 of 3
UP Railroad Switching Circular Original Page 27

Smith, Carlton, Industries
Southern Boiler & Tank Works Co
Southern Chemical Co
Southern Cotton Oil Co
Southern Cotton Oil Mill Co
Southern Cream Sales Co
Southern Parts Corp
Southern Products Co
Southern Terminal & Storage Co
Southern Transfer Co
Southern Trucking Co
South Memphis Stock Yards, Inc
Southwest Wine Co
Spears Co
Stanley Home Products Co
Stewart's Inc
Stanton-Warren Hardware Co
Stuck, H. B. Co
Sull & Co Feed Mill
Tall, K. Warehouse
Tennessee Quick Freezer & Storage Co
Tenn-Penn Oil Co
Tennessee Valley Authority
Tennessee Vinegar Co, Inc
Texas Automatic Sprinkler Co
Texas Company
Texas Products Co
Texas Warehouse Co

DCS Color and Supply Co, Inc
1050 E. Bay Street
Delta Reprints & Reproductions
6203 N. Turlin Ave
Elements LTD 546 S. Water St
Federal Marine Terminal
Municipal Docks No. 50, Piers 2, 3 and 4
Frazz & Company, 12314 W. Silver Spring
Groesbeck Brothers, 4277 W. Lincoln
H&H Scrap Metals, 9000 W. Ford La Avenue
Hansen Storage Co, No. 112,
2800 N. 112th Street
Kellogg's Water Compressing,
300 S. Water St (Pail No. 8)
Kohr's Foods, 11100 W. Burling Street
Laden Co, 5481 S. Packard Avenue
Larsen Lumber
Milwaukee Sewerage Commission,
Jones Island Sewerage Plant
National Warehouse Corp., 531 S. Water St
Odyne Distribution Centers
Peltz, 1514 East Thomas St
Perry, J. C. Co., 11800 W. Burling St
Roundy's Inc., 11300 W. Burling St
Tex Pac Energy, Inc., 3443 W. Mill Rd
Weyenbauer Co., 2960 N. 112th St
Wisconsin Cold Storage Co.,
344 E. Florida Street
Wisconsin Color Press, Inc.,
5400 W. Good Hope Rd
Wisconsin Paperboard Corp.,
1514 E. Thomas Street

MODESTO, CA

General Foods
J.S. West Milling (S)
Proctor & Gamble
Snowden Chemical

A-1 Recycling, 2101 W. Morgan Ave
Alpine Plywood
American Can Company, 6000 N. Tuloma Ave
Biller Inc., 10733 W. Blumound Road
Continental Grain Co. (KK Elevator),
732 N. Jackson
Crown Cork & Seal Co, Inc.
4601 W. Woodworth Ave

MODESTO, CA

General Foods
J.S. West Milling (S)
Proctor & Gamble
Snowden Chemical

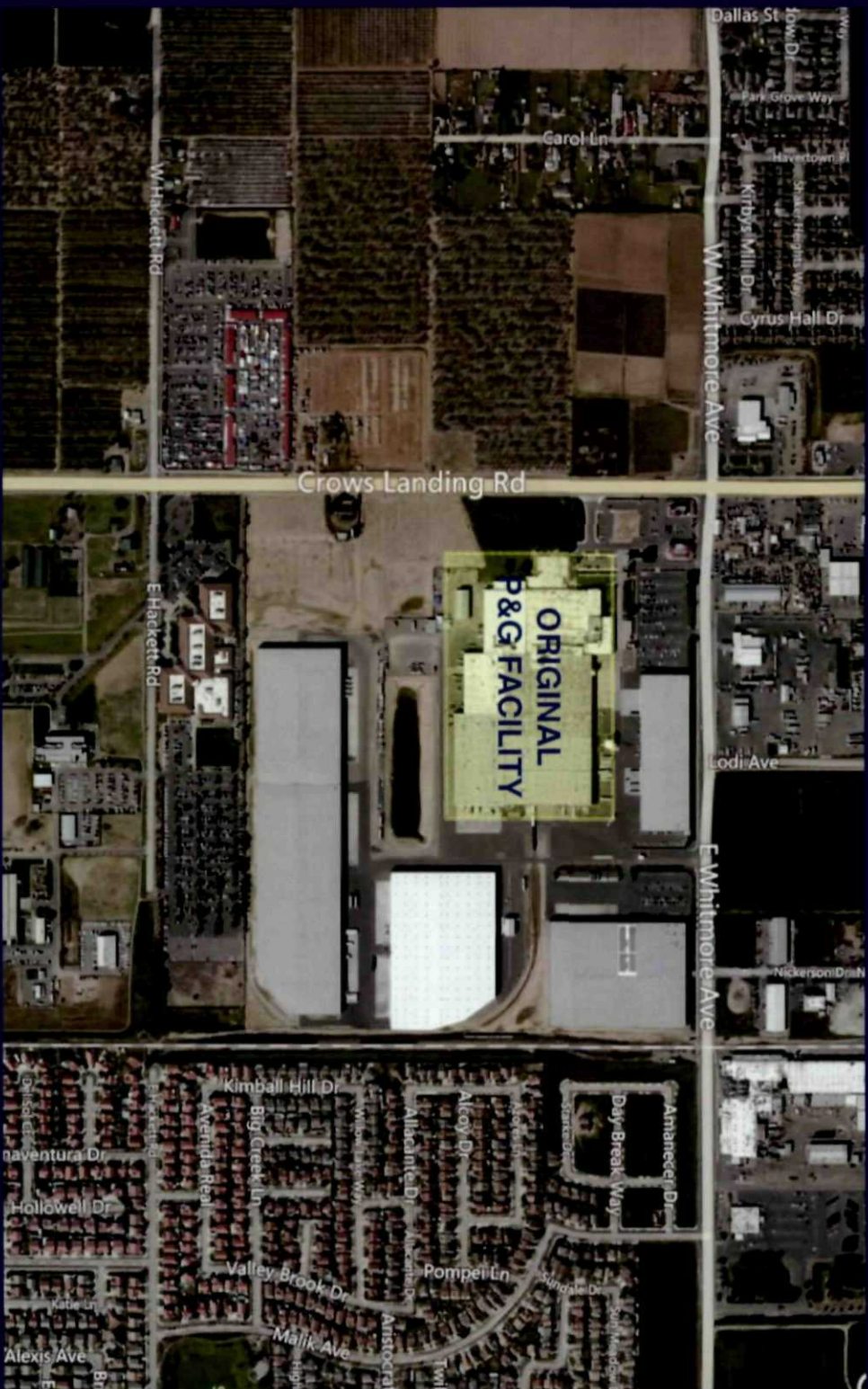
MONROE, LA

Allen Willock Mfg Co
Ballard's Inc
Brookings, R. E. Co
Faulk-Colel Bonded Warehouses, Inc (No 1)
Gulf South Warehouse
Howard Brothers Discount Stores, Inc
Karcher Brothers Manufacturing
L.A. Industries
MAPM Oils
Mason and Hyde
Morris Brick & Builders Supply Co
Morris Warehouse Co
Murphy GC
News-Star-World Publishing Corp
Seers, Roebuck & Co

Issued December 1, 2000
by Western Publishing, Room 1110
Union Pacific National Company, 1416 Dodge Street, Omaha, NE 68179

Effective January 1, 2001

G3 Enterprises Modesto Warehousing



SOURCES:

www.g3enterprises.com/Ware-Housing/Locations.asp

www.maps.bing.com

MET-Served Warehousing

SOURCE: www.beardland.com



Beard Land Improvement Company

Beard Land Improvement Company has the ability to satisfy the industrial warehousing needs of businesses in Modesto, California. We can accommodate small to large build-to-suit projects, as well as short- and long-term leasing. We welcome your inquiry ... 209.557.2706.

Beard Land has an integral role in the multitude of businesses located in the Beard Industrial District, including several Fortune 500 companies, which employ thousands of area residents. Many of the industries are food related and most sites are rail served by our sister company, [Modesto and Empire Traction Company](#), which offers a great advantage to rail customers by interchanging daily with both BNSF Railway and Union Pacific Railroad. In addition, our location in Modesto affords us proximity to Highway 99 and Interstate 5.

- Home
- History
- Industries
- For Lease
- Photos
- Area Map
- River Bluff
- Board of Directors
- Shareholders
- Contact Us
- Employment

MET-Served Warehouses for Lease

SOURCE: www.beardland.com/sections/forlease



Beard Land Improvement Company

FOR LEASE

- MODESTO, CA ... 3924 Finch Road
 - 100,000 sq. ft. Warehouse #124 [\[details\]](#)
- MODESTO, CA ... 4000 Finch Road
 - 150,000 sq. ft. Warehouse #125 [\[details\]](#)
- MODESTO, CA ... 3643 Finch Road
 - 98,750 sq. ft. Warehouse #131 [\[details\]](#)
- MODESTO, CA ... 3700 Leckron Road
 - 157,500 sq. ft. Warehouse #139 [\[details\]](#)
- MODESTO, CA ... 2285 Tenaya Drive
 - 10,200 sq. ft. Warehouse #120 [\[details\]](#)
- MODESTO, CA ... 2273 Tenaya Drive
 - 3455 sq. ft. Warehouse #117, Unit A [\[details\]](#)
 - 2680 sq. ft. Warehouse #117, Unit C [\[details\]](#)
- MODESTO, CA ... 409 12th Street
 - 8820 sq. ft. Office Building #607 [\[details\]](#)
- MODESTO, CA ... 3173 Del Este Avenue, Warehouse #148
 - Warehouse Size/Available: 20,470 sq. ft. [\[details\]](#)
- MODESTO, CA ... 819 Mariposa Avenue, Warehouse #149
 - Space Available: 16,387 sq. ft.
 - Warehouse Size: 21,850 sq. ft.

Many Beard properties are rail served by the Modesto & Empire Traction Company. M&ET interchanges daily with both BNSF and UP railroads.

BUILD TO SUIT SITES AVAILABLE

Concrete Tilt-Up Warehouses can be constructed from 20,000 square feet to 1,000,000

Home
History
Industries
for Lease
Photos
Areas Map
River Bluff
Board of Directors
Shareholders
Contact Us
Employment

Example Warehouse for Lease

SOURCE: www.beardland.com/sections/forlease

Warehouse # 124

3924 Finch Road, Modesto Ca

100,000 Sq. Ft.



For More Information

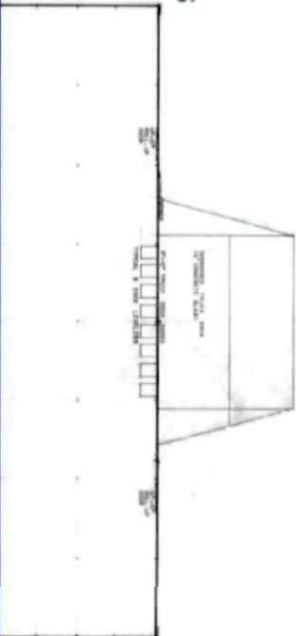
Please contact:

Elvia Victorine

209.557.2706

EVictorine@beardland.com

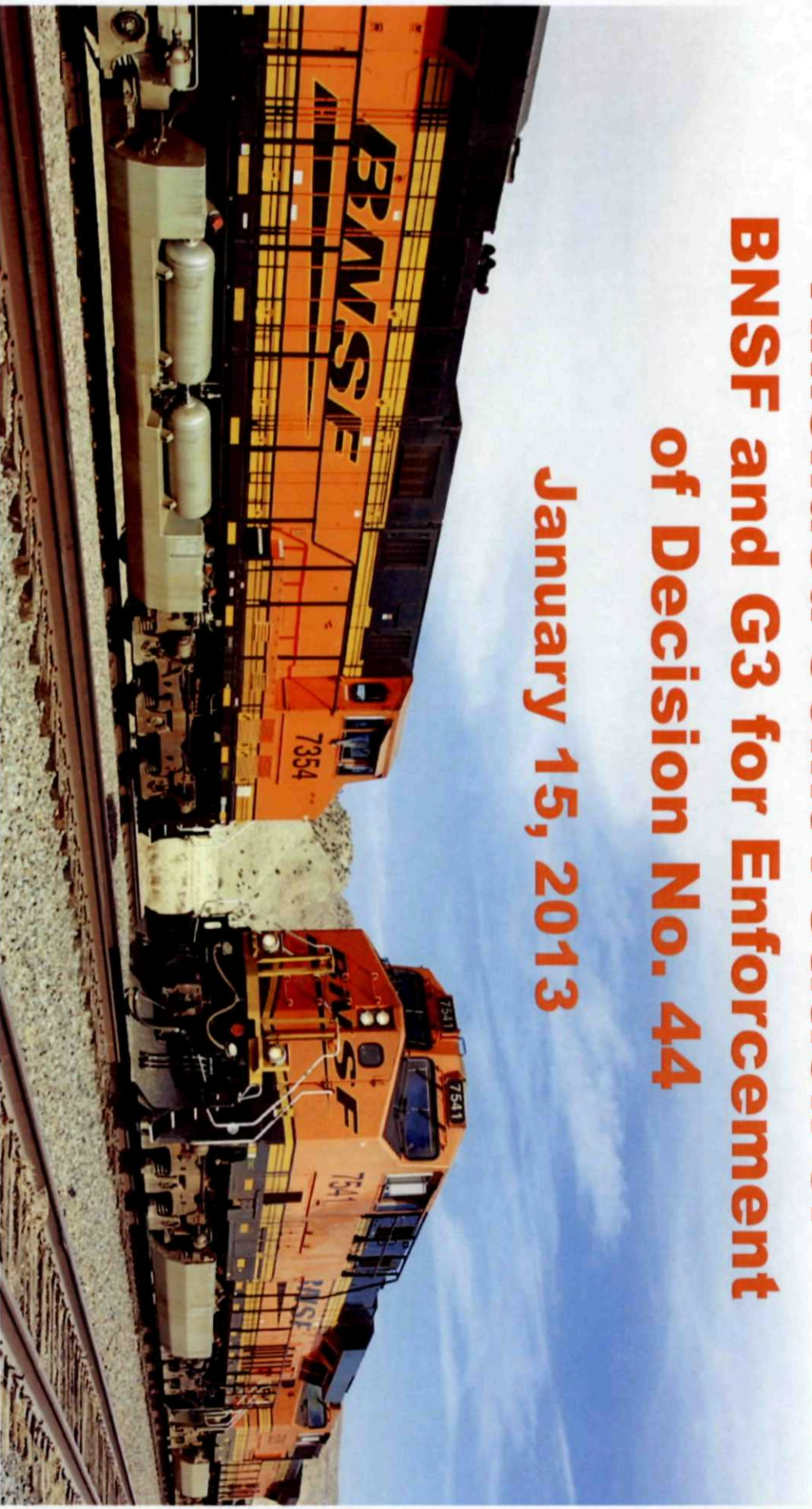
- * Rail Access
- * 2 Rail Doors
- * 8 Dock Doors
- * 2 Truck Access Doors
- * 4.91 Acres
- * Close to Highways
- * 28' Clear Height



Finance Docket No. 32760

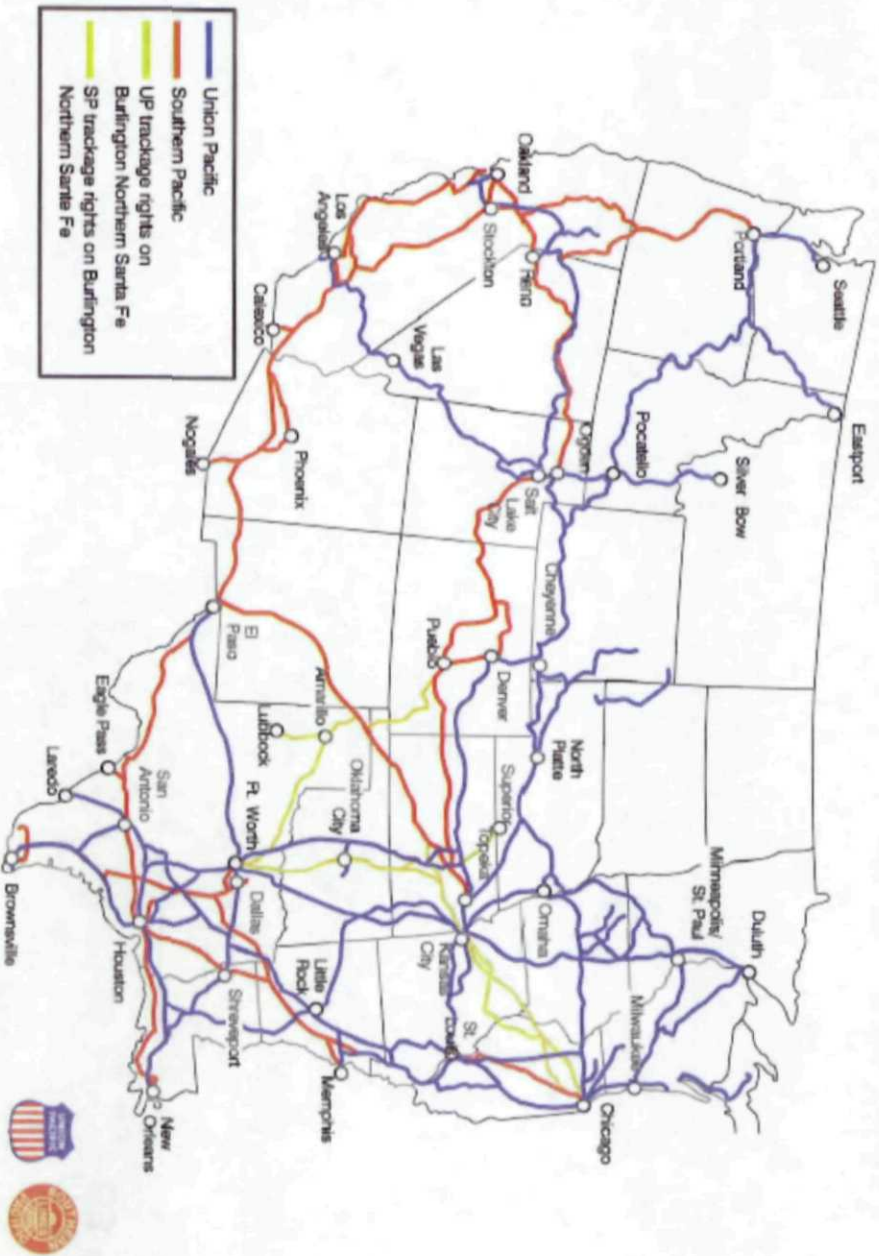
Amended Joint Petition of BNSF and G3 for Enforcement of Decision No. 44

January 15, 2013

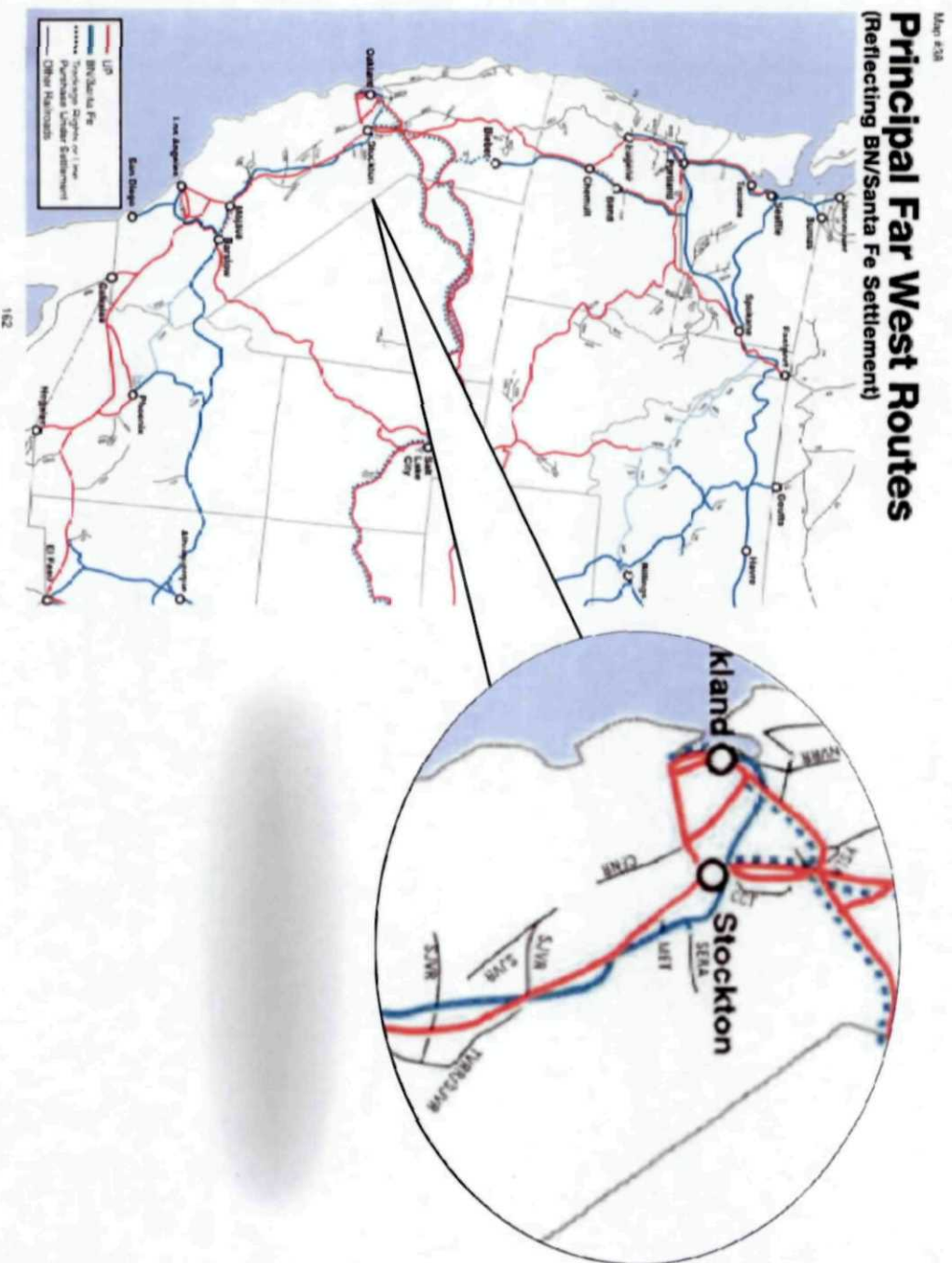


Merged UP/SP System

Union Pacific and Southern Pacific



Principal UP/SP Far West Routes



Pre-merger: 3 railroad access to Rogers

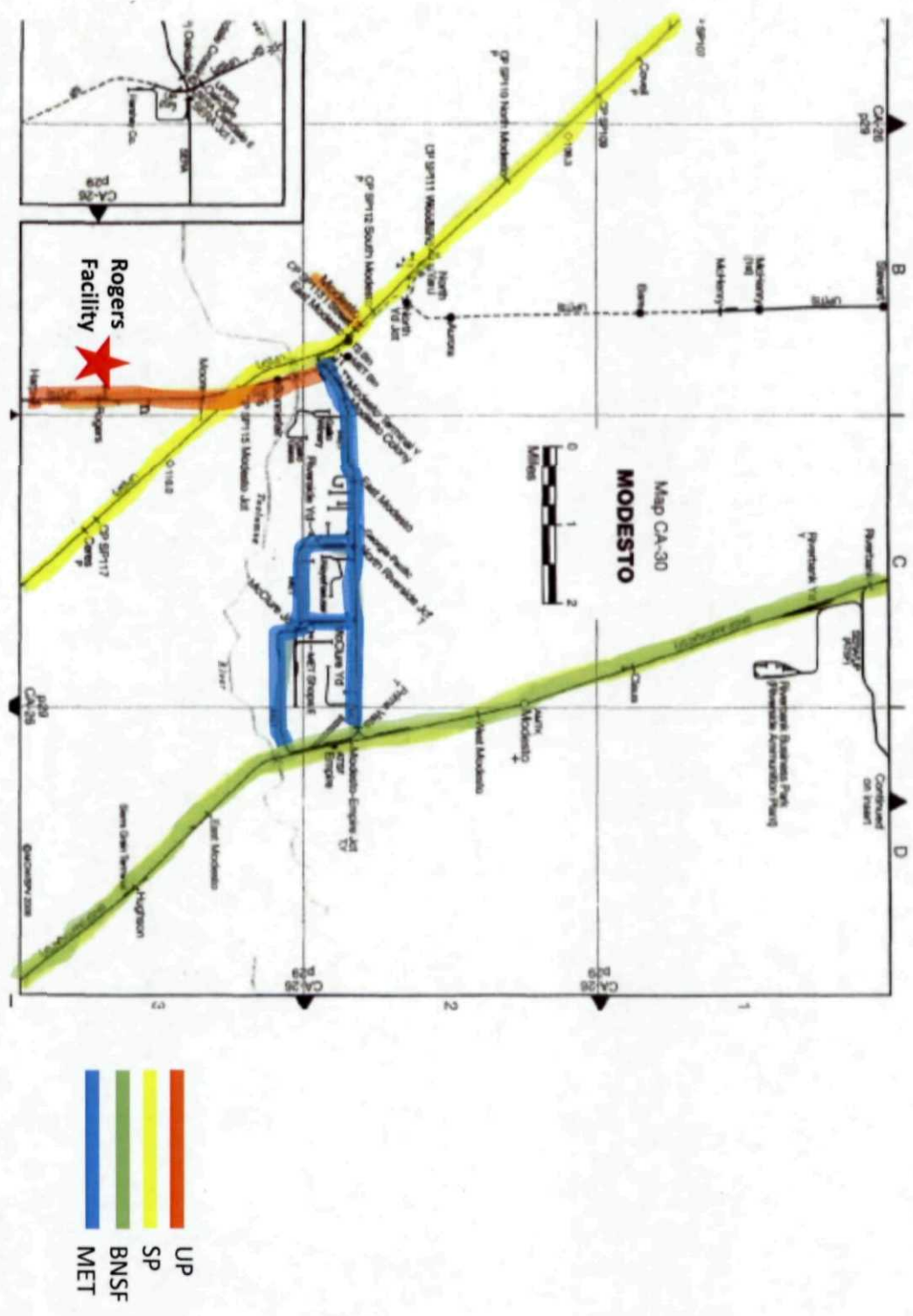


Exhibit A to Amended Joint Petition of BNSF and G3



UP's Merger Representations

UNITED
Office of the Secretary
JUN - 4 1996
Part of
Public Record

BEFORE THE
Surface Transportation Board
Finance Docket No. 32790
UNION PACIFIC CORPORATION,
UNION PACIFIC RAILROAD COMPANY AND
MISSOURI PACIFIC RAILROAD COMPANY
—CONTROL AND MERGER—
SOUTHERN PACIFIC RAIL CORPORATION,
SOUTHERN PACIFIC TRANSPORTATION COMPANY,

25
RECEIVED
JUN 3 1996
WASHINGTON
D.C.

As soon as the UP/SP merger agreement was announced, Applicants emphasized their intent to ensure that a second strong railroad would compete at every location where UP and SP provide the only rail competition. Applicants negotiated with a number of railroads, but shippers quickly made it clear that only BN/Santa Fe could provide the strong, comprehensive competition that was required. Smaller railroads such as KCS

CAWSON
LORIN P.
CARR, A.
SCOTT
THA
One M
San F
(415)
PAUL A.
RECHART
JAMES N.
HARR
1800 2
WASH
(202)
Attorney
Fuehl
St. La
Camp
Dress
Railroad Company

CONTRASTOR & HOBAN
1201 Pennsylvania Avenue, N.W.
P.O. Box 7066
Washington, D.C. 20044-7066
(202) 682-5588
Attorneys for Union Pacific
Corporation, Union Pacific
Railroad Company and Missouri
Pacific Railroad Company

June 5, 1996

UP's Merger Representations

ENTERED
Office of the Secretary
JUN - 4 1996
Part of
Public Record

27

UP-SP-260
JUN 3 1996
RECEIVED
WASH DC

BEFORE THE
Surface Transportation Board
Finance Docket No. 32780

UNION PACIFIC CORPORATION,
UNION PACIFIC RAILROAD COMPANY AND
MISSOURI PACIFIC RAILROAD COMPANY
—CONTROL AND MERGER—
SOUTHERN PACIFIC RAIL CORPORATION,
SOUTHERN PACIFIC TRANSPORTATION COMPANY,

CANNON
LORD P.
CARR, A
SCOTT
T
Ose M
San F
(415)
Patt A
REKAR
JAMES

Applicants carefully analyzed each one of the 26 cities and towns where "3-to-2" traffic originates or terminates, and found that in every case combining UP and SP will yield much stronger competition. In most instances, UP

IRVING CUNNINGHAM
1800 Nindeweth Street, N.W.
Washington, D.C. 20006
(202) 972-7091
Attorneys for Southern Pacific Corporation, Southern Pacific Transportation Company, St. Louis Southern Railway Company, SP&SL Corp. and The Denver and Rio Grande Western Railroad Company

UNION PACIFIC RAILROAD COMPANY
MISSOURI PACIFIC RAILROAD COMPANY
1416 Dodge Street
Omaha, Nebraska 68102
(402) 271-5000
ALVIN E. BOWEN II
J. MICHAEL DEWEIN
MICHAEL L. ROSENTHAL
CORROTORO & BURNARD
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044-7566
(202) 682-5888
Attorneys for Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company

June 3, 1996

Applicants' Brief (UP/SP-260) dated June 3, 1996 at pp. 33-34



MET sought assurances from UP

MODESTO and EMPIRE TRACTION CO.
MODESTO'S SHORTLINE RAILROAD

P.O. BOX 3198 • 528 E. 9TH STREET • MODESTO, CALIF. 95334 • PHONE (209) 524-4671 • FAX (209) 525-5246



November 21, 1995

Richard K. Davidson, President
Union Pacific Corporation
Martin Tower
8th and Eaton
Bethlehem, PA 18018

Dear Mr. Davidson:

M&ET is fearful that with the loss of competition between the UP and SP following their merger, the incentive to maintain open switching at Modesto will disappear to the detriment of M&ET and local shippers. If you believe M&ET has no warrant for its apprehension, I should welcome having your assurance that the switching districts open to M&ET will not be changed following the proposed merger.

Yours truly,

James L. Beard
James L. Beard
President

JLB/elv

c: Robert D. Krebs
President & C.E.O.
Burlington Northern Santa Fe



UP provided assurances to MET

JOHN L. BEARD
President
Modesto and Empire Traction Company
P O Box 3106
530 Eleventh Street
Modesto, CA 95353

UNION PACIFIC RAILROAD COMPANY

RECEIVED
UNION PACIFIC RAILROAD COMPANY
400 27th Street
Omaha, Nebraska 68179
Tel. 402-342-7242

December 13, 1995

Dear Mr. Beard:

Your letter of November 21 addressed to Dick Davidson has been referred to me. You expressed concern that the present reciprocal switching arrangements with the MET at Modesto, California may disappear following the UP/SP merger.

We can assure you that if the merger is approved, Union Pacific has no intention of diminishing the current switching district of Modesto, California. For your ready reference, attached are copies of item 1233 of Switching Tariff UP 8005-D and item 10815 of Switching Tariff SP 9500-C, which define the switching district of Modesto.

With regard to the industries currently served by UP and SP at Modesto, all the industries which are open to reciprocal switching are located on the UP, as provided in item 1663 of Switching Tariff 8005-D, copy attached for your convenience. Again, following a UP/SP merger, we have no intention of closing UP's present open customers as specifically named in item 1663.

Thank you for your letter. I hope we have addressed your concerns.

Sincerely,

Dick Davidson

CC: Dick Davidson - Bethlehem, PA


RECEIVED
UNION PACIFIC RAILROAD COMPANY
DEC 18 1995
MODESTO & EMPIRE
TRACTION CO.

UP provided assurances to MET

Mr. James L. Beard
President
Modesto and Empire Traction Company
P O Box 3106
530 Eleventh Street
Modesto, CA 95230

December 13, 1995

UNION PACIFIC RAILROAD COMPANY



ROOM 1138
1100 BROADWAY
CHICAGO, ILLINOIS 60611
TEL 408-271-2242

Dear Mr. Beard:

me. You MET at M

of diminishing

reference, attached are copies of item 1233 of Switching Tariff UP 8005-D and item 10815 of Switching Tariff SP 9500-C, which define the switching district of Modesto.

of diminishing


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Industrial item 1663 following a as specific

We can assure you that if the merger is approved, Union Pacific has no intention of diminishing the current switching district of Modesto, California. For your ready reference, attached are copies of item 1233 of Switching Tariff UP 8005-D and item 10815 of Switching Tariff SP 9500-C, which define the switching district of Modesto.

Item 1663 of Switching Tariff 8005-D, copy attached for your convenience. Again, following a UP/SP merger, we have no intention of closing UP's present open customers as specifically named in item 1663.

Sincerely,



CC: Dick Davidson - Bethlehem, PA

RECEIVED
UNION PACIFIC
DEC 18 1995
MODESTO & EMPIRE
TRACTION CO.

Exhibit C to Amended Joint Petition of BNSF and G3

12

Merger Condition Principles

1. No shipper facility which received competitive service pre-merger could be reduced to one carrier service as a direct result of the merger.
2. UP cannot take action post-merger to reduce any shipper facility to one carrier service.



Restated and Amended Settlement Agreement

03/01/02

RESTATED AND AMENDED AGREEMENT

This Restated and Amended Agreement ("Agreement") is entered into this ____ day of

March, 2002, between
corporation, and THE B
("BNSF"), a Delaware s

WITNESSETH:

WHEREAS, UP

amended by supplemental agreements dated November 18, 1995, and June 27, 1996

(collectively, the "1995

Rail Corporation and
Corporation, Union Pa

Control and Merger -

Company, St. Louis, Mo

Grande Western Railins

WHEREAS, the

and merger of UP and
1996) and in so doing

STB, the April 18,

Manufacturers Associat

WHEREAS, as

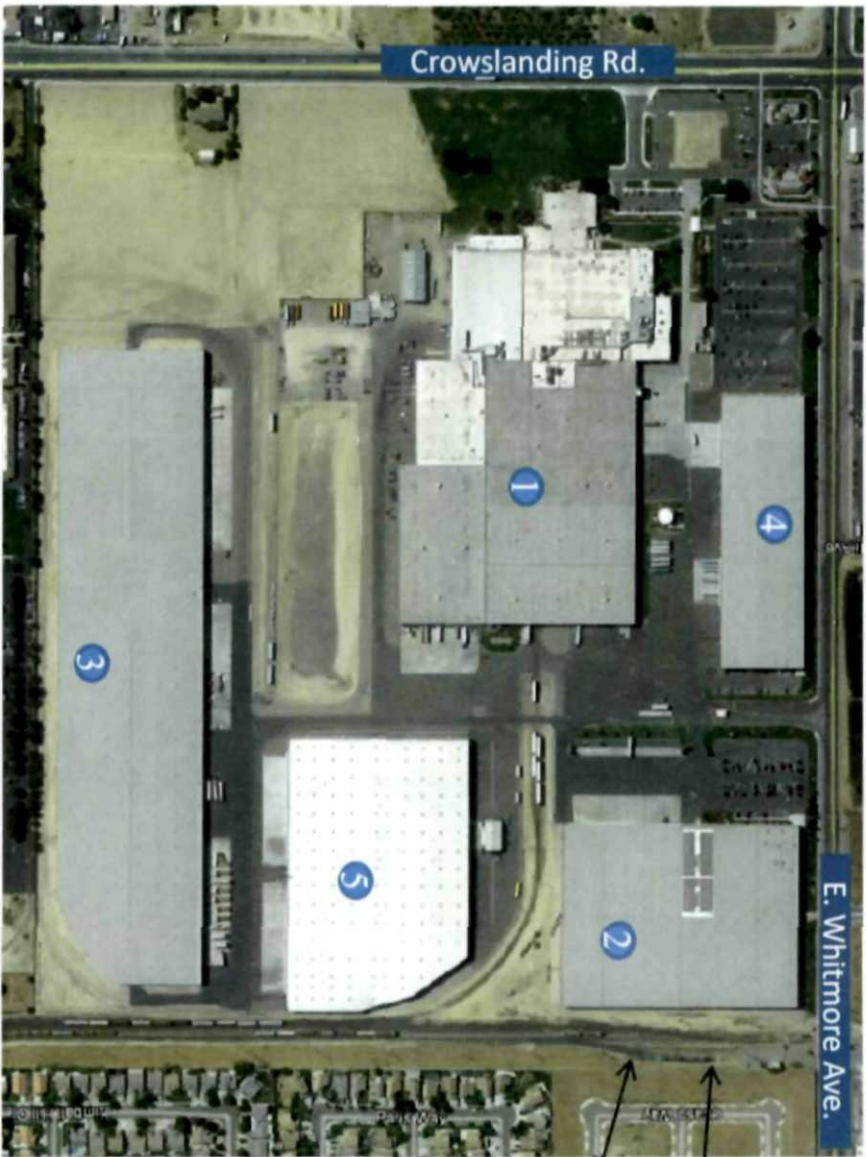
32760, 32766 (Sub-No

of the conditions it imp

Shopper Facilities shall mean all existing or new shipper or receiver facilities, including transload facilities as well as rail car storage and car service and repair facilities not owned, leased or operated by UP.

"2-to-1" Shipper Facilities shall mean all Shipper Facilities that were open to both UP and SP, whether via direct service or via reciprocal switching, joint facility or other arrangements, and no other railroad when the 1995 Agreement was executed, regardless of how long ago the shipper or receiver at that facility may have shipped or received, or whether the shipper or receiver at that facility ever shipped or received, any traffic via either UP or SP. The "2-to-1 Point Identification Protocol" between the parties attached hereto as Exhibit E shall govern the process for identifying "2-to-1" Shipper Facilities open to BNSF as a result of the conditions imposed on the UP/SP merger.

G3 Enterprises Campus (127 acres)



Property	Date Acquired/Built	Acres	Sq Ft	Investment (000's)
G3 Business Center				
Warehouse #1	06/08/01	127	506,759	\$ 11.0 million
Warehouse #2	08/01/02		320,000	\$ 5.7 million
Warehouse #3	07/01/03		685,000	\$ 11.8 million
Warehouse #4	07/01/08		172,500	\$ 4.7 million
Warehouse #5	07/01/09		357,470	\$ 6.8 million
Total - G3 Business Center		127	2,041,729	\$40 million